The appeal should, I think, be allowed, and the case remitted to the District Court with our opinion that the award does apply to a claim of this nature.

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SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Appeal allowed. Case remitted to District Court for rehearing.

Solicitors for the appellant, *Sullivan Brothers.*

Solicitors for the respondent, *Creagh & Creagh.*

B. L.

[HIGH COURT OF AUSTRALIA.]

BOWES (CARRYING ON BUSINESS AS THE BRITISH TIE COMPANY) . . . DEFENDANT, APPELLANT;

AND

CHALEYER (CARRYING ON BUSINESS AS J. CHALEYER & COMPANY) . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Contract—Sale of goods—Indenting of goods—Conditions precedent—Time of shipment—Repudiation of contract—Excuse for non-performance of conditions—Repudiation not accepted—Subsequent tender of goods.

Practice—Pleading—Amendment—Amendment by one party—Right of other party to plead at large—Rules of the Supreme Court 1916 *(Vict.), Order XXVIII., rr.* 1, 6.

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MELBOURNE, *Mar.* 1, 2, 5, 6; *May* 11.

KNOX C.J., ISAACS, HIGGINS, RICH and STARKE JJ.

The plaintiff and the defendant entered into a contract by the acceptance by the plaintiff of an order given by the defendant in the following terms:— "Please indent for my/our account and risk from the manufacturer the undermentioned goods, the prices to be understood for goods taken at factory

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in Europe. All importing charges, namely, packing, railway carriage (if any), freight, insurance, and exchange at current rate to be defrayed by me/us. Goods to be shipped per sailer/steamer. Half as soon as possible. Half two months later. I/We also agree to accept on presentation and to pay on or before maturity your documentary draft drawn from Melbourne at ninety days sight. Failing this I/we authorize you to sell the goods on my/our account and I/we hold myself/ourselves responsible for any loss that may arise from such resale and accept all risks of non-delivery or short shipment owing to strikes, lock-outs or through any other cause beyond the seller's agent's manufacturer's control including pillage." Then followed particulars of the goods, which were 89 pieces of tie silk, and the prices.

Held, by *Knox* C.J., *Higgins* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), that the words "Goods tc e shipped per sailer/steamer. Half as soon as possible. Half two months later," meant that the goods were to be shipped by sailing ship or steamship in two instalments, each consisting of substantially one-half of the goods ordered, the first instalment to be shipped as soon as possible and the second instalment two months after the shipment of the first; that the provisions as to shipment were conditions precedent, and that a breach of any of those conditions entitled the plaintiff to reject the documents tendered to him for acceptance.

The plaintiff, having failed to comply with the conditions as to shipment, tendered some of the goods and drafts for their contract price to the defendant, who refused to accept them on the sole ground that the contract had been cancelled. It had not been cancelled. The plaintiff did not accept the repudiation of the contract, but, treating it as still in operation, made other similar tenders, which the defendant refused to accept on the same ground. In an action by the plaintiff, who had sold the goods, against the defendant to recover as damages the difference between the price realized and the contract price,

Held, by *Knox* C.J., *Higgins* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), on the facts, that the defendant had not waived his right to rely on the non-performance by the plaintiff of the conditions precedent as to shipment.

Braithwaite v. *Foreign Hardwood Co.*, (1905) 2 K.B., 543, distinguished.

Where a party is allowed by the Court or a Judge to amend his pleadings the other party is not at large in amending his pleadings.

Rees v. *Duncan*, (1900) 25 V.L.R., 520, on this point overruled.

Decision of the Supreme Court of Victoria (*Macfarlan* J.) reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Joseph Chaleyer, who carried on business in Melbourne as J. Chaleyer & Co., against Timothy Bowes, who carried on business in Melbourne as the British Tie Co. The plaintiff, by his statement of claim, alleged (par. 3)

that by a contract in writing dated 8th March 1920 it was agreed between the plaintiff and the defendant that the plaintiff should indent for the defendant's account and risk from the manufacturer 1,800 yards of French tie silks at various prices, that all importing charges, namely, packing, railway carriage (if any), freight, insurance and exchange at current rates should be defrayed by the defendant, and that the goods should be shipped per sailer/steamer half as soon as possible, half two months later; (par. 4) that the defendant by letter dated 3rd June 1920 wrongfully repudiated and had since wrongfully continued to repudiate the contract and had refused to accept the goods or any of them or to pay for the same, whereby the plaintiff had suffered damage. The plaintiff claimed £457 11s. 5d., being the difference between the contract price and the price obtained on a sale of the goods. The material defences raised by the defence were that the provisions in the contract that half of the goods should be shipped as soon as possible and that half should be shipped two months later were conditions of the contract, and that neither half nor any of the goods were shipped as soon as possible nor was the second half shipped two months later than the first; that the plaintiff did not accept the alleged repudiation of the goods, but tendered goods on 19th January 1921 which the defendant had a right to reject as not within the contract as to time of shipment; alternatively, that an agreement had been made between the plaintiff and the defendant to cancel the contract. By his reply the plaintiff alleged that by his repudiation of the contract the defendant had waived the performance by the plaintiff of any conditions precedent.

The action was heard by *Macfarlan* J. At the hearing the plaintiff obtained leave to amend his statement of claim and amended it by adding an allegation to par. 3 that the contract was on or about 4th May 1920 by mutual consent varied by increasing the prices to a specified extent. The defendant thereupon proposed to amend his defence by alleging that it was a condition of the contract that the draft which by the contract the defendant agreed to accept and pay should be accompanied by proper documents, including a bill of lading and a policy of insurance, and that no bill of lading or policy of insurance was presented to the defendant.

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Macfarlan J. by his judgment found (*inter alia*) that the first half of the goods had been shipped as soon as possible, and that the provision for shipment of the second half "two months later" meant not more than two months later than the shipment of the first half, and that the provision had been complied with; and he refused to allow the amendment of the defence proposed by the defendant, on the grounds that it was not consequential on the plaintiff's amendment, that the application to make the amendment was not made until the end of the defendant's case, and that no objection on the ground of non-presentation of a bill of lading or a policy of insurance had been taken by the defendant when the draft was tendered or at any time before trial. The learned Judge, therefore, gave judgment for the plaintiff for £457 11s. 5d. with costs.

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

The other material facts appear in the judgments hereunder.

Latham K.C. (with him *Ham*), for the appellant. The contract should be regarded as a contract for the sale of goods by the plaintiff to the defendant. The contract means that one-half of the goods were to be shipped as soon as possible, and that there should be an interval of substantially two months between the shipment of the first half and that of the second half. Those provisions as to shipment are conditions precedent, and if any of them was not performed the appellant was entitled to refuse to accept the goods (*Bowes* v. *Shand* (1); *Hartley* v. *Hymans* (2); *Benjamin on Sale*, 6th ed., p. 675).

[ISAACS J. referred to *Kidston & Co.* v. *Monceau Iron Works Co.* (3).

[STARKE J. referred to *Attwood* v. *Emery* (4).]

It was only upon presentation of documents for one-half of the goods that the appellant's liability would arise (*Hydraulic Engineering Co.* v. *McHaffie, Goslett & Co.* (5)). See also *Hansson* v. *Hamel & Horley Ltd.* (6).

[KNOX C.J. referred to *J. Aron & Co.* v. *Comptoir Wegimont* (7).]

The repudiation of the contract by the appellant did not relieve

(1) (1877) 2 App. Cas., 455, at p. 463.
(2) (1920) 3 K.B., 475, at p. 495.
(3) (1902) 7 Com. Cas., 82.
(4) (1856) 1 C.B. (N.S.), 110.
(5) (1878) 4 Q.B.D., 670.
(6) (1922) 2 A.C., 36, at p. 42.
(7) (1921) 3 K.B., 435.

the respondent of his obligation to perform the conditions precedent, for the repudiation was not accepted (*Reid* v. *Hoskins*; *Avery* v. *Bowden* (1); *Lennon* v. *Scarlett & Co.* (2); *Johnstone* v. *Milling* (3)). The learned Judge was wrong in refusing to allow the appellant's amendment of his defence. The respondent having amended his pleadings, the appellant was at large to plead as he thought fit (*Rees* v. *Duncan* (4)).

H. I. Cohen K.C. (with him *Claude Robertson*), for the respondent. The amendment sought to be made by the appellant was properly refused. The question of amendment was within the discretion of the learned Judge (*Rules of the Supreme Court* 1916 (Vict.), Order XXVIII., rr. 1, 6), and he properly exercised his discretion. *Rees* v. *Duncan* (4) is the only authority in favour of the proposition that where one party amends his pleadings the other party is at large. The proper rule is that in such a case the other party may only make consequential amendments. (See also *Edevain* v. *Cohen* (5); *In re Martin*; *Hunt* v. *Chambers* (6); *In re Wray* (7).)

[KNOX C.J. The majority of the Court is of opinion that the appeal should not be allowed on the question of amendment.

[STARKE J. In my opinion *Rees* v. *Duncan* (4) cannot be relied on as a correct statement of the law.

[ISAACS J. I agree with that opinion, but I reserve my reasons for refusing the amendment.

[HIGGINS J. That is my opinion also.]

The provisions as to shipment are not conditions precedent. The stipulation for shipment "as soon as possible" is not a condition precedent, because the time fixed is not definite (*MacAndrew* v. *Chapple* (8)).

[STARKE J. referred to *Benjamin on Sale*, 6th ed., p. 679, citing *Cleveland Rolling Mill* v. *Rhodes* (9); *Filley* v. *Pope* (10).]

The provision that shipment was to be by sailer or steamer shows

(1) (1856) 6 E. & B., 953.
(2) (1921) 29 C.L.R., 499, at p. 510.
(3) (1886) 16 Q.B.D., 460.
(4) (1900) 25 V.L.R., 520, at p. 528.
(5) (1889) 43 Ch. D., 187.
(6) (1882) 20 Ch. D., 365.
(7) (1887) 36 Ch. D., 138, at p. 145.
(8) (1866) L.R. 1 C.P., 643.
(9) (1887) 121 U.S., 255.
(10) (1885) 115 U.S., 213.

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that the time of shipment or of arrival was not of the essence of the contract. There is nothing to show that each half was to be shipped in one bottom. The words "half two months later" mean that the second half is to be shipped within two months from the shipment of the first half; and the goods were so shipped. The repudiation of the contract persisted in by the appellant had the effect of relieving the respondent from the necessity of proving performance of the conditions precedent (*Braithwaite* v. *Foreign Hardwood Co.* (1); *Halsbury's Laws of England*, vol. VII., p. 436; *Taylor* v. *Oakes, Roncoroni & Co.* (2)).

[ISAACS J. referred to *Forrestt & Son Ltd.* v. *Aramayo* (3); *In re Arbitration between Rubel Bronze and Metal Co. and Vos* (4).]

Latham K.C., in reply, referred to *Cort* v. *Ambergate, Nottingham and Boston and Eastern Junction Railway Co.* (5); *Cohen & Co.* v. *Ockerby & Co.* (6); *Ripley* v. *M'Clure* (7).

Cur. adv. vult.

May 11.

The following written judgments were delivered:—

KNOX C.J. This was an action for damages for breach of an agreement in writing to purchase certain tie silks. The material terms of the agreement were as follows:—"Indent No. 4935.—Melbourne, 8th March, 1920.—Messrs. Chaleyer & Co., 510-514 Collins Street.—Dear Sirs,—Please indent for my/our account and risk from the manufacturer the undermentioned goods the prices to be understood for goods taken at factory in Europe. All importing charges, namely, packing, railway carriage (if any), freight, insurance and exchange at current rate to be defrayed by me/us. Goods to be shipped by sailer/steamer. Half as soon as possible. Half two months later. I/We also agree to accept on presentation and to pay on or before maturity, your documentary draft drawn from Melbourne at ninety days sight. Failing this I/we authorize you to sell the goods on my/our account and I/we hold myself/ourselves

(1) (1905) 2 K.B., 543, at p. 551.
(2) (1922) 27 Com. Cas., 261; 38 T.L.R., 517.
(3) (1900) 83 L.T., 335.
(4) (1918) 1 K.B., 315, at p. 322.
(5) (1851) 17 Q.B., 127, at p. 144.
(6) (1917) 24 C.L.R., 288, at p. 298.
(7) (1849) 4 Ex., 345.

responsible for any loss that may arise from such re-ale and accept all risks of non-delivery or short shipment owing to strikes, lock-outs or through any other causes beyond the seller's agent's manufacturer's control including pillage."

On 4th May 1920, the parties agreed that the prices originally quoted should be increased. Shortly afterwards negotiations took place for a cancellation of the contract. The contract was for 89 pieces of silk containing 1,780 yards. On 21st October 1920, 19 pieces containing 380 yards were shipped by the *El Kantara*. On 17th November 1920, 41 pieces containing 820 yards were shipped by the *Morea*; and on 13th December 1920, 29 pieces containing 580 yards were shipped by the *Naldera*. On 19th January 1921, the 19 pieces ex *El Kantara* were tendered to and rejected by the appellant. On 25th January 1921, 30 pieces, ex *El Kantara* and *Morea*, containing 600 yards were tendered to the appellant with drafts for £318 4s. 10d., the contract price, and £82 1s. 8d., customs duty, and rejected. The drafts tendered were endorsed by the appellant "Order cancelled." On 27th January 1921 the appellant wrote to the respondent asserting that the order had been cancelled and refusing to accept drafts or delivery.

On 8th February respondent's solicitor wrote to appellant as follows:—"395 Collins Street, Melbourne, 8th February 1921.—The Manager, British Tie Company, 281 Little Lonsdale Street, Melbourne.—Dear Sirs,—Under instructions from Messrs. J. Chaleyer & Co. I hand you herewith invoices for the first half of your indent contract No. 4935 for tie silks, amounting to £489 9s. 2d., also particulars of duty and landing charges thereon, amounting to £121 9s. 1d., and I now present for your acceptance bill of exchange at ninety days for the above sum of £489 9s. 2d. and also bill of exchange on demand for the above sum of £121 9s. 1d. and for return to me. With regard to the second half of the goods, these are now to hand and will be tendered for your acceptance upon the expiration of two months, unless you desire to have same delivered at an earlier date and notify my clients to that effect.—Yours truly, P. St. J. Hall." Enclosed in this letter were drafts for £489 9s. 2d. in respect of the price of the goods invoiced and £121 9s. 1d. in respect of customs duty and an invoice for one half (10 yards of each piece of silk)

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specified in the contract. On 9th February the appellant's solicitors wrote to the respondent's solicitor asserting that the contract had been cancelled on 3rd June 1920 and refusing to accept the draft or the balance of the goods referred to in the contract. On 11th February 1921 respondent's solicitor wrote to appellant's solicitors as follows:—"395 Collins Street, Melbourne, 11th February 1921. —Messrs. Parkinson & Wettenhall, Solicitors, Queen Street.—Dear Sirs,—*Re* Chaleyer and British Tie Co.—I am in receipt of letter herein of 9th inst., and am instructed to state that there was no cancellation of the contract as referred to in your letter, and my clients will now take the necessary steps to enforce their rights under the contract.—Yours faithfully, P. St. J. Hall." On 14th March 1921 the respondent's solicitor wrote to the appellant's solicitors as follows:—"395 Collins Street, Melbourne, 14th March, 1921.—Messrs. Parkinson & Wettenhall, solicitors, Queen Street. —Dear Sirs,—*Re* J. Chaleyer & Co. and the British Tie Co.— Referring to our previous correspondence herein, I have to inform you that the goods referred to have now been sold by my clients in accordance with the contract and realized £810 13s. 9d., which after deducting commission, £41 0s. 8d., and advertising, £6 8s., leaves a balance of £763 5s. 1d. Deducting this amount from the £1,220 16s. 6d. there is a balance of £457 11s. 5d. owing by your client to mine. Unless this amount is paid on or before Thursday next, 17th inst., I am instructed to take proceedings to recover same. Will you let me know if you are prepared to accept service?—Yours truly, P. St. J. Hall."

As the pleadings stand it must be taken that proper documents were tendered to the appellant on each of the three days, 19th January, 25th January and 8th February, in respect of the parcels of goods tendered on those days respectively. The respondent sued the appellant claiming as damages the difference between the contract price of the goods and the price obtained on the sale by auction, alleging that the appellant had on 3rd June 1920 wrongfully repudiated the contract. The appellant pleaded (*inter alia*) (1) breach of condition that half the goods should be shipped as soon as possible; (2) breach of condition that half the goods should be shipped two months later; (3) that the respondent did not accept

the alleged repudiation of 3rd June 1920 but tendered goods on 19th January 1921 which appellant had a right to reject as not within the contract as to time of shipment, and (4) cancellation of the contract.

Macfarlan J. held that the conditions as to shipment had been complied with, and gave judgment for the respondent for £457 11s. At the trial the appellant sought to amend his defence by setting up that proper documents were not presented to him; but this application was refused, and this Court by majority rejected the appeal against this refusal. The learned Judge also decided that the appellant had failed to establish that the contract had been cancelled, and the appellant does not challenge this decision. The case was conducted by both parties on the assumption, which, in my opinion, is well founded, that the rights of the parties were the same as on a contract for sale of the goods by the respondent to the appellant.

The first question for decision is whether the appellant was entitled to reject the goods tendered to him on the ground that the conditions of the contract as to shipment had not been complied with.

Three questions are involved, namely :—(1) What is the meaning of the stipulation with respect to shipment ? (2) Was the stipulation complied with ? and (3) If not, did the failure to comply with it entitle the appellant to reject the goods tendered ?

(1) As to the first of those questions, the words of the stipulation are " Goods to be shipped per sailer/steamer. Half as soon as possible. Half two months later." I can find no ambiguity in these words. Their natural or literal meaning appears to me to be that the goods were to be shipped by sailing ship or steamer in two instalments, each consisting of substantially one-half of the goods ordered, the first instalment to be shipped as soon as possible and the second instalment two months after the shipment of the first. *Macfarlan* J. thought that the words " two months later " might mean either " not more than two months later," " exactly two months later," " as nearly as possible two months later," or " not less than two months later." I am unable to agree. I can find no justification in the context for adding to the plain and unambiguous expression " two months later " either the words " not more than " or the

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words "not less than." The parties having expressed their agreement in plain words, it is not open to the Court to consider what their motives were or whether they may not have meant to stipulate for something different. In view of the dates and quantities of the respective shipments, it is not necessary to consider whether "two months later" meant "exactly two months later" or "as nearly as possible two months later."

(2) On the meaning which I attribute to the stipulation in question it is clear that the respondent did not comply with it. A small portion of the goods—about two-ninths—was shipped on the *El Kantara* on 21st October 1920. Another portion, about four-ninths, was shipped on the *Morea* on 17th November 1920, and the balance, about one-third, was shipped on the *Naldera* on 13th December 1920. In one respect, at any rate, the words of the agreement are clear, namely, in providing that a period of substantially two months must elapse between the shipment, i.e., the complete shipment, of one-half of the goods ordered and the shipment of the other half; and, even assuming that the contract did not require the first half to be comprised in one shipment, the admitted facts show that neither the first shipment taken alone, nor the first and second shipments taken together, consisted even approximately of one-half of the goods ordered, and that the third shipment did not comprise even approximately one-half of the goods and was not made two months later than the second shipment, some portion of which was required to make up the first instalment of one-half.

(3) The stipulation in question fixed the times of shipment of the goods sold, as well as the amounts of the respective shipments. The general rule is that a stipulation in a contract for the sale of goods that the goods shall be shipped at a given time is, at least prima facie, a condition precedent (see *J. Aron & Co.* v. *Comptoir Wegimont* (1), and the cases referred to by *McCardie* J. in his judgment in that case). I can find nothing in the terms of the contract or in the circumstances of this case which requires that this stipulation should be considered otherwise than as a condition precedent, the breach of which would justify the appellant in rejecting the goods when tendered. The tender made on 19th January was not of

(1) (1921) 3 K.B., 435.

one-half the goods, nor was the tender which was made on 26th January; and on 8th February, when the third tender was made, the conditions of the contract as to shipment of both instalments had been broken. But Mr. *Cohen*, for the respondent, argued that the appellant had, in June 1920, repudiated his obligation under the contract and that his repudiation absolved the respondent from the necessity of showing that any condition precedent had been fulfilled; and in support of this argument he relied on the decision of the Court of Appeal in *Braithwaite* v. *Foreign Hardwood Co.* (1). It is a sufficient answer to this argument that the repudiation by the appellant was never accepted by the respondent, who elected to proceed with the performance of the contract notwithstanding the repudiation. By his statement of claim the respondent alleges that in June 1920 the appellant wrongfully repudiated the contract. After that date the respondent procured the shipment of all the goods covered by the contract and, so far from accepting the repudiation, on three separate occasions tendered goods to the appellant in assumed performance of the contract. A repudiation, or, more properly, a breach by anticipation, of the contract by one party gives the other party the option of treating the contract as at an end or of waiting till the time for performance has arrived before making any claim for breach of contract. If he elects to wait—as the respondent did in this case—he remains liable to perform his part of the contract and enables the party in default to take advantage of any supervening circumstance which would justify him in refusing to perform it (*Halsbury's Laws of England*, vol. VII., p. 439; *Frost* v. *Knight* (2)).

I may add that since the conclusion of the argument in this case the report of the decision of the House of Lords in *British and Beningtons Ltd.* v. *North-Western Cachar Tea Co.* (3) has become available. In his speech in that case Lord *Sumner* discussed the decision of the Court of Appeal in *Braithwaite's Case* (1), and it is clear from the observations of his Lordship (4) that that decision gives no support to the argument in aid of which it was cited by Mr. *Cohen*.

(1) (1905) 2 K.B., 543.
(2) (1872) L.R. 7 Ex., 111, at p. 112.
(3) (1923) A.C., 48.
(4) (1923) A.C., at pp. 70-71.

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For these reasons I am of opinion that the appeal should be allowed and judgment be entered for the appellant, the defendant in the action.

ISAACS AND RICH JJ. The result of this appeal depends, in our opinion, not so much upon the literal construction of the stipulation as to shipment or upon whether that stipulation has been broken, as upon the nature of the stipulation in relation to the contract as a whole and, in the last analysis, upon the effect upon the contract as a whole of such a breach as the particular breach proved, if there be a breach. The reason for this specific statement will be apparent when the relevant law is stated and applied to the circumstances.

The stipulation is in these terms:—"Goods to be shipped per sailer/steamer. Half as soon as possible. Half two months later." All other questions in this case have been cleared by the findings of the primary tribunal and the conduct of the cause. Particularly there may be mentioned the requirement as to "documentary draft." It is enough to say that it was, as the learned primary Judge states, admitted by counsel for the present appellant, that the proper documents as understood by the word "documentary" could have been presented, that is, if the appellant had not dispensed with the presentation by the course he adopted.

In the difference of opinion that unfortunately exists, we find it necessary for ourselves to bear in mind that every contract must be construed on its own basis, regard being had to its own language read in the light of its own circumstances. Other cases where statutes are not controlling are useful only for the principles they enunciate or illustrate. In all cases of contract the supreme function of the Court is to see that the real intention of the parties is enforced, so far as that can be ascertained or deduced from the language they have used with reference to the circumstances in which they have used it. Particularly is this so in mercantile contracts; since merchants are habitually less formal than lawyers, and trust to terse and often elliptical modes of expression that need close attention to surrounding circumstances in order to appreciate their true meaning. The Court must be careful to maintain the spirit

of the bargain so far as that is consistent with the language employed, neither neglecting the materiality of stipulations expressly assented to, nor blindly adhering to form at the expense of substance whereby either party may slip out of an honest bargain (see *Dimech* v. *Corlett* (1) and *The Teutonia* (2)). In the present case that duty is markedly apparent. There cannot be a doubt that the respondent in all substantial respects has faithfully carried out his part of the transaction : the right goods were procured, the prices are correct, there was no delay and, indeed, the only fault ascribed to him is a too speedy performance. No potential or actual damage is suggested by the fault ascribed ; the defence is purely formal. All the elements of real justice are on the side of the respondent. It must be acknowledged in favour of the appellant that the objection now relied on was not his own. When the circumstances come to be scrutinized, the appellant's silence on this point was only natural. No honest reasonable merchant in his position would have dreamt of asserting that what is now alleged as a fatal breach was such as frustrated the adventure or destroyed the foundation and substance of the contract. Not even in the course of the appellant's evidence is such an idea suggested. But that is what, in our opinion, is necessary to enable the appellant to succeed. The present objection was evolved as a *dernier ressort* by the ingenuity of his legal advisers. The appellant's only personal claim to be absolved from paying a debt otherwise just, was that the contract had been cancelled. When the draft and documents were placed before him, he raised no such contention as is now insisted on. He had one ground, and one only, namely, agreed cancellation. That, after controversial testimony, has been determined against him ; and the decision is not now challenged. And we would observe that, when the true meaning and intention of the crucial provision as to shipment comes to be considered, the tacit admission by the appellant, by reason of his business conduct and undivided reliance on the one ground of discharge, is a strong indication that its strict performance was not intended to be a condition precedent (see per Lord *Colonsay* in *Forbes* v. *Watt* (3)). But, quite apart from that assistance, the

(1) (1858) 12 Moo. P.C.C., 199, at p. 224.

(2) (1872) L.R. 4 P.C., 171, at p. 182.

(3) (1872) L.R. 2 H.L. (Sc. & D.), 214, at p. 216.

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provision referred to, when tested in the ordinary way, leads, in our opinion, to the conclusion that the judgment appealed from should not be disturbed.

The learned trial Judge, *Macfarlan* J., says that "no evidence was given as to the precise nature of a contract to indent, both parties preferring to treat it as in effect a contract by plaintiffs to purchase themselves and resell to defendant." His Honor adds: "I had some doubts whether this was the proper view of it." The construction of the written contract being for the Court, it is a question of law (*Di Sora* v. *Phillipps* (1); *Williams Brothers* v. *Ed. T. Agius Ltd.* (2); *George D. Emery Co.* v. *Wells* (3)). It is therefore impossible, when appealed to for its judicial opinion, that the Court in authoritatively declaring the rights of the parties should accept an erroneous construction of the very nature and effect of the contract, even though suggested by both parties. A Court is bound to dispense the King's justice according to law (*Chilton* v. *Corporation of London* (4); *Gramophone Co.* v. *Magazine Holder Co.* (5), per Lord *Loreburn* L.C.; *Glasgow Navigation Co.* v. *Iron Ore Co.* (6)). Parties may so conduct their case as to conclude themselves as to the existence or non-existence of facts, where the truth does not appear; but they cannot relieve the Court from its duty of legal interpretation of documents before it, or of giving the true legal effect to facts as ascertained. The common law is as binding on the Court as any statute.

We find ourselves unable to treat this as a simple and ordinary contract of sale. Its effect must be ascertained judicially. The actual incidents of the transaction are before us, and must be taken into account in estimating the importance of the particular provision in dispute, and especially in estimating the potential effect on the contract as a whole of such a breach as that alleged. But we do not mean to say that the general principles of law applicable here differ in the least from those which would be applicable if the case were one of ordinary sale. For instance, we think that sec. 15 of the Victorian *Goods Act* 1915 (English *Sale of Goods Act* 1893,

(1) (1863) 10 H.L.C., 624, at p. 638.
(2) (1914) A.C., 510, at p. 527.
(3) (1906) A.C., 515.
(4) (1878) 7 Ch. D., 735, at p. 740.
(5) (1911) 28 R.P.C., 221, at p. 225.
(6) (1910) A.C., 293

sec. 10) sets out the law equally applicable to both. The result of applying those principles, however, might be quite different by reason of the different circumstances to which they are applied.

The contract consists of what is called an " Indent Order " signed by the appellant, and addressed to the respondent. It is dated 8th March 1920, and is a request to indent certain goods. It became finally binding on 4th May 1920 by confirmation. Without the necessity of any special evidence as to all the incidents of an indent order, it is common knowledge that an indent order is an order to a person to procure goods from abroad, from some other person with whom the person giving the indent order does not come into contractual relation. The indentor is liable to the foreign supplier, and in this case the respondent paid the foreign merchant by means of a letter of credit. The indent order in the present instance is of the description mentioned. It begins: " Please indent for my/our account and risk from the manufacturer the undermentioned goods." This indicates to us that, although the goods ordered are not specific, yet the " indenting " does not consist of two separate independent operations, namely, an independent procuring of the goods by the indentor for himself, with liberty to deal with the goods as he pleases, followed by an independent resale to the appellant, but is as from the very first an operation intended to be on behalf of the appellant, who has contracted with the respondent for goods which, when procured, are contractually destined for the appellant, who takes the *risk* of the goods from the very moment they are procured by the respondent and appropriated by him or at his direction to the transaction in accordance with the contract. The *property*, however, was not intended to pass to the appellant until acceptance of the documentary draft (*The Parchim* (1)). The order proceeds : " the prices to be understood for goods taken at factory in Europe." The basis, therefore, is that, the goods being for " account and risk " of the appellant as from the beginning, the basic prices are to be for goods " taken at factory." Then it continues : " All importing charges, namely, packing, railway carriage (if any), freight, insurance and exchange at current rate to be defrayed by me/us." That means that all additional actual

(1) (1918) A.C., 157, at pp. 168, 170.

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charges, being the cost from packing to exchange, of getting the goods from the factory safely to Australia are to be borne *eo nomine* by the appellant. So far, he is to be charged just what he would be charged if he dealt with the foreign manufacturer direct, taking over the goods at his factory. But as he is not dealing with the manufacturer direct, but is dealing direct with the indentor, the latter has to pay the manufacturer for the goods, and has, in the first instance, to disburse the charges for packing, &c., which the appellant has agreed to defray. Be it remembered, the indentor is not an ordinary merchant buying and selling goods in the accepted sense, that is, laying in a stock and risking the market; but is merely an Australian intermediary on special terms between foreign manufacturers and an Australian merchant.

It is, we think, a violent presumption that, when we find in such a request as the present the indefinite provision "Goods to be shipped per sailer/steamer. Half as soon as possible. Half two months later," that indicates a condition precedent any departure from which, *ipso facto* and without the least possible or actual damage arising, much less frustration of the bargain, is to entitle the local merchant to repudiate the whole transaction and throw the goods and the subsequent disbursements entirely on the hands, not of the supplier, but of the intermediary—principal though he be in a sense.

Looking first at the words of the provision itself, it was agreed that it makes a clear stipulation for two, and only two, shipments, each comprising one-half of the goods ordered, the first shipment to be made "as soon as possible," and the other exactly two months later. It was said that this came within the class of cases of which *Bowes* v. *Shand* (1) is the leading example, and that any departure from the stipulation was, at the election of the appellant, fatal to the contract. We respectfully think that argument misplaced. Before stating the appropriate legal tests, let us further consider the words of the provision itself with a view to ascertain its inherent definiteness, or otherwise.

"Goods to be shipped per sailer/steamer."—There is, at once, at least a choice between sailing vessels and steamships; so that

(1) (1877) 2 App. Cas., 455.

the time of arrival is clearly not considered very important. This at once distinguishes such cases as *Reuter, Hufeland & Co.* v. *Sala & Co.* (1) and *Norrington* v. *Wright* (2). That is confirmed by the next words: "Half as soon as possible." What, in the first place, is meant by "half"? It has been argued that the division into "halves" had a pecuniary significance, being to enable the appellant to dispose of the first half before being called on to pay for the second half, and this, notwithstanding the draft was at ninety days sight; and, therefore, it was said "half" means "half" in measurement. But if it has a pecuniary significance, why half in measurement, when the prices vary from 27 francs per metre to 12·50 francs per metre, and the respondent could select any of the items? Why not half in value? And, as the goods differ in width very considerably, one-half as lineally measured would by no means represent one-half in quantity. The assumption made that because of the mere lineal measurements the "halves" have been seriously departed from is not reliable, since the widths make a vast difference. There is, consequently, a great indefiniteness in the word "half," and opinions may reasonably differ as to this. But, again, there is the expression "as soon as possible." We think it is somewhat more stringent than "within a reasonable time." We think it means "as soon as reasonably practicable, paying due regard, from factory to ship, to the appellant's requirement for speedy despatch." And we think the availability of shipping accommodation must be considered as an element (see *Hydraulic Engineering Co.* v. *McHaffie, Goslett & Co.* (3)). But, even conceding this somewhat stricter view, there is obvious indefiniteness and obvious vagueness, and there are obvious alternatives not unreasonable. Then come the words "Half two months later." Read as the appellant contends, they operate in this way: You find on what day in fact the shipment of the first half took place, and you date your two months from that day. We must remember that in commercial matters a "month" means a calendar month unless the contrary appears (*Hart* v. *Middleton* (4)). Then the two calendar months would be complete on the corresponding day

(1) (1879) 4 C.P.D., 239.
(2) (1885) 115 U.S., 188.
(3) (1878) 4 Q.B.D., 670.
(4) (1845) 2 C. & K., 9.

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in the second month afterwards (*Freeman* v. *Read* (1)). If we are to read the phrase " half two months later " in the same way as the months are read in the *Bowes* v. *Shand* (2) class of cases, then a day earlier or a day later would be as fatal in the one case as in the other. No *cy-près* doctrine could save the situation. No want of shipping facilities could avail as an answer, because the qualifying clause relates only to " short shipment," not to delay in shipping the full quantity. By that time the goods are assumed to have passed into the control of the respondent. What object is discernible in the contract and its attendant circumstances to lead the Court to suppose such a consequence intended ? The goods themselves were not ties, but materials for making ties. The goods are not perishable, they are not pretended to be of fleeting fashion, and, if they were, a speedier arrival could not interfere with the object of the contract ; they could not spoil, they are not affected by the time of shipment : in short, there is no conceivable reason for thinking the purchaser's venture would be frustrated. Reading the phrase " half two months later " with the preceding expression, " half as soon as possible," we are inclined to think with *Macfarlan* J. that the " business efficacy " of *Bowen* L.J. is that the appellant indicates that he is anxious to get " half " shipped as early as it is possible to manufacture and despatch it, but that he is content to let the rest stand for another two months. However this may be, it is by no means essential to our ultimate conclusion, namely, that the stipulation is not a condition at all, and certainly that the particular breach alleged is not a breach which can be acted on as dissolving the contract, as being a breach that strikes at its root and foundation. No doubt, the same words if they came after a definite point of time would have denoted an exact period of two months, neither more nor less, and fixed at both termini by the contract ; but how can that be when the *terminus a quo* is itself unknown and entirely dependent on future circumstances incapable of present ascertainment ? The first half may be either by " sailer " or " steamer." Must it be in one " steamer " or one " sailer " ? If, for instance, there were two steamers at Marseilles each ready to take a quarter but not a half, would it have been a breach of a

(1) (1863) 4 B. & S., 174, at p. 184. (2) (1877) 2 App. Cas., 455.

"condition precedent" practically annulling the contract, if the appellant so wished, to divide it between these vessels; or was it obligatory to wait until some one ship—perhaps a sailing vessel—came along prepared to accept the full half? Would that accord better with the phrase "as soon as possible," than to send the half divided between two steamers? And, if not, why must the first half be indivisible as a condition? Further, if a "sailer" would meet the obligation for the first half and a steamer for the second, it is clear that payments for both halves might come very close to each other without breach of stipulation.

Thus, the very words of the crucial provision seem to us not appropriate to be a condition precedent. Not only so, but there is in the language of the rest of the document evidence to the contrary which convinces us that the parties contemplated that departure from the shipping provision is rather matter for compensation than for entire repudiation. The appellant says:—"I/We . . . accept all *risks* of *non-delivery* or *short shipment* owing to strikes, lock-outs, or through any other causes beyond the seller's agent's manufacturer's control including pillage." "Non-delivery" and "pillage" cannot reasonably refer to delivery after shipment, because the goods are already to be at the appellant's "risk" before shipment, they are to be insured on shipment, and, if only proper shipment takes place, the indentor has no responsibility beyond presenting the documentary draft. No further delivery is necessary. The "non-delivery" is, therefore, prior to, or certainly not later than, shipment, and the "short shipment" is a later or synchronous deviation from the contract. If the shipment provision were a condition precedent to any risk of the appellant, and particularly in the sense of *Bowes* v. *Shand* (1), as an expression descriptive of the goods, the acceptance of "risks" of "short shipment," though perhaps not impossible, would be at least a very singular provision. That acceptance of risks of "short shipment" appears to us to lean heavily in the direction of pecuniary liability if loss occurs through "short shipment" from causes other than those specified.

The principles—some positive, and some negative—which have been authoritatively declared as applicable to the construction of

(1) (1877) 2 App. Cas., 455.

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contracts in order to ascertain whether a given stipulation is a "condition" or not, or a given breach is a breach of a condition or not, appear to us to be conclusive in favour of the respondent. There is no doubt the provision under consideration is a substantive part of the contract. Nor is there any doubt it is a material part of the contract. Nor is there any doubt that for any departure from its strict performance the respondent would be responsible. But the first question is: assuming a breach and assuming the utmost clearness as to the word "half," what is the responsibility of the respondent? Is it a possible repudiation of the whole transaction at the election of the appellant; or is it merely a liability to compensate him for any damage suffered, unless the breach be of such a nature as to amount to a frustration of the adventure? In other words, besides being a *substantive* part of the contract, is it an *essential* part of the contract, in the necessary sense? The problem cannot be better stated than it was by *Fletcher Moulton* L.J. in *Wallis, Son & Wells* v. *Pratt & Haynes* (1), in a judgment adopted by the House of Lords in the same case (2). The learned Lord Justice says:—"A party to a contract who has performed, or is ready and willing to perform, his obligation under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognized that such obligations are not all of equal importance. There are some which *go so directly to the substance of the contract or, in other words, are so essential to its very nature* that their non-performance may fairly be considered by the other party as *a substantial failure to perform the contract at all*. On the other hand there are other obligations which, though they must be performed, are *not so vital* that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the

(1) (1910) 2 K.B., 1003, at p. 1012. (2) (1911) A.C., 394.

contract." In that passage *Fletcher Moulton* L.J. has accepted the test of a condition as formulated by *Parke* B. in *Graves* v. *Legg* (1), quoted by *Blackburn* J. in *Bettini* v. *Gye* (2) at p. 188, at which latter place this is said :—" In the absence of such an express declaration " (that is, a declaration of intention to make the performance of a given stipulation a condition precedent or not a condition precedent) " we think that we are to *look to the whole contract*, and applying the rule stated by *Parke* B. to be acknowledged, see whether the particular stipulation goes to *the root of the matter*, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff *a thing different in substance* from what the defendant has stipulated for; or whether it merely *partially affects it* and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent."

In *Bentsen* v. *Taylor, Sons & Co.* (3) *Bowen* L.J., who based his observations principally on what he termed the " train of reasoning " in *Behn* v. *Burness* (4), said with reference to distinguishing a " condition " from a " warranty " :—" There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, *will best be carried out* by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, *one of the first things you would look to is, to what extent* the accuracy of the statement—the truth of what is promised—would be *likely to affect the substance and foundation of the adventure* which the contract is intended to carry out." Then follow some words which, in our opinion, are of the very highest importance as indicating the ultimate and decisive consideration for determining the question. The learned Lord Justice says :—" There, again, it might be necessary to have recourse to the jury. In the case of a charter-party it may well be that such a test could only be applied after getting the jury to

(1) (1854) 9 Ex., 709, at p. 716.
(2) (1876) 1 Q.B.D., 183.
(3) (1893) 2 Q.B., 274, at p. 281.
(4) (1863) 3 B. & S., 751.

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say what the effect of a breach of such a condition would be on the substance and foundation of the adventure; not the effect of the breach which has in fact taken place, *but the effect likely to be produced on the foundation of the adventure by any such breach of that portion of the contract.*"

"Frustration" of the object of the contract was a test enunciated in *Behn* v. *Burness* (1). In that case, also, it was very pointedly stated (2) that "a statement is more or less important in proportion as the object of the contract more or less depends upon it." In other words, a stipulation may be "material" and yet not "essential." "Materiality," therefore, does not determine the question; essentiality does, not in the sense of being an essential part of the contract as opposed to a mere representation, but in the sense of being essential to the fundamental substance of the thing contracted for—as, for instance, if it formed part of a descriptive statement of the goods themselves, as in *Bowes* v. *Shand* (3). It may be such a descriptive statement by *directly* describing them, as in *Wallis, Son & Wells* v. *Pratt & Haynes* (4), where the goods sold were stated to be "common English sainfoin." Or there may be added to their ordinary name a description of some *incident* of the goods (*Behn* v. *Burness* (5)) so closely connected contractually with the ordinary name as to be part of the identification of the subject matter. *Bowes* v. *Shand* is the classical instance of this. The subject is clearly dealt with in *Pollock on Contract*, 9th ed. (1921), at pp. 302, 304, 572 and 573, and in *Anson on Contracts*, 15th ed., pp. 184-186, 361 and 366; see also *Hurnandrai Fulchand* v. *Praydas Budhsen* (6).

The position may be summarized thus:—(1) A statement may be collateral to the *contract*; that is, it is not a substantive part of the contract at all. There the present question does not arise. (2) It may be a *substantive* part of the contract, in the sense that it is one of its terms. But it still may not be an essential part of the contract; but while not collateral to the contract as a whole, it is still collateral *to the main object* of the contract. (3) It may, besides

(1) (1863) 3 B. & S., at p. 757.
(2) (1863) 3 B. & S., at p. 759.
(3) (1877) 2 App. Cas., 455.
(4) (1911) A.C., 394.
(5) (1863) 3 B. & S., at p. 755.
(6) (1922) L.R. 50 Ind. App., 9, at p. 13.

being a substantive part of the contract, be also an *essential* part of it; in the sense that it is of its essence, and, so, essential *to the main object* of the contract. Otherwise phrased, it is a vital term going to the root of the contract, inasmuch as, if it were not performed, the thing offered would be a different thing—as different as are beans from peas. The responsibility for breach of the first class depends on considerations with which we are not here concerned. The responsibility for breach of the second class is, not repudiation, but damages. The responsibility for breach of the third is both repudiation and damages.

It is clear, from what has been said, that the conclusion which the Court searches for, as to whether a stipulation is a "condition" or not, is by no means an arbitrary one, nor is it predetermined by any rigid rules of construction. Nor is it to be arrived at by a mere consideration of the words of the provision themselves. The whole contract must be read, and even then the same words at one time—as in time of peace—may be a mere warranty, and at another time—during war—may be a condition. The whole circumstances have to be regarded, the relative positions of the parties considered, the probable effect of non-performance weighed as the parties would have weighed it when making the contract; and then, and then only, is the Court in a situation to decide whether the stipulation is so vital as to be a condition, or only so material as to be sufficiently met by compensation. The law on which this case depends may, in our opinion, be thus formulated:—Apart from statutory provision or expressed intention as to whether a stipulation shall or shall not be a condition, the one final test is this: Does its breach go to the root of the contract so that it either frustrates the main object of the contract or makes further performance substantially performance of a different contract? Any other rule establishes the tyranny of mere words over substance. In *Tarrabochia* v. *Hickie* (1) *Pollock* C.B. quotes with approval from *Abbott on Shipping* a passage containing the statement that "an intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed." *Bowen* L.J. in *Bentsen* v. *Taylor, Sons & Co.* (2) observes: "I agree that a condition

(1) (1856) 1 H. & N., 183, at p. 187. (2) (1893) 2 Q.B., at p. 283.

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precedent ought to be clearly expressed." Those observations point to this: that, while merchants are taken not to put into their contracts immaterial terms, still, if they wish to attach to their breach the fatal consequence of annihilation of the contract, they should say so distinctly, otherwise that intention must be plain in view of the whole circumstances. On the preceding page *Bowen* L.J. acknowledges that "the vagueness or ambiguity of the statement is one of the elements which would influence the Court very much in deciding whether the parties intended that the statement should be a promise the fulfilment of which was to be a condition precedent." (See also *Rhymney Railway* v. *Brecon &c. Railway* (1).) In *Dimech* v. *Corlett* (2) the Judicial Committee laid down some valuable guiding principles entirely in accord with what has been stated, and adding some further elements which a Court is bound to take into consideration. "Frustration" is accepted as one decisive test (3). But dealing with a feature present in this case, namely, the indefiniteness of the time stipulated for, their Lordships make very clear the essential distinction between a provision that is *definite* and one that is *indefinite*. That is to say, so far as this case is concerned, the class of cases of which *Bowes* v. *Shand* (4) is a type is entirely eliminated. As to determining whether a stipulation is a "condition" or a "warranty," Sir *John Coleridge* in delivering the judgment says (5):—"But the question in those cases arises on the intention of the parties; and in determining this it is impossible to exclude the nature of the thing stipulated for. A contract that a thing shall be done on a day named is in itself certain and defined; it excludes all consideration of the influence of future circumstances; but a contract that it shall be done with all convenient speed necessarily admits a consideration of them all; and then what, under the circumstances, is 'convenient speed,' may plausibly enough be judged differently by different minds. It is, therefore, not unreasonable to hold, that in the former case the stipulation was intended to be a warranty, and yet to consider a failure in the latter as only entitling the party to a cross-action, or allowance from the damages, whenever the consequence

(1) (1900) 69 L.J. Ch., 813.
(2) (1858) 12 Moo. P.C.C., 199.
(3) (1858) 12 Moo. P.C.C., at pp. 224-225.
(4) (1877) 2 App. Cas., 455.
(5) (1858) 12 Moo. P.C.C., at p. 228.

of the failure has only been partially injurious, and has left the main object of the contract still attainable." That exactly applies to the expression " as soon as possible," and that phrase is inseparable from the word " half." It is also inseparable in effect from the succeeding phrase " half two months later."

Applying the final test of the Privy Council to the present case, we are unable to see how it is possible to contend that a failure, by the shipment of " half " (whatever that may mean) in two ships instead of one, or a shipment of the balance not just at the expiration of two months later than the shipment of the first portion, could have been believed by the parties to be such as to destroy the substance and foundation of the contract or to be otherwise than, at most, " partially injurious," leaving " the main object of the contract still attainable."

That the shipment clause is not descriptive of the goods or of any incident thereof is, we think, apparent, not only from what we have said, but from the very particular description of the goods themselves (see *Hurnandrai Fulchand* v. *Pragdas Budhsen* (1)). The indent order is for " the undermentioned goods," and they are mentioned thereunder with great definiteness. Reading the contract as a whole, it cannot, in our opinion, reasonably be construed as including the strict performance of the shipment clause as " essential to the main object " of the contract, in the sense required to permit of repudiation for mere failure to perform it strictly.

In justice to the learned counsel for the appellant, it should be mentioned that they did not contend for a destruction of the substance and foundation of the contract by the mode of shipment actually adopted, except by reliance on the class of cases typified by *Bowes* v. *Shand* (2). The " half " was said to be as much a descriptive statement of the goods as the specified months of shipment in the case mentioned.

We have dealt with the case, so far, quite apart from the appellant's refusal on the ground of cancellation, into which comes the much canvassed case of *Braithwaite* v. *Foreign Hardwood Co.* (3).

(1) (1922) L.R. 50 Ind App., 9. (2) (1877) 2 App. Cas., 455.
(3) (1905) 2 K.B., 543.

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That case was relied on by counsel for the respondent as establishing a rule that, where one party to a contract repudiates it before completion on an improper ground, the other party, whether he accepts the repudiation and terminates the contract or not, not only is absolved from further performance but also is relieved from all necessity whatever of showing he was ready and willing to carry it out; in short, that the latter may sue and recover damages as if he had been fully prepared to carry out his contract to the letter. It is sufficient to say that it is impossible that the three eminent jurists who decided that case could ever have intended to lay down such a proposition, and there is no language in the judgments expressive of such a rule. On the other hand, notwithstanding what the learned primary Judge found as a fact and what the Court of Appeal accepted as established, that the plaintiff had failed in a vital particular, namely, the character of the goods, to comply with the conditions of the contract so as to have given the defendants the right to reject at one stage, the Court of Appeal certainly held that the plaintiff was entitled to recover damages, but damages lessened by the amount of damage sustained by the defendant through the plaintiff's breach. There is only one way to reconcile those two propositions, namely, that there had been a waiver of the right of rejection by the express statement of the ground on which the repudiation was made. That is what counsel for the plaintiff argued, and that is what *Collins* M.R. decided (1) in the following passage: —"In my opinion that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which I am assuming he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not ready and willing to perform the conditions precedent devolving upon him, and that if they had known the facts they might have rejected the instalment when tendered to them. One answer to such a contention on the part of the defendants is that, tested by the old form of pleadings, it would have been a good replication by the plaintiff

(1) (1905) 2 K.B., at pp. 551-552.

to aver that the defendants had waived performance by him of the conditions precedent by adhering to their original repudiation of the whole contract, and would not accept any instalment if tendered to them. The defendants are not in a position now, by reason of their after-acquired knowledge, to set up a defence which they previously elected not to make." With that opinion *Cozens Hardy* L.J. agreed. *Mathew* L.J. (1) said the same thing. That case has given rise to a considerable amount of controversy, which has been set at rest in accordance with what we have said by the House of Lords in the recent case of *British and Beningtons Ltd.* v. *North-Western Cachar Tea Co.* (2), which has reached us since we wrote what we have said as to the construction of the contract in this case. The actual decision in that case is remote from the question now under consideration; but still there is one point of contact, to which we may in passing refer. One question there was whether the parol agreement had the effect of creating a new agreement in substitution for the written agreement. It was held it had not; and Lord *Atkinson* says (3): "There is a single provision for changing the place of delivery of some of the teas *which cannot possibly be treated as so inconsistent with the earlier written contract as to go to the root of the latter.*" That seems to us to embody precisely the same considerations as we have set out above. If the parol agreement there did not so alter the delivery as to go to the root of the contract and make it really another contract, actual delivery, in the same way, would have to be tested by the same principles. Lord *Sumner*, as to "frustration" (for counsel for the appellants had argued that the essence of the contract was delivery in London), said (4):—"The arbitrator has found against frustration, so far as it is a matter of fact. It certainly is not a matter of abstract law, and as all this tea reached British ports without mishap and is not a particularly perishable commodity, any frustration of the commercial objects of the adventure must have been connected with markets and prices or other matters of fact, which were for the arbitrator. I, therefore, think this point fails." As to *Braithwaite's Case* (5) Lord *Atkinson* (6) quotes

(1) (1905) 2 K.B., at p. 554.
(2) (1923) A.C., 48.
(3) (1923) A.C., at p. 62.
(4) (1923) A.C., at pp. 66-67.
(5) (1905) 2 K.B., 543.
(6) (1923) A.C., at p. 65.

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portion of the passage in the judgment of *Collins* M.R. already referred to. Lord *Sumner*, whose judgment has the concurrence of Lord *Wrenbury* and Lord *Carson*, says (1): "The case was dealt with as one in which the buyers had explicitly waived all *conditions precedent*, while retaining a right to rely on them as *terms*, the breach of which would sound in damages that could be given in evidence in reduction of the claim, and the judgment of *Kennedy* J., who had thus reduced the plaintiff's damages, was consequently affirmed." On the same page Lord *Sumner* points out that repudiation, giving no reason at all, might be supported by any valid reason. But, where reasons are in fact given, the learned Lord in effect says they have to be considered as to what is intended to be insisted on and what is intended to be waived. In no case, however, can any waiver of a condition oblige the buyer to pay in full if the seller could not have carried out his contract at all.

On these principles, the question arises: Supposing, for the sake of argument, that the "half shipment" and the "two months later" were "conditions" which required strict performance at the peril of rejection, what is the effect of the rejection on the one expressed ground of cancellation? We have already pointed out that the attitude of the appellant, then and later, was a strong tacit acknowledgment, in view of his knowledge, that no idea was entertained of the shipment provision being a "condition" entitling him to rejection. But, as between mercantile men, how would that refusal be construed and understood? Certainly, in our opinion, as intimating:—"We have one objection, and one only, namely, no contract. We see the invoice and the draft and all the nature of the shipment and we raise no objection but the one, namely, cancellation." *Braithwaite's Case* (2) in itself and as interpreted by the House of Lords leads us to the conclusion, applying of course the principle to the present facts, that the appellant waived whatever objection he might have had to the time and proportion of shipment as a *condition precedent*, without surrendering any claim for compensation if he could prove actual damage.

For these reasons, with great deference to the opinions from which we have the misfortune on such far-reaching principles to differ,

(1) (1923) A.C., at p. 71. (2) (1905) 2 K.B., 543.

but yet without being able to acknowledge any hesitation, we arrive at the conclusion that the provision in question was not intended as a condition, and that such a breach as is alleged—if it be a breach—was not such as tended to frustrate the adventure or to destroy the substance and foundation of the contract; and, therefore, we are of opinion that the appeal should be dismissed with costs.

HIGGINS J. The discussion in this case has taken a wide range, but ultimately the success or failure of the appeal depends (a) on the meaning of the "indent order" of 8th March 1920, accepted, with a variation increasing the prices, on 4th May, and (b) on the effect on the contract of the defendant's contention, which failed, that the order was cancelled by mutual consent on 3rd June 1920. This contention was not sustained by the evidence, and it has not been pressed before us.

In the plaintiff's order form, filled in and signed by the defendant, the plaintiff was requested to indent for the defendant certain tie silks, specified, from Europe:—"Goods to be shipped per sailer/steamer. Half as soon as possible. Half two months later." It appears that some 340 yards were shipped by the *El Kantara* on 21st October; some 800 yards by the *Morea* on 17th November; some 580 yards by the *Naldera* on 13th December—all in 1920. It is clear, therefore, that the half-and-half stipulation was not observed; nor was there an interval of two months between the first and second shipments, or between the second and third shipments. The learned Judge who tried the action interpreted the words "half two months later" as meaning not more than two months later—just as if the words used were "half *within* two months afterwards." I regret that I cannot take this view of the meaning; I regret it because the defendant would probably not have accepted the goods even if the contract as to shipment had been literally fulfilled. But the emphatic word is "later"; and as there is nothing in the rest of the contract to qualify the words, I am constrained to take the view that there was to be an interval of substantially two months before the second shipment. Such a provision may well have a familiar commercial purpose—the merchant may well want an interval within which he may dispose of the first shipment before

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he be called on to find the money for the second; or in arranging his contracts for a period to come, he may want to know how long, approximately, it will be before the ship can arrive with the goods. The parties may not have actually meant this effect; but we have to act not on what they actually meant, but on what they have said. Looking at the construction of the words as they stand, I can find no ground for treating the stipulation as to the interval between shipments as being other than a condition precedent to the duty of the purchaser to accept the goods. On this point, the case of *Bowes* v. *Shand* (1) throws much light. I state the case, omitting matters immaterial. There was a contract for the sale of Madras rice to be shipped at Madras "during the months of March and/or April 1874" per *Rajah of Cochin*. The rice was shipped—was put on board the ship—during the last few days of February, and bills of lading given. In an action for refusing to accept the rice, it was held to be a good defence that the rice had not been shipped "during the months of March and/or April"; that the shipping during those months was an essential part of the description of the goods sold; and that the plaintiff could not recover damages, not having tendered the thing contracted for. As Lord *Cairns* L.C. said (2), "it may well be that a merchant making a number of rice contracts, ranging over several months of the year, will be desirous of expressing that the rice shall come forward at such times, and at such intervals of time, as that it will be convenient for him to make the payments, and it may well be that a merchant will consider that he has obtained that end if he provides for the shipment of the rice during a particular month, or during particular months, and that he will know that provided he has made that stipulation the rice will not be forthcoming at a time when it will be inconvenient for him to provide the money for the payment." The Lord Chancellor also said (3) that the shipment in the two months mentioned was "part of the description of the subject matter of what is sold"; in other words, as Lord *Hatherley* put it (4), "it is not the article rice only that is sold, but the thing that is sold is the article rice shipped in March or April, and . . . the article rice shipped in February is not the

(1) (1877) 2 App. Cas., 455.
(2) (1877) 2 App. Cas., at pp. 463-464.
(3) (1877) 2 App. Cas., at p. 468.
(4) (1877) 2 App. Cas., at p. 475.

article which has been purchased by the defendants." Here, the order is to indent goods (described), at prices (described), to be shipped (as described). Where the words used involve a condition on their face, and to treat them as involving a condition is not an obvious absurdity, but is consistent with an intelligible business purpose, the Courts do not take on themselves to say that the words are not words of condition, on a nice balancing of conjectures and probabilities. This is the essence, as I take it, of *Bowes* v. *Shand* (1). The Courts, very properly, do not allow evidence of the actual mental processes of the parties, apart from what they have written. As Lord *Hatherley* expressed the position (2), "the danger of such a construction" (by balancing probabilities) "is extreme, because it is impossible to know all the causes which may have induced the persons to put words into a contract. If the words have a certain definite meaning, it is dangerous to depart from that meaning until you can arrive at any sound ground upon which you should do so; it is dangerous to depart from it upon a conjecture that it can make no difference to the parties, and especially you cannot reject the literal construction because you think that, unless you reject it, you may be affording an opportunity for an evasive purchaser to escape from his bargain."

Unless, therefore, the alleged repudiation of the contract by the defendant relieved the plaintiff in some way of his obligation to have the goods shipped as provided in the contract, the defendant was not under any obligation to accept the goods.

It appears that after a conversation on 2nd June, the defendant wrote to the plaintiff, announcing that the defendant would be compelled to cancel the order under the present tariff and exchange, added to the advanced price; he saw no hope of selling. In subsequent letters the defendant offered to pay £40 or £45, and be done with the matter. The plaintiff, however, on 13th December intimated that portion of the order was on the *El Kantara* which was due to arrive about 18th December, and that as soon as the documents came the plaintiff would pass particulars on to the defendant. The plaintiff also on 19th January tendered portion of the order, but the defendant refused to accept delivery. The

(1) (1877) 2 App. Cas., 455.

(2) (1877) 2 App. Cas., at p. 476.

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plaintiff made repeated tenders; but the defendant on bills drawn for purchase-money and for duty disbursed made the endorsement "Order cancelled The British Tie Co."; and on 27th January 1921 the defendant wrote: "As you already know order for French tie silks was cancelled by consent shortly after the order was given, under these circumstances cannot accept draft or delivery." On 8th February the plaintiff's solicitor sent to the defendant invoices for what was called the "first half of the indent contract," and particulars of duty, &c., and presented bills of exchange for the amounts; saying that "with regard to the second half of the goods these are now to hand and will be tendered for your acceptance upon the expiration of two months" (or earlier if preferred). The defendant's solicitors on 9th February repeated that the contract was cancelled on 3rd June, and said that the defendant would not accept the bills, nor accept delivery of the balance of the goods referred to in the contract. The goods were sold accordingly by the plaintiff in March; and, the net proceeds being less than the contract price by £457 11s. 5d., this action was brought for that sum. Judgment was given for the plaintiff on 30th June 1922.

It is clear, therefore, that on and after 19th January, if not before, the defendant gave absolute and unequivocal notice to the plaintiff that he would not accept the goods—would not perform the contract. The plaintiff then had a right of election: he could have concurred with the defendant in rescinding the contract, and bring an action for the breach; or he could have treated the notice as inoperative, and proceed with the contract. The plaintiff chose the latter course; and thereby he remained subject to all his own obligations under the contract, and the defendant remained in a position to take advantage of any failure of the plaintiff to do his part. A door must be either open or shut; a contract must either subsist or be at an end. This contract was not at an end; and the question remains, has the plaintiff failed to fulfil the conditions which would entitle him to payment from the defendant. On my view of the meaning of the words of the contract, the plaintiff has failed to have the goods shipped in halves, with an interval of two months; and the defendant is entitled to say, "what you offered to me is not that for which I bargained—*non haec in fœdera veni.*"

It is not for Courts to weigh the importance of conditions which parties choose to put into their contracts; the failure here must be treated as being as fatal as if the contract were for pigskins and the tender were of sheepskins.

Counsel for the plaintiff have relied on a case before the Court of Appeal in England (*Braithwaite* v. *Foreign Hardwood Co.* (1)). There a contract provided for the sale of rosewood to be delivered in Hull in instalments during 1903. There were two consignments. Before the first consignment reached Hull the buyers refused to accept any rosewood under the contract on a ground which was untenable. Afterwards, the plaintiff wrote saying that he had the bill of lading for the first consignment; and the defendants wrote refusing to take the bill of lading as they had repudiated the whole contract; and the plaintiff sold the consignment and claimed the difference between the contract price and the price on resale. The second consignment came, and the defendants again refused, and the consignment was resold at less than the contract price. It appeared subsequently that the first consignment was inferior in quality to that agreed on; the second consignment was satisfactory in quality. It was held by *Kennedy* J. that the repudiation of the contract by the defendants was *accepted* by the plaintiff as a final repudiation; and that the defendants could only give evidence of inferior quality in reduction of damages. This decision was affirmed by the Court of Appeal on the ground that the refusal of the defendants to take the bill of lading (after the general repudiation) amounted to a waiver by the defendants of the performance by the plaintiff of the conditions precedent. There is no such waiver here of the performance by the plaintiff of the conditions precedent as to shipment. This case was discussed and followed in *Taylor* v. *Oakes, Roncoroni & Co.* (2); and *Scrutton* L.J. said (3) :—" The vendor, not accepting the first repudiation, tendered the bill of lading for the instalment, and the purchaser refused to take it, on the ground that there was a collateral contract which he inaccurately alleged to exist. Thereupon the vendor accepted the

(1) (1905) 2 K.B., 543.
(2) (1922) 27 Com. Cas., 261; 127 L.T., 267.
(3) (1922) 27 Com. Cas., at pp. 272-273; 127 L.T. at p. 271.

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second repudiation and sold the goods. It was held that it was no use the purchasers saying 'Oh, but the goods you were going to tender were not in accordance with the contract,' because once they had repudiated the contract *and the repudiation had been accepted*, the vendor was relieved from the necessity of proving his readiness and willingness." The expressions used in *Braithwaite's Case* (1) may not have been very carefully weighed; but the case lends no support to the argument that failure of the plaintiff to fulfil a condition precedent cannot be used as a defence where the plaintiff has not accepted the defendant's repudiation (see also *British and Beningtons Ltd.* v. *North-Western Cachar Tea Co.* (2)).

In my opinion, the appeal should be allowed.

I do not hesitate to say that my opinion is given with hesitation. For we have to interpret a loosely expressed contract—a printed form of the plaintiff, filled in carelessly, without a careful fitting of the written words to the printed. One may conjecture, for instance, that the word " sailer " was inadvertently left standing in the printed form " per sailer/steamer " ; but as the word has not been crossed out, we must give it due effect. If I felt free to preface my judgment by a general statement that the respondent in all substantial respects has faithfully carried out his part of the transaction, and that all the elements of real justice are on the side of the respondent, my opinion would, of course, be in favour of the respondent; but I should feel that I was begging the whole question. The whole case turns on the construction of a peculiar contract which is not likely to be repeated.

STARKE J. In the month of March 1920, the appellant, Bowes, made a request in writing to the respondent, Chaleyer, to indent on his account certain tie silks from Europe, which Chaleyer agreed to do. Both parties treat the arrangement as a contract for the sale of goods; as, in my opinion, it was in point of law. The written order contained these words:—" Goods to be shipped per sailer/steamer. Half as soon as possible. Half two months later." As a matter of construction, these words mean, in my opinion, that the goods are to be shipped in equal parts, the first part as soon as

(1) (1905) 2 K.B., 543. (2) (1923) A.C., 48.

possible, and the second part two months after the first part has been shipped. A stipulation for shipment in half parts does not warrant a piecemeal shipment of those parts; the shipment of the half part must be in one parcel. "In carrying out a commercial contract such as this, some slight elasticity is unavoidable; no one supposes that" that shipment must be mathematically one half of the goods purchased; it must, however, be substantially of the quantity specified (cf. *Harland & Wolff* v. *Burstall & Co.* (1)). The words "as soon as possible" in this contract mean "within a reasonable time," regard being had to the ability of the vendor to obtain the goods from the manufacturers and to despatch them to the purchaser (cf. *Attwood* v. *Emery* (2); *Hydraulic Engineering Co.* v. *McHaffie, Goslitt & Co.* (3)).

Now, the learned Judge who tried the action held that the first half of the goods was shipped as soon as possible. The goods purchased amounted to about 1,780 yards of tie silks in various pieces, of different designs and prices. In October 1920 about 380 yards were shipped, in November about 820 yards and in December about 580 yards. The learned Judge must consequently have held that the contract, upon its true construction, authorized piecemeal shipments of the first half of the goods purchased. But I cannot agree with this construction. Then, as to the second half of the shipment, the learned Judge says:—"Looking at the context and the subject-matter of the present contract I am of opinion that, having regard to the provision that the first half was to be shipped 'as soon as possible,' it meant *not more than two months later*. If this be correct, it follows that, as the second half was admittedly shipped not more than two months later, this condition was complied with." As I understand the learned Judge, the second half of the shipment is to be shipped within two months after the first half has been shipped. Again I cannot agree. The words are "half two months later," not "within two months." The stipulation is that the shipment of the second half shall take place two months after the first half has been shipped. Consequently, in my

(1) (1901) 6 Com. Cas., 113, at p. 116. (2) (1856) 1 C.B. (N.S.), 110.
(3) (1878) 4 Q.B.D., 670.

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opinion, the vendor did not comply with the stipulation of the contract as to shipment; and the evidence shows that he never in fact tendered documents for goods shipped in accordance with the stipulation, and was never able to do so. This leads me to inquire whether the stipulation was of the essence of the contract, so that its breach entitled the opposite party to be discharged from his liabilities under the contract, or whether it was a collateral or subsidiary promise, the breach of which would not entitle the opposite party to be discharged but only to a right of action for damages.

The question is one of intention, to be gathered from the contract and the circumstances in which it was made (*Glaholm* v. *Hays* (1)). Of course, as has often been observed, "the object must be to arrive at the real intention of the parties," but the intention must be judged from the words used in the particular circumstances, "not by reference to what might probably or ought in fairness to have been the intention." "Men should be able to rely upon the Courts to give effect to the terms for which they stipulate" (cf. *Carver on Carriage by Sea*, 3rd ed., secs. 164, 235). And the Courts of law, in a long line of cases, have indicated certain canons or principles of construction useful in gathering that intention. Thus, in what may perhaps be called the foundation case, *Behn* v. *Burness* in the Exchequer Chamber (2), we find the following passage: "With respect to statements in a contract descriptive of the subject matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as . . . a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it." Again (3): "Then, if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition . . . unless we can find in the contract itself or the surrounding circumstances reason for thinking that the parties did not so intend." *Bentsen* v. *Taylor, Sons & Co.* (4) and *Wallis, Son & Wells* v. *Pratt*

(1) (1841) 2 Man. & G., 257.
(2) (1863) 3 B. & S., at p. 755.
(3) (1863) 3 B. & S., at p. 759.
(4) (1893) 2 Q.B., 274.

& Haynes (1) contain modern enunciations of the same rule. The Supreme Court of the United States—no mean authority—has expressed the same principle in these words: "A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as . . . a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract" (*Norrington* v. *Wright* (2); cf. *Filley* v. *Pope* (3)). A like material incident may be added, such as the mode of shipping or the quantity to be shipped. And, as Sir *William Anson* says (*Contracts*, 14th ed., p. 357), a condition "may assume the form either of a promise that a thing is or of a promise that a thing will be."

Is, then, the stipulation in the present case a substantive part of the contract? "Merchants are not," as Lord *Cairns* said in *Bowes* v. *Shand* (4), "in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." Financial and business reasons may well have dictated the stipulations now before us. "The Court has neither the means nor the right to determine why the parties specified shipment" in half parts, &c. But, as the contract so provides, why is it not as much a part of the description of the subject matter or of some material incident thereof as was the month of shipment in *Bowes* v. *Shand*, or the class of ship in *Ashmore & Son* v. *Cox & Co.* (5), or the date of a bill of lading in *In re General Trading Co. and Van Stolk's Commissiehandel* (6)? Because, so it is said, of the nature of the contract and the indefiniteness, vagueness and ambiguity of the stipulation. But I have not been able to gather why, from a business point of view, the stipulation should be of less importance in this indent contract, which involves the obligations of an agreement for sale, than it would be in an ordinary agreement for sale. If such a stipulation be clear, definite and unambiguous the same result must surely follow in the one case as in the other. We are told, however, that the merchants who made the contract quite failed to appreciate the indefiniteness and ambiguity of the word "half";

(1) (1910) 2 K.B., at p. 1012.
(2) (1885) 115 U.S., at p. 203.
(3) (1885) 115 U.S., 213.
(4) (1877) 2 App. Cas., at p. 463.
(5) (1899) 1 Q.B., 436.
(6) (1911) 16 Com. Cas., 95.

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as also did the manufacturer who was advised by his Australian correspondent, Chaleyer, to divide the goods into two shipments, half as soon as possible and half two months later. Now, if there had been anything obscure in the stipulation I should have thought that the matter would have been canvassed before the learned primary Judge, and on this appeal, when the trade practice might have been explained and any apparent obscurity removed. As the matter stands, however, the stipulation seems to me to be plain enough. It means: Divide the goods into two shipments, and ship half the quantity in one ship as soon as possible, and ship the other half two months after the first half has been shipped. Now, such a stipulation seems, on its face, to be most important from a business point of view, and also to be a material incident relating to the subject matter of the contract from a legal point of view. But it is not, so it is said, regarded as very important in this contract, because the time of arrival of the goods was quite uncertain: they might be shipped either by sailer or by steamer. Yet clearly it is *shipment* as soon as possible, not arrival, which is the important stipulation of the contract. And it is rather going in the face of the provision for a documentary draft at ninety days, to substitute arrival of the goods as the test of the importance of the clause, instead of shipment, as it actually prescribes. Goods afloat are as valuable commercially to the holder of the mercantile documents representing them as are the goods themselves. It may be that Bowes, while he bought with the intention of manufacturing the goods into ties, was also quite alive to the fact that he might dispose of the goods whilst afloat and so avoid a loss or make a profit. The Court has no real means of estimating the value and importance of the stipulation; and it is far safer, in my opinion, to treat as conditions substantial and important provisions in a mercantile contract relating to the time, place or mode of shipment of goods the subject matter of the contract, unless the contrary intention is manifest.

It is now very common in mercantile contracts to provide that one or other of the parties shall take the risks of non-delivery or short shipment owing to strikes, &c.; and to depreciate the value of other stipulations in the contract by reference to that clause appears to me to be not only novel, but also in opposition to the

general intent of business men. The clause has, in my opinion, no bearing upon the questions involved in this action. The stipulation in the present contract as to shipment was, to my mind, a condition, the breach of which entitled the buyer to refuse performance of his obligation to accept documentary drafts pursuant to the contract.

The seller contends, however, that the buyer waived or excused his performance of the condition precedent. Unquestionably the buyer declined to carry out his part of the contract, and on several occasions refused acceptance of the documents tendered under the contract, on the ground that it was cancelled. The learned Judge below found that the contract had not been cancelled, and the finding was not, and could not have been, successfully challenged on this appeal. The seller did not accept the buyer's repudiation of the contract as operative and binding upon the parties. "But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it" (*Frost* v. *Knight* (1)).

The case of *Braithwaite* v. *Foreign Hardwood Co.* (2) was cited as an authority for the proposition that a buyer who repudiates a contract for a reason which fails, waives the performance of all conditions precedent on the part of a *seller who refuses to end the contract* and elects to treat it as operative, and insists upon performance of the contract according to its terms. But *British and Beningtons Ltd.* v. *North-Western Cachar Tea Co.* (3) destroys the contention, and expounds the true basis of *Braithwaite's Case*: That was a case "in which the buyers had explicitly waived all conditions precedent, while retaining a right to rely on them as terms, the breach of which would sound in damages" (see Lord *Sumner* (4)).

This case, therefore, depends upon the proper conclusions of fact

(1) (1872) L.R. 7 Ex., at p. 112.
(2) (1905) 2 K.B., 543.
(3) (1923) A.C., 48.
(4) (1923) A.C., at p. 71.

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to be drawn from the evidence rather than upon any rule or principle of law. No doubt, if a party repudiates a contract and the repudiation is accepted and acted upon by the other party, then the latter is relieved from proving readiness and willingness on his part to perform the contract. But in the present case Chaleyer would not accept and act upon the repudiation: he insisted upon tendering, in performance of the contract, documents for goods which had not been shipped in accordance with its terms. The fact that Bowes asserted that the contract was cancelled was "very material," to quote Lord *Sumner* in *British and Beningtons Ltd.* v. *North-Western Cachar Tea Co.* (1), "on the question in what respects" he waived "the performance of conditions still performable *in futuro* or" dispensed the other party "from performing his own obligations any further." What are the facts? Bowes, in effect, said: "You need not tender any documents for goods shipped according to the contract; it is cancelled." Chaleyer, in effect, replied: "It is not cancelled; I will not accept or act upon your statement as a repudiation of the contract; you must perform the contract, and I will perform it on my part." Chaleyer then endeavoured to perform the contract according to its terms. But he never tendered nor was he ever able to tender documents for goods shipped in accordance with the terms. He did not alter his conduct or position by reason of any act or statement of Bowes. He simply refused to be relieved from performance of the contract—he insisted that it should be performed not only by Bowes but also by himself. A finding that Chaleyer did not perform the contract because he was relieved from doing so by Bowes, or that he was always ready and willing, "disposed and able to complete" the contract, if it had not been renounced by Bowes, cannot, I think, be made or justified upon these facts (*Cort* v. *Ambergate &c. Railway Co.* (2); *British and Beningtons Ltd.* v. *North-Western Cachar Tea Co.* (3).

Then, do the acts and conduct of the parties evince an intention to treat the stipulation as to shipment as a warranty or to reduce that stipulation to the level of a warranty, a subsidiary promise sounding in damages only? Even suppose that Bowes may be

(1) (1923) A.C., at pp. 71-72. (2) (1851) 17 Q.B., 127.
(3) (1923) A.C., at p. 64.

taken as having said "You have documents of some sort for tie silks, which I refuse to take because the contract is cancelled, and you may prove your damages for my refusal if I fail to prove the contract to be cancelled" (see *British and Benningtons Ltd.* v. *North-Western Cachar Tea Co.*, per Lord *Sumner* (1)), still Chaleyer would have none of it. He insisted that the contract was not cancelled, but had all its original force and effect and must be performed by the parties according to its terms. There is no solid basis, in this state of facts, for concluding that the parties did not regard the stipulation as a condition, or that they agreed to reduce it, or to treat it as reduced, to the level of a warranty. The misfortune of the case is that Chaleyer would not accept and act upon Bowes' renunciation of the contract, but insisted upon its performance, when he was never in a position to fulfil, on his part, the obligation of the contract relating to shipment. But the Court cannot relieve him of the consequences of his election. It can only apply the law to the facts as they actually exist.

The appeal must, in my opinion, be allowed and the judgment below reversed.

Appeal allowed. Judgment appealed from reversed. Judgment for defendant with costs. Respondent to pay costs of appeal.

Solicitors for the appellant, *Parkinson & Wettenhall.*

Solicitor for the respondent, *P. St. J. Hall.*

B. L.

(1) (1923) A.C., at p. 71.