[PRIVY COUNCIL.]

THE YORKSHIRE INSURANCE COMPANY LIMITED AND ANOTHER . . } APPELLANTS;
DEFENDANTS,

AND

CRAINE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE HIGH COURT.

PRIVY COUNCIL.* 1922. July 20.

Fire Insurance—Policy—Conditions—Defence—Failure to make claim within stipulated time—Acceptance of claim—Taking possession of premises—Estoppel by conduct.

By the conditions of a policy of fire insurance it was provided that the insured must, "within fifteen days after the loss or damage, or such further time as the company may in writing allow in that behalf, deliver to the company a claim in writing for the loss and damage," &c., and also that "on the happening of any loss or damage the company may, so long as the claim is not adjusted, without thereby incurring any liability, (*a*) enter, and take, and keep possession of the building or premises where the loss or damage has happened," &c.

Held, that the company, having gone into or continued in possession of the premises of the insured after it had received and accepted his claim, was estopped by its conduct from contending that the claim had not been delivered within the appointed time.

Decision of the High Court: *Craine* v. *Colonial Mutual Fire Insurance Co. Ltd.*, (1920) 28 C.L.R., 305, affirmed on another ground.

APPEAL from the High Court.

This was an appeal by the respondents from the decision of the High Court: *Craine* v. *Colonial Mutual Fire Insurance Co. Ltd.* (1).

The judgment of their Lordships, which was delivered by Lord ATKINSON, was as follows:—

(1) (1920) 28 C.L.R., 305.

* Present—Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Parmoor and Lord Wrenbury.

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This is an appeal from a judgment of the High Court of Australia dated 31st August 1920, reversing a judgment given by the Chief Justice of Victoria, sitting with a jury, in favour of the appellants in two actions tried together. Thomas Craine, the present respondent, was the plaintiff in both actions, the Yorkshire Insurance Co. being the defendants in one, and the Colonial Mutual Fire Insurance Co. the defendants in the other. For convenience' sake the two companies have in the proceedings been referred to respectively as the Yorkshire Company and the Colonial Company. The action against the Yorkshire Company was brought to recover under three policies of insurance issued by them the loss the plaintiff alleged he suffered by reason of the destruction by fire of certain motor-cars, his property, insured under the said policies; and the action against the Colonial Company was brought to recover the loss resulting from the destruction by the same fire of three other and different motor-cars insured by the latter Company under three policies similar in terms to those issued by the Yorkshire Company. Statements of defence raising many defences, including fraud, were filed in both actions. But a verdict was found against the Companies on the issues raised on these defences, and, in reference to all those issues save those raised on the defence based upon the 11th condition attached to the policies, the findings of the jury are not now challenged.

The 11th and 12th conditions of the policies run as follows:—"Condition 11—Occurrence of Fire.—On the happening of any loss or damage the insured must forthwith give notice in writing thereof to the Company, and must, within fifteen days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company a claim in writing for the loss and damage, containing as particular an account as is reasonably practicable of all the articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, and of any other insurances; and must at all times at his own expense produce and give to the Company all such books, vouchers and other evidence as may be reasonably required by or on behalf of the Company, together with a declaration on oath or in other legal form of the truth of the claim and of any matters

connected therewith; and if the insurance is subject to average the insured must within the aforesaid fifteen days, or such further time as the Company may in writing allow in that behalf, deliver to the Company an account of all the property insured with the estimated value thereof at the breaking out of the fire. No amount shall be payable under this policy unless the terms of this condition have been complied with. Condition 12—Salvage.—On the happening of any loss or damage the Company may, so long as the claim is not adjusted, without thereby incurring any liability :—(*a*) Enter, and take, and keep possession of the building or premises where the loss or damage has happened. (*b*) Take possession of, or require to be delivered to it, any property of the insured in the building or on the premises at the time of the loss or damage. (*c*) Examine, sort, arrange, or remove all or any of such property. (*d*) Sell or dispose of, for account of whom it may concern, any salvage or other property taken possession of or removed. In no case shall the Company be obliged to undertake the sale or disposal of damaged goods, nor shall the insured under any circumstances have the right to abandon to the Company any property, damaged or undamaged, whether taken possession of by the Company or not. Entry upon or taking possession of the premises by the Company shall not be taken as recognition of abandonment by the insured."

It will be observed that the claim which, under condition 11, is to be delivered within fifteen days after the loss or damage or such further time as may be allowed in that behalf, must contain many things as particulars: (1) an account as particular as may be reasonably practicable of all the articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, and of any other insurances; (2) a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith. The information required is obviously very full. The truth of it and of all matters connected with it must be verified by a declaration on oath. One would suppose that in such a business matter as this insurance, if all the information thus required was furnished, the Company would be able to make up their minds whether or not the claim was a valid one, and represented a real and genuine loss, although they might dispute the amount claimed.

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The penalty inflicted upon the assured in case all the terms of condition 11 be not complied with is that no amount should be payable to the assured under the policy of insurance. The Company are thus free to take an objection to the non-performance of any of these terms and refuse to pay anything to the insured. The important question remains, can the Company do this after they have availed themselves and while they are availing themselves of the powers conferred upon them by condition No. 12. Those powers are vast, they are far-reaching, and might in their operation and results inflict serious pecuniary loss on the assured. The Company are empowered (1) to enter, take and keep possession of the premises of the assured where the loss or damage has occurred; (2) to take possession of, or require to be delivered up to them, any of the property of the assured in the building or on these premises at the time of the loss or damage, whether that property be covered by the policy or not; (3) to examine, sort, arrange or remove all or any portion of this property; (4) sell or dispose of, for account of whom it may concern, any salvage or other property taken possession of or removed. It may well be that it would be just and fair and businesslike to empower each Company to exercise all or any of those powers while the amount of the claim of the assured was not adjusted; but it would be most oppressive and unbusinesslike to enable them after they had exercised these or any of these powers to say to the assured "Your claim did not comply with all the terms of condition 11, therefore, though we have taken possession of your premises and sold your property, we will pay you nothing on foot of your policies."

In their Lordships' view the proper construction of condition 12 protects the assured against treatment such as that, and of course the assured is only bound by his contract as properly construed. The opening words of the condition show clearly that the assured is so protected. They run as follows:—"On the happening of any loss or damage the Company may, so long as the claim is not adjusted, without incurring any liability," &c. These words suggest adjustment is all that remains to be done to the claim. They presuppose that a valid claim against the Company has been made, and that all that remains to be done is to adjust the amount of it. If no claim

had been made, or a claim is so defective that it gives no right to obtain any money under the policy, it would be ridiculous to refer to the adjustment of it. Until the Company accept the claim of the assured as valid, imposing on them a liability, there would be nothing to adjust. Until the Company accept the claim as valid they may insist they owe nothing under the policy, and a cipher cannot be adjusted. These two conditions are interdependent the one upon the other, and the powers conferred by the second are only authorized to be used when the requirements of the first as to claims, at least, have been fulfilled. If that be so, then, in their Lordships' view, it is not competent for either of the Companies, if they have gone into or continued in the possession of the premises of the assured after they have received and accepted the claims of the assured, to contend that those claims fail to comply with the terms of condition 11. They are estopped by their conduct from doing so, since they cannot insist that their own action was unauthorized and illegal. It could only be legal if claims valid or accepted as valid had been made by the insured upon and delivered to them. Many authorities on the subject of estoppel by conduct might be cited; for instance, in *Wing* v. *Harvey* (1) it was held in the Court of Appeal that the acceptance of premiums with the knowledge of circumstances entitling the insurer to avoid the policy, estopped him from averring that by reason of those circumstances the policy was not valid. Again, a man who, acting as a director of a company, takes part in the allotment of shares to himself cannot in any action for calls be permitted to say that his appointment as director or the allotment to him of the shares was irregular and *ultra vires*. So the Companies here, if by the act of their authorized agent they go into possession and retain possession of the premises of the assured, expel him from them and only allow him to enter into them by their permission, cannot be permitted to say that the circumstances legalizing their action did not in fact exist. The ruling on this point would involve nothing more than the decision of the proper construction of two clauses in a written document. As will presently be shown, there is, in reality, no controverted issue of fact to be considered or ruled upon. It is necessary, however, to refer to

(1) (1854) 5 DeG. M. & G., 265.

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some facts on which this question depends which are in substance undisputed. The fire took place on 30th September 1917. The claim should have been delivered on or before 15th October 1917. An application in writing was on that day made to extend for a week the time to lodge formal claims. By a letter dated 15th October 1917, written by Mr. Leslie on behalf of the Companies, the time was extended up to 4 o'clock on 22nd October 1917. A further extension of time was asked for, and by letter of 24th October 1917 granted, namely, up to 12 o'clock on Friday, 26th October. The claims were not lodged within that time, and Mr. Leslie on that day wrote to the representative of the insured, the plaintiff, a letter containing the following paragraph :—" These claims should have been lodged not later than 12 o'clock noon of this date, but were only left at my office, without any covering letter, after 3 o'clock this afternoon. I therefore acknowledge their receipt without prejudice and without setting up any waiver of any of the provisions or requirements of the policy conditions." On 29th October 1917 the plaintiff Craine wrote to both the Companies a letter complaining of the delay. It ran as follows :—" It is now four weeks since the disastrous fire occurred to my premises at 50 City Road, South Melbourne. The reason for this long delay in adjustment is not apparent. A settlement could and should have been effected within forty-eight hours. As you are no doubt aware, my machinery and plant were not insured, and have been exposed in wet weather since the fire. My men and I have not been allowed on the premises to attend to it, and this salvaging " (*sic*) " of the undestroyed property owing to the arbitrary manner your adjuster has adopted. The keeping of my premises closed for such an unreasonable time has been a very serious loss to me, and this annoying and expensive delay is being adversely commented upon by policy holders of your Company." In reply to this letter the plaintiff received from the Companies the two letters following :—Letter, Yorkshire Insurance Co. Ltd. to plaintiff, 29th October 1917.—" We beg to acknowledge your letter of the 29th inst. As the adjustment of the claim is in the hands of Mr. F. F. Leslie, we have forwarded your letter on to him for his attention." Letter, the Manager, the Colonial Mutual Fire Insurance Co. Ltd., to plaintiff, dated 29th October

1917.—"I am duly in receipt of your favour of the 29th inst., and note contents. The matter having been placed in the hands of Mr. F. F. Leslie, of 47 Queen Street, Melbourne, for his attention, I have therefore forwarded to him your letter." Mr. F. F. Leslie is thus by both Companies constituted and held out to be their representative and agent, fully authorized to deal on their behalf with the plaintiff's claims.

It is sworn to by the assured, and not disputed by Leslie, that the latter went into possession of the assured premises on 5th October 1917, and held possession of them till 4th February 1918. The assured had been kept out of possession of them, and only allowed to enter them by Leslie's permission.

He had an interview with Leslie on 2nd October 1917. On the same day, and presumably after that interview, Leslie wrote plaintiff a letter in which he states that he, Leslie, directed plaintiff's attention to the conditions of the policies, asked him to comply with them and to formally acquaint him, Leslie, with the insurances on six motor-cars, which he names, stock-in-trade of coachbuilder, machinery and plant, &c., and then proceeds as follows:—"I require of you to forthwith produce and give me all books, papers or other documents relating to your business which you have in your possession. Having regard to your statement that the last stock sheets have been destroyed, I require you to deliver to me the copy of your last income tax return, which you stated is in your possession. I also await in due course your claims for the loss and damage:—(1) As to each of the motor-cars above enumerated. (2) As to the stock-in-trade, with details, showing of what this consisted, of its aggregate value at the time of the fire, and of the value of the salvage. You will be permitted access to the premises between the hours of 9 and 5 p.m. at any time you may make an appointment with me for this purpose. Of course, you will be granted whatever opportunity you desire for the examination of the documents and stock on the premises to enable you to fulfil my requirements, and support your claim. . . . As to the foregoing information, will you please let me have your prompt compliance with my request for books, documents and list of insurances; as to all the other information I recognize that it will take time for you to prepare the

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necessary data, but I trust you will do this as quickly as possible." From the paragraph preceding the last portion of this letter it is clear that Leslie had made up his mind to go into possession of the plaintiff's premises when he wrote. He states the terms upon which the assured will be permitted to enter his own premises, and notwithstanding the time given by the statement in the last paragraph, he went into possession forty-eight hours after this paragraph was written, and ten days before the time was up for delivering the claims, namely, 15th October 1917. It may well be that Leslie, acting upon behalf of the Companies, was entitled under condition 11 to receive all that he demanded in this letter, and that, if his request was not complied with, the Company might repudiate all liability. But it is obvious that Leslie went into possession before the plaintiff was in any default whatever, and did not pretend to do so because of any default on the part of the plaintiff. It appears to their Lordships impossible to contend that condition 12 authorized or justified any such action.

On the receipt of this letter the plaintiff appointed one Frederick William Spry, a public accountant, to act on his behalf in this matter under the direction, however, of Mr. Doria, the plaintiff's solicitor. This gentleman had interviews with Leslie on 8th and 12th October 1917. There was some controversy as to whether what was said during them was not stipulated to be without prejudice. The learned Judge admitted the evidence of what passed, but it is not desirable, because of this controversy, to base this judgment in any way upon it. On 26th October, Spry delivered at Leslie's office seven distinct claims in respect of the different items of loss mentioned in them. Each claim was duly verified by a statutory declaration. Spry received from Leslie a letter of the same date, the relevant parts of which run as follows :—" Declaration and Statement of Claim against the Yorkshire Insurance Company for £197 in respect of the Talbot Motor-Car.—These claims should have been lodged not later than 12 o'clock noon of this date, but were only left at my office, without any covering letter, after 3 o'clock this afternoon. I therefore acknowledge their receipt without prejudice and without setting up any waiver of any of the provisions or requirements of the policy conditions. *A casual glance at the*

claim forms shows that some at least of them are irregularly executed. I will advise you in due course of my further requisitions in the matter of these claims. In the meantime, I call upon Mr. Craine to forthwith give full answers to the questions and requisitions already made. I also have to request confirmation in writing of the verbal intimation given and accepted, and under which I have been acting, of the appointment you hold from Mr. Craine to represent him in all matters appertaining to his claim against the several companies for whom I am acting."

The plaintiff then wrote to the Company the rather plaintive letter of 29th October, already set out. The only answer received to which was the following :—Letter, F. F. Leslie to plaintiff, dated 30th October 1917.—"The managers of the Royal Exchange Assurance Corporation, the Yorkshire Insurance Company and the Colonial Mutual Insurance Company have handed to me your letters of 29th October, sent to them individually. It will facilitate matters generally if you will kindly correspond direct with me instead of with the Companies. Replying to your letter, I have to say that the reason for the delay in the adjustment of your claims is known, and should be apparent to you. So far as your machinery, plant and tools are concerned, your statement that you and your men have not been allowed to attend to these is not correct. You and your foreman have been given every facility for being on the premises, and the salvage of these particular interests was urged upon you for your own benefit. It was even suggested to you by me that you should collect all these things together and remove them from the premises, if you so desired. As to the keeping of your business 'closed,' I know of nothing to prevent the continuation of your business. In regard to the settlements of claims, these are not yet adjusted, and no amounts are payable unless and until you comply with the policy conditions."

The plaintiff received another letter from Mr. Leslie of the same date, repeating the requisitions made in his letters of 5th and 15th October 1917, making many further requisitions, stating that it was his intention to sell the salvage stock, asking him to remove the machinery and other things not insured, informing him that failing to give the information required about certain articles named

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would involve the sale of them on account of whom it might concern, in terms of condition 12 of the policy, and as to the claims stating as follows :—" (1) Claims.—I have already acknowledged receipt of these—without prejudice and still under cover of this I now notify you that :—Royal Exchange Assurance Corporation.—The claim form is not signed by you and is not identified by the J.P. as the annexe referred to in your declaration. Colonial Mutual Fire Insurance Company.—The statements of loss are not signed by you or by the J.P. Yorkshire Insurance Company Ltd.—The statements of claim (4) are not signed by you. Please call at your convenience, and either re-declare these before a J.P., or attend before the J's.P. who took your declaration and amend these forms. For this purpose I will attend on the justices with you. (2) Regarding your claims generally—I append hereto further requisitions and call upon you to give this further information and proofs as asked for by 4 p.m. on Thursday next, 1st November."

The plaintiff's solicitor, Mr. Doria, called next day, 31st October, on Leslie. This gentleman was examined at the trial. He said Leslie produced to them the claims delivered on 26th October, saying :—" Look, Doria, they are not in order. Some exhibits are not signed. The best thing to do is to take them all away and have them re-sworn and let me have them back again at once " ; that he, Leslie, then pointed out in each form what Craine or Spry had neglected to do ; that he, Doria, then said, " Very well, Mr. Leslie, I will have that done " ; that he returned to his office, taking the forms with him ; saw Craine later in the day, filled up some of the forms himself, his clerk filling up the others, had them re-sworn, told his clerk to write a letter to Leslie as directed ; took this letter and declaration back to Leslie's office, saw him and said :—" Mr. Leslie, I have the documents now all in order. Would you be good enough to look through them " ; that Leslie then examined each one of them and said " They are all right now " ; that he, Doria, then said " Will you see Spry ? " and Leslie replied " Yes, I will see Spry " ; that the witness then said " What about the buildings ? " and Leslie replied " Do not bother about the buildings, I have made an offer to the bank." He then said " I will see Spry later and we will see what we can do."

The following is the evidence of Mr. Leslie in reference to what took place at this interview (it is not in conflict with that of Mr. Doria) :— "Question : And you did not use the words 'without prejudice' yourself in connection with that interview ? Answer : I did not. I do not remember doing so, at any rate. Question : It is perfectly correct that you allowed Doria to take the documents away and have them re-sworn ? Answer : Yes. Question : And you accepted them from him when they came back ? Answer : I think they came back on the following day. He sent them back under some covering letter. Question : Doria said it was on the same day, but it may have been the second day ? Answer : If I received it on the 31st October my date stamp would be on it. Question : This is dated the 31st, 'I now return you statutory declaration re-declared by Mr. Craine.' Mr. Doria swears that was delivered to you on the 31st ? Answer : I would not deny it. Question : That you took them from him without question and without demur ? Answer : Any question then raised would have been put into correspondence, I think. Question : There is no correspondence on that point, so that you did take them without question, or without demur ? Answer : That would be so if it is so."

From 5th November 1917 till 8th February 1918 several letters passed between the solicitor of the plaintiff and the solicitors of the defendants, the latter insisting that all the information required by their requisitions had not been furnished, and pointing out again and again that until that was done nothing was payable by the Companies under the policies, and the former stating that the plaintiff had complied with the requisitions and given all the information he possibly could give.

The Judge at the trial on the suggestion, or, indeed, rather at the request of the counsel for the Companies, left only one question to the jury, namely, this : Did the defendants represent to the plaintiff that they did not intend to rely upon the claims having been put in too late ? To which the jury answered : Yes, they waived their claims.

It will be observed that no question was left to the jury touching the alleged omissions of the plaintiff to furnish to Leslie the copious information demanded by the numerous requisitions addressed to

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him by the latter. Nor is any question left to them as to the insufficiency or defectiveness in form of the claims when ultimately delivered corrected. The timely delivery of the claims was treated as the question on which the case turned. Their Lordships thoroughly concur with the following observations made by Mr. Justice *Isaacs* in the High Court. He said (1):—"Having regard to the well-known principles as to the conduct of a party at a trial laid down and acted on in *Browne* v. *Dunn* (2), in *Nevill* v. *Fine Art &c. Co.* (3) and *Seaton* v. *Burnand* (4), it must, we think, be taken as against the defendants that they did not really contest, or did not act as if they contested, the two elements of 'inducement' and 'prejudice,' if once the element of 'representation' was established, any more than they contested the fact of actual knowledge with reference to waiver. It must be taken, consequently, that they cannot be permitted to raise them now." But that does not get rid of the difficulty. It has been well established by a long line of authority that in order to support a plea of estoppel by representation, the representation must be a representation of an existing fact, a promise or a representation of an intention to do something in the future is entirely insufficient, and this, though Lord *Bowen* said in *Edgington* v. *Fitzmaurice* (5) that the state of a man's mind was as much a fact as the state of his digestion. In their Lordships' view it is impossible to say with any confidence whether the representation found by the jury to have been made, namely, "*that the defendants did not intend to rely upon the claims having been put in late*," is a representation of an existing fact, a present existing resolve, or a promise or representation of an intention to do something in the future. Under those circumstances their Lordships think it is more desirable to dispose of the appeal on the ground of estoppel by conduct in going into possession, if that course be under the circumstances permissible, which they think it is.

It is quite true that the question of the proper construction of condition 12 was not distinctly and clearly raised either at the trial or in the High Court on the hearing of the appeal. It can

(1) (1920) 28 C.L.R., at p. 318.
(2) (1894) 6 R., 67, particularly at pp. 75-76, 80.
(3) (1897) A.C., 68, at p. 76.
(4) (1900) A.C., 135, at p. 145.
(5) (1885) 29 Ch. D., 459, at p. 483.

scarcely be said, however, that it was not indirectly referred to. In the 16th paragraph of the defendants' defence delivered on 1st February 1919, it is averred that, with the three exceptions named, the plaintiff never delivered to the defendants claims under the respective policies for loss or damage. In par. 3 of the reply of the plaintiff to this defence, it is averred that as to this par. 16 if the accounts and other declarations were not delivered as alleged the defendants are estopped from saying that they were not delivered. Particulars of this reply were delivered on 28th July 1919, and by an amendment made on 21st November 1919 it is averred that each of the defendants entered into and took possession of the plaintiff's premises on or about 30th September 1917 and retained that possession, excluding the plaintiff until on or about 4th February 1918. The question of the construction of condition 12 is necessarily involved in the question of estoppel by going into possession, raised in the amended particulars. The appellants, in the 8th, 9th, 10th and 12th paragraphs of their reasons given for their appeal, deal with this question of possession, and the respondent in the second of his reasons sets out that the appellants "took and retained possession of the premises and salvage until 4th February 1918 to the detriment of the respondent, and should, therefore, not now be admitted to aver that no valid claim was made and pending."

Whether, however, this be so or not, their Lordships think, on the authority of Lord *Watson's* judgment delivered in the Privy Council in the case of *Connecticut Fire Insurance Co.* v. *Kavanagh* (1), the construction of condition 12 should be ruled upon. He said: "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 admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea." In the present case condition 12 is a written document, and the fact that the Company entered into possession is proved beyond controversy. It will be observed that this statement of Lord *Watson* is not rested upon any statutory enactment resembling the 4th section of the *Appellate Jurisdiction Act* 1876, but upon the general principle upon which a tribunal of last resort exercises in

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

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the public interest the jurisdiction conferred upon it. Every word of Lord *Watson's* judgment is, in their Lordships' view, applicable to this case, and they think that on this question of estoppel by conduct, namely, the taking of the possession of the plaintiff's premises, the appeal, on the proper construction of condition 12, fails; and they will humbly advise His Majesty accordingly.

Having regard to the appellants' undertaking given when special leave to appeal was granted, they must pay the respondent's costs of the appeal as between solicitor and client.

[HIGH COURT OF AUSTRALIA.]

BUCKNELL . . . . . APPELLANT;
DEFENDANT,

AND

O'DONNELL . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922.

SYDNEY, *Sept.* 14, 15.

KNOX C.J., GAVAN DUFFY AND STARKE JJ.

Contract—Sale of goods—Agreement by another to pay the price—Judgment obtained against purchaser—Action against other for price—Estoppel.

Held, that, where A agreed to sell certain goods to B for a certain price and to deliver them on a certain day, and C afterwards agreed with A that, if A supplied and delivered those goods to B for that price on that day, C would pay to A the price for those goods, an unsatisfied judgment obtained by A against B for the price is not a bar to a subsequent action by A against C for the same price.

Isaacs & Sons v. *Salbstein*, (1916) 2 K.B., 139, followed.

Decision of the Supreme Court of New South Wales: *O'Donnell* v. *Bucknell*, (1922) 22 S.R. (N.S.W.), 339, affirmed.