requested to state a special case. As to this, it is unnecessary, in the view we take of the first point, to say anything, and, having regard to the absence in this appeal of that learned counsel, we say nothing about it.

We agree to the order suggested.

Order appealed from varied by striking out the questions directed to be stated and substituting those set out in the judgment of Knox C.J. and Starke J. Otherwise order affirmed. Parties to abide their own costs of the appeal.

Solicitors for the appellant, *Maddock, Jamieson & Lonie.*

Solicitor for the respondent, *V. J. Whitehead.*

B. L.

[HIGH COURT OF AUSTRALIA.]

BANNISTER . . . . . APPELLANT;
DEFENDANT,

AND

HEYMAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *Feb.* 20-22; *June* 10.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Contract—Construction—Performance—Agreement to purchase at future time goods to be then ascertained—Readiness and willingness—Appropriation of goods—Agreement to grant sub-lease—Consent of lessor not obtained—Repudiation.

The plaintiff, who was carrying on the business of a ship-chandler and desired to sell and dispose of all his stocks of chandlery, entered into an agreement with the defendant whereby it was agreed (*inter alia*) that, from and after the date of the agreement and for a period ending on a specified date, the

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defendant should purchase "all such stocks of chandlery which are now carried by" the plaintiff except certain classes of chandlery, and that the plaintiff would continue selling to others; that on the specified date the defendant "shall purchase and take over" from the plaintiff "all such of the stocks remaining in the ship-chandlery department" of the plaintiff as the plaintiff "shall be willing to sell and dispose of to" the defendant; that the plaintiff would "sub-let" to the defendant as from the specified date "the lease of the premises" in which the plaintiff carried on business, "such sub-lease being subject to the approval of" the lessor, at a certain weekly rental; and that, if on the specified date the stocks to be taken over by the defendant were not reduced to a certain sum, the agreement could be postponed for a further six months on the same terms, but if before the end of that period the stocks should be reduced to that sum the defendant should take them over. An action was brought by the plaintiff against the defendant to recover damages for breaches of the contract, the breaches alleged being the refusal by the defendant to purchase or take over the goods on the specified date and his refusal to pay rent for the premises.

Held, by *Isaacs*, *Rich* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that the plaintiff was not entitled to recover:

By *Isaacs* and *Rich* JJ., on the grounds (1) that the plaintiff did not inform the defendant on the specified date what goods then in his possession he was then willing to sell to the defendant, and (2) that before the specified date there had been no repudiation of the contract by the defendant so as to relieve the plaintiff from the obligation of being ready and willing to perform the contract on the specified date; and, by *Isaacs* J., on the further ground (3) that by reason of his omission to obtain the consent of the lessor to the sub-lease on or before the specified date the plaintiff was not then ready to perform an essential portion of the contract;

By *Starke* J., on the ground that there was no sale of or agreement to sell any goods and that the obligation to pay rent was dependent upon a sale of or an agreement to sell goods.

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

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Aage Heyman, trading as P. W. Heyman, against Leonard Bannister, in which the plaintiff claimed £2,100 damages for breaches of a contract dated 27th May 1922 between the plaintiff (therein called the vendor) and the defendant (therein called the purchaser). By the contract, which recited that the plaintiff had for some time carried on (*inter alia*) the business of ship-chandler, and was desirous of selling and

disposing of all his stocks in connection with that business in the manner thereinafter appearing, it was agreed as follows :—

1. From and after the date hereof and for a period extending to 1st March 1923 the purchaser shall purchase all such stocks of chandlery which are now carried by the vendor save and except stocks known or classed as horseshoe nails, swivels and wire ropes. The vendor will continue selling to others.

2. The prices to be paid by the purchaser to the vendor for such stocks *shall be the usual selling price* of the vendor *less a discount* of 10 per cent. Provided always that in the case of shelf goods the price to be paid by the purchaser shall be the wholesale purchasing price plus £5 per cent on such price.

3. The purchaser shall pay to the vendor for all stocks purchased and delivered to him on the first week of each month succeeding the purchase.

4. On 1st March 1923 the purchaser shall purchase and take over from the vendor all such of the stocks then remaining in the ship-chandlery department of the vendor as the vendor shall be willing to sell and dispose of to the purchaser but in no event shall such stocks be deemed to include horseshoe nails, swivels or wire ropes.

5. The prices to be paid by the purchaser to the vendor for such of the stocks as the purchaser shall purchase and take over under the preceding clause as aforesaid, shall be based on the ruling prices in Melbourne as on 1st March 1923 and such prices shall be estimated and determined as follows : (a) in respect of imported stocks the selling price of similar articles on 1st March 1923 quoted by the company, firm, person or factory from whom the articles were purchased by the vendor plus the charges for freight, import duty, dock dues, insurance, exchange on purchase price and landing charges to be paid by the vendor in respect of such imported stocks ; (b) in respect of locally-manufactured articles, the prices shall be the prices quoted by the Australian company, firm, person or factory from whom the locally-manufactured articles were brought by the vendor ; (c) in respect of damaged articles, the prices shall be such as shall be mutually agreed upon or shall be settled by arbitration as hereinafter provided.

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6. The purchaser shall pay to the vendor the purchase-money as follows namely: one-third of the total purchase-money in cash on or before 1st March 1923 and the balance by monthly instalments, the first of such instalments to be made on 1st April 1923, together with interest at the ruling bank rate to be calculated on the balance of purchase-money from time to time remaining unpaid. The said monthly instalments shall be not less than £500, but if stocks or goods of a greater value than £500 are delivered by the vendor to the purchaser before the first day of any month the increase in value over the said sum of £500 shall also be paid by the purchaser in addition to the said monthly instalments of £500.

7. The book debts and liabilities of the vendor in respect of the said chandlery business are not to be deemed to be included in any way in this agreement.

8. The vendor after the said 1st March 1923 shall be at liberty to sell the said horseshoe nails, swivels and wire ropes through the agency of William McBean, and in the event of the said William McBean being in the employment or service of the purchaser the purchaser is not to raise any objection to the sales of such stocks being effected by the said William McBean.

9. During the period from the date of these presents to 1st March 1923 the vendor, after procuring the consent and approval of the purchaser, is to be at liberty to tender or enter into contracts for the supplies or sale of various stocks of chandlery, and the purchaser shall after the said 1st March 1923 duly perform and carry out the obligations of the vendor under any such tenders or contracts and will indemnify the vendor against any loss, damage or expenses arising out of or in connection with the said tenders or contracts after the said date. Provided always that all moneys paid by the vendor by way of deposit or otherwise in connection with any such tender or contract shall be repaid to the vendor and the purchaser shall not have any right or claim to the same.

10. The vendor will sub-let to the purchaser as from 1st March 1923, subject to a right of passage-way to the vendor and his staff for the purpose of using the lift, the lease of the premises at present held by the vendor in respect of his ship-chandlery department, such sub-lease being subject to the approval of the Melbourne City Corporation, and

the purchaser will pay to the vendor a weekly rental of £6 for the said shop. The said premises to be taken over by him comply with all the terms and conditions (except as to payment of rent) contained in the vendor's lease of the whole premises in so far as the same are applicable, and all costs and expenses for painting repairs &c. under the said lease to the vendor shall be borne equally between the vendor and the purchaser. All shelving and other fittings in the said shop to be taken over by the purchaser as aforesaid shall be purchased by the purchaser from the vendor at the cost price thereof less 25 per cent discount, and the amount thereof shall be paid by the purchaser to the vendor on 1st March 1923.

11. During the continuance of this agreement and in consideration thereof the purchaser will, when soliciting orders from any ships in port for the supplies of goods from his own business, use all reasonable efforts to obtain orders from such ships for the supply of tobacco of every sort and description and also of all provisions in the nature of food and drinks for such ships, and the purchaser shall give to the vendor the first refusal for the supplies under such orders. Such supplies shall be invoiced by the vendor to the purchaser and the vendor will allow to the purchaser a discount of £15 per cent. on all payments received for the same. In the event of vendor refusing to take up such orders the purchaser shall be entitled to supply such orders on his own account and for his own exclusive profit.

12. During the period from the date hereof to 1st March 1923, in the event of the vendor being short in any lines of chandlery stocks, the purchaser will, in so far as he is able so to do, on application by the vendor sell or supply to the vendor such lines and shall allow to the vendor 10 per cent discount on the ordinary selling price thereof.

13. The purchaser shall as from 1st March 1923 employ William McBean as manager of and in connection with the department for the sale and disposal of the stocks hereinbefore referred to and the carrying out of this agreement.

14. If within three months from the date hereof the vendor, who is at present residing in Copenhagen, Denmark, signifies by letter or cablegram that he will not approve of or ratify this agreement then the same shall be null and void and be of no effect and the purchaser shall not be entitled to any compensation on account of such refusal,

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nor shall the purchaser be under any further obligation to the vendor hereunder.

16. In continuation of the above, if on 1st March 1923 the stock to be taken over by the purchaser is not reduced to £4,000, the agreement can be postponed a further six months on the same terms, but if before the end of this period the stock is reduced to £4,000 the purchaser shall take it over.

The breaches alleged by the plaintiff were, in substance, the refusal by the defendant on 1st March 1923 to purchase or take over the stocks mentioned in clause 4 of the contract and the refusal of the defendant to pay the rental mentioned in clause 10 of the contract.

The action was heard by *Mann* J., who found in favour of the plaintiff in respect of both the alleged breaches and gave judgment for the plaintiff for £720 damages with costs.

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

The other material facts are stated in the judgments hereunder.

H. I. Cohen K.C. (with him *Claude Robertson*), for the appellant. The contract is void for uncertainty. It is uncertain what were the duties of the appellant under clause 1 and as to what were the rights and obligations of the parties under clause 4. As to clause 10 the term of the sub-lease is not stated. That omission invalidates the agreement (*Dolling* v. *Evans* (1); *Ellis* v. *Rogers* (2); *Southern* v. *Harriman* (3); *Fitzmaurice* v. *Bayley* (4)).

[ISAACS J. referred to *Hallen* v. *Spaeth* (5).]

The phrase "sub-let the lease" has no meaning, and in any event does not refer to an assignment of the lease. The agreement as to a sub-lease was a material part of the whole contract, and, unless the consent of the Melbourne City Corporation to the sub-lease were obtained on or before 1st March 1923, there was no obligation on the appellant to purchase the goods under clause 4. The respondent offered goods on 1st March 1923 only on condition that the appellant paid more than he was bound to pay; the tender of the goods

(1) (1867) 36 L.J. Ch. 474.
(2) (1884-85) 29 Ch. D. 661.
(3) (1866) 14 W.R. 487.
(4) (1860) 9 H.L.C. 78.
(5) (1923) A.C. 684.

was therefore bad (*Joubert & Joubert* v. *Corona Manufacturing Co.* (1)). The respondent did not indicate to the appellant what goods he was on 1st March 1923 ready and willing to sell to the appellant as he was bound to do under clause 4.

Jacobs (with him *Eager*), for the respondent. There is no allegation in the defence that the contract was void for uncertainty. [Counsel was stopped on this point.] There was no obligation under clause 10 upon the respondent to obtain the consent of the Melbourne City Corporation to the sub-lease; the only result of the consent not being obtained would be that no sub-lease would be granted, but if a sub-lease was not granted that would not relieve the appellant from his obligations under the other clauses of the contract. The contract should be read in a reasonable and businesslike manner (*Hart* v. *MacDonald* (2)). There was a sufficient indication by the respondent of the goods he was willing to sell on 1st March 1923. The appellant repudiated the contract, and that repudiation was accepted by the respondent on 2nd March.

[STARKE J. referred to *Bowes* v. *Chaleyer* (3).]

H. I. Cohen K.C., in reply.

Cur. adv. vult.

June 10.

The following written judgments were delivered:—

KNOX C.J. AND GAVAN DUFFY J. We think the judgment in this case was right, and that this appeal should be dismissed. But as the majority of the Court is of opinion that the appeal should be allowed and as the questions at issue turn on the construction of the particular contract sued on and on the facts of the case, we think it would serve no useful purpose for us to state in detail our reasons for the conclusion at which we have arrived. We therefore say no more than that we agree in substance with the reasons for judgment given by *Mann* J.

(1) (1922) V.L.R. 644; 44 A.L.T. 37.
(2) (1910) 10 C.L.R. 417, at p. 431.
(3) (1923) 32 C.L.R. 159.

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ISAACS J. The statement of claim is framed to recover damages under two separate heads of breach of a contract dated 27th May 1922, namely, (1) breach of clause 4 relating to goods, and (2) breach of clause 10 relating to rent. The learned primary Judge (*Mann* J.) gave judgment for the respondent (the plaintiff) and awarded him £720 damages in respect of the first head of claim, no damages being awarded in respect of the second.

The only ground upon which the damages have been challenged was that there was no evidence, or no sufficient evidence, to sustain the damages awarded. That ground of objection cannot be supported. The evidence of damage as to the goods is from the nature of the case confined to opinion and business probabilities, and in the circumstances would be sufficient for the purpose.

The question, however, presents itself whether the decision as to the appellant's liability for breach of clause 4 can be supported. I am of opinion it cannot—this on two separate and independent grounds which, before I explain the reasoning on which they depend, may conveniently be shortly stated. The first ground is that the goods in respect of which liability has been declared do not answer the description of the goods the subject matter of the contract. The second ground is that on the admitted facts the respondent was not ready and willing to perform an essential portion of the contract, namely, to sub-let the premises.

A further question has been raised by the respondent that, the appellant having repudiated the agreement, he (the respondent) was relieved from the condition of being ready and willing to perform his part of it. As to this I may, with equal convenience, say that the contention in my opinion fails, first, because I can see no sufficient evidence of repudiation; next, because, if there be repudiation, the respondent has not established an election to terminate the contract before the time of performance or during performance, and lastly, because a premature termination of the contract would not in the circumstances assist the respondent.

In order to make the position clear, a few general observations are necessary. The respondent on 27th May 1922 was carrying on, in Flinders Street, Melbourne, two distinct businesses, namely, ship-chandlery and grocery, in different portions of the premises

leased to him by the Melbourne City Corporation for three and a half years from 1st January 1921. The lease, therefore, at the date of the agreement sued on had about sixteen months to run. The appellant on the same date was a ship-chandler in Melbourne. The agreement recites that "the vendor" (that is, the respondent) "has for some time past carried on (*inter alia*) the business of ship-chandler, and is desirous of selling and disposing of all his stocks in connection with the said business in manner hereinafter appearing." The respondent's attorney under power deposed: "We wanted to get out, and he was to succeed us." These references are made, not because the express terms of the agreement are not clear, but to show that the avowed purpose of the parties is precisely in accord with the primary meaning of the very words of their bargain.

The agreement is drawn up, certainly in the main, by no unskilled hand, and is couched in terms apparently specially selected so far as was thought to be to the advantage or protection of the appellant. I may at once point out that, notwithstanding the allegation of consideration in the statement of claim and all that was said in argument as to consideration, no consideration was necessary, inasmuch as the agreement is under seal. The nature of the only actual consideration for clause 4, namely, clause 10, becomes, however, highly important on the question of construction. The scheme of the agreement is plain. From the date it was made, 27th May 1922, an interim or preparatory period was determined on by the parties ending on 1st March 1923. During this interim period the agreement expressly declared that "the purchaser shall purchase all such stocks of chandlery which are now carried by the vendor" —with certain specified exceptions. The prices of these interim purchases were the vendor's usual selling price less a discount of 10 per cent, with exceptions not now material. This, if unqualified, might mean that the purchaser, and he alone, should, as he required in the course of his business, purchase whatever "stocks"—that is, classes of goods—which the vendor at the date of the agreement had for sale in his ship-chandlery business. But, without relieving the purchaser, the vendor was given greater liberty. Clause 1 said "*The vendor will continue selling to others.*" This provision, in view of the events that happened, becomes extremely important. It

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means that the vendor could between 27th May 1922 and 1st March 1923 go on selling his existing stocks, which then amounted to £12,000 or £13,000, to any one he chose, irrespective of the appellant, but that during that period the appellant was bound to purchase; and it was urged by learned counsel for the respondent that the appellant was entitled to obtain whatever stocks he needed from the respondent if the respondent had them. This definite statement as to goods is in striking contrast to the provisions of the fourth clause, to be presently mentioned. The interim period extends to 1st March 1923, and the only further observation as to that period is to emphasize the dual provision compelling the appellant to purchase from the respondent during the whole of that period whatever stocks he needed at the price specially fixed for that period, and the right of the respondent to continue selling any or all of his stocks up to the end of that period to other persons at any price he chose. On 1st March that relation ends and *not till that date*, and then an entirely new relation is created. The appellant is no longer bound to purchase piecemeal, so to speak; the vendor is on that day free from all obligation to sell any goods to the appellant, he is free to keep his remaining stocks, or to sell them to others at any price he chooses, and he has the option of compulsorily selling the whole or some selected portion of his stocks to the appellant at prices stated. The two periods are fixed, by the agreement, the line of demarcation being 1st March 1923. The two sets of relations so delimited cannot be encroached upon without some new mutual bargain between the parties.

I now deal specifically with the two grounds above stated.

1. *The Goods.*—The new relation between the parties is that by clause 4 *on* 1st March 1923—and not before—if there should on that date be in fact any remaining stocks, the purchaser undertakes to buy *such*—and only *such*—of those stocks as the vendor is on that day willing to sell *to the purchaser*. Clauses 4, 5 and 6 show that 1st March 1923 is the day which the parties have agreed shall be the day when the question and extent of any new obligation to purchase shall be definitely settled, and (with the one possible reservation as to arbitration respecting the prices of damaged articles, which are exceptional) even as to the prices and consequent debt. It was the

only day under the contract for (a) the existence of the stocks out of which the purchased stocks, if any, are to come—(this is as much a necessary part of the description as were the shipping words in *Bowes* v. *Shand* (1)); (b) the vendor's selection (if any) out of those goods of the stocks he was willing to sell—(this is, in my opinion, much more requisite to the identification of the goods than was the requirement of half-shipment in *Bowes* v. *Chaleyer* (2), cited during the present argument); (c) the prices called "ruling prices in Melbourne" in clause 5—(these are the governing words of the clause and are defined for imported goods and for locally manufactured goods separately, and in the exceptional case of damaged goods, of which we have heard nothing, special provision is made, which may or may not lead to arbitration, as indeed may any other portion of the agreement, so comprehensive is the arbitration clause); (d) the payment of one-third of the purchase-money in cash—(the words "or before" are in this connection insensible from an operative point of view though they add force to the necessity of ascertaining the debt (subject to possible arbitration which might arise as to *anything* under the contract) not later than 1st March); (e) the commencement of the "sub-lease" of the premises and the purchase of and payment for the shelving and fittings in the sub-let premises; (f) other rights and obligations as in clauses 8 and 13.

The critical date is only alterable under clause 16, that is, "if on 1st March 1923 the stock to be taken over by the purchaser is not reduced to £4,000"—a condition which insists on the vendor's right, and therefore the purchaser's right, to await 1st March for the ascertainment of the goods (if any) to be taken over.

The vendor's "willingness" on 1st March to sell some defined goods to the purchaser is on this branch of the case the pivotal point, and calls for careful consideration. There is an important principle of construction embodied in the following words of *Abbott* C.J. in *R.* v. *Hall* (3), adopted and applied by the Privy Council in *The Lion* (4): "The meaning of particular words in Acts of Parliament . . . is to be found not so much in a strict etymological propriety of language, nor even in popular use, as *in the subject or occasion, on which they are*

(1) (1877) 2 App. Cas. 455.
(2) (1923) 32 C.L.R. 159.
(3) (1822) 1 B. & C. 123, at p. 136.
(4) (1869) L.R. 2 P.C. 525, at p. 530.

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used." The principle is, of course, applicable to every written instrument, and the present is a notable instance of the necessity of remembering it. The willingness "to sell and dispose of," within the meaning of clause 4, has, with respect to purpose and effect, nothing in common with the willingness to sell conveyed by a proposal or offer to sell. It is not in the nature of an offer; it connotes no acceptance. It is not the initial factor of a possible bargain, but is the final factor stipulated by an existing bargain (so far as there is a bargain, as to which see *infra*) to reduce by its existence or non-existence on a given date the uncertainty of further obligation to certainty. Until its existence or non-existence is itself made certain, so as to bind both parties beyond the recall of either, the uncertainty of obligation to purchase remains. Its existence is ascertainable, if at all, at some specific moment on 1st March 1923, and is not in its nature continuous. That is established by the application of the principle of construction mentioned, because "the subject or occasion" is one which attracts a distinct rule of contractual law. The rule I refer to is the rule in *Vyse* v. *Wakefield* (1), which established, in the words of *Parke* B., that "there are certain cases where, from the very nature of the transaction, the law requires *notice* to be given, though not expressly stipulated for." Lord *Abinger* C.B. says (2): "When it is to do a thing which lies within the peculiar knowledge of the opposite party, then *notice* ought to be given him." *Rolfe* B. says (3):—"The question is, what is the meaning of the contract, where a party covenants to do something at the option of another? It must mean, provided he have notice of *that option having been exercised.*"

Whether the respondent would, on 1st March 1923, be "willing to sell and dispose of" all or any of "the stocks then remaining in the chandlery department"—that is, after the mutual rights and obligations of the interim period had terminated and the new period of relations had commenced—was clearly, when the contract was made, a matter to be "within the peculiar knowledge" of the respondent. And it was necessarily to be within his peculiar knowledge because of two essential considerations, namely, (1) the

(1) (1840) 6 M. & W. 442, at p. 453. (2) (1840) 6 M. & W., at p. 452.
(3) (1840) 6 M. & W., at p. 456.

quantity of stocks actually remaining on 1st March 1923, and (2) the specific stocks (if any) actually selected on that date as those he was willing the appellant should purchase. It must, therefore, in law be taken that "notice" was required of those two actual facts if they existed, a notice which, *ex naturâ rerum*, could not be given before 1st March 1923. In the event of any stocks remaining on 1st March there was an option of the respondent to be exercised on that date, and, to apply Baron *Rolfe's* words, notice must be notice "of that option having been exercised." In the absence of such "notice" the appellant could, in the words of *Bramwell* B. in *Makin* v. *Watkinson* (1), "only guess or speculate about the matter." He could only guess or speculate whether the respondent had or had not adhered to his intention, and could only guess or speculate as to whether it was obligatory on himself to pay any, and if so what, sum of money on 1st March. If the respondent had sold out even the whole of the stock mentioned in his letter, even without intimation to the appellant, what legal cause of complaint would the latter have had either against the respondent or any person to whom he had sold them? None that I can see.

But that would be simply because the act of appropriation—namely, by notice of actual exercise of election on 1st March—was necessary, not merely to pass property, but to identify the goods agreed to be sold, and so comply with their description in clause 4 (see *Blackburn on Contract of Sale*, 3rd ed., p. 138). If we approach the matter from another standpoint and regard the appellant's undertaking in clause 4 to be a standing irrevocable offer, to be converted into a sale by an event in March, in the option of the respondent, the same result is reached. Until that event occurs, there is not any sale or purchase or even any agreement to sell or purchase (see per Lord *Herschell* in *Helby* v. *Matthews* (2)). The event expressed in the words "willing to sell and dispose of" used in relation to "such of the stocks *then* remaining" &c. still attracts the doctrine of *Vyse* v. *Wakefield* (3). In that aspect, when was there a sale of goods? At what moment was the appellant in a position to know the amount of his indebtedness? My answer is, not before he

(1) (1870) L.R. 6 Ex. 25, at p. 30.
(2) (1895) A.C. 471, at pp. 476-477.
(3) (1840) 6 M. & W. 442.

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received *notice*, on 1st March, not merely of the personal willingness of the respondent to sell designated stocks, but also that those designated stocks were in fact then *in esse*. The principle of *Vyse* v. *Wakefield* (1), and similar cases, is recognized by the House of Lords in *Murphy* v. *Hurly* (2), though held not applicable to the facts of that case. It is a principle of justice and necessity in such a case as this, where the respondent and *he alone* could know what stocks he had in a particular department of his own business and yet unsold, that he should give *notice* to the appellant of the fact. There was no difficulty on the respondent's part in preparing for this and taking any course to enable him to do it. If even it were impossible, that would be no reason for his insisting on the appellant doing the impossible. Ruling prices may stand on a different footing.

If this view be not correct, then it must follow that a notice of willingness given the day after the agreement was made, that all stocks remaining in March should be sold, would enure to bind the defendant to pay an unknown sum on 1st March. So in analogous cases. A notice of demand of a debt not yet due, an intimation of intention to exercise an option to purchase given a month before the option is exercisable according to the contract, a notice to quit before and in anticipation of a breach of covenant, the breach occurring afterwards, could all be said to be continuing and constantly speaking notices, because unwithdrawn, enuring for the benefit of the person giving them. But this case seems to me even clearer because the notice must be of an existing *fact*. And since it must be of an existing fact it seems clear on principle that prior intimation of *intention*, even unwithdrawn, would be insufficient. The reasoning in *Jorden* v. *Money* (3), and other cases of that class (as *Chadwick* v. *Manning* (4)) is in point. See also *Yorkshire Insurance Co.* v. *Craine* in the Privy Council (5).

It is hardly necessary to observe that the notice is not a " condition precedent " in the pleading sense of Order XIX., rule 14, the distinction being well explained in the notes to that rule in the *Annual Practice* for 1923, pp. 343-344. It is of the essence of

(1) (1840) 6 M. & W. 442.
(2) (1922) 1 A.C. 369.
(3) (1854) 5 H.L.C. 185.
(4) (1896) A.C. 231.
(5) (1922) 2 A.C. 541, at p. 553; 31 C.L.R. 27, at p. 38.

the obligation because, as explained in the cases cited, it is by implication an act required to be done by the respondent before any duty is cast on the appellant and thus cannot be given, as I have said, at any time other than 1st March 1923. Until the option is exercised there is no sale, and there was to be no sale until 1st March. Until that day comes, there does not exist the "fund," so to speak, named by the contract as that which, or part of which, may by the respondent's act be made to constitute the subject matter of a purchase. And until the "fund" is in existence, it is, of course, impossible to actually segregate a selected portion of it, that is, so as to be a segregation within the import of clause 4 and to bind both vendor and purchaser. The vendor retains his power of choice until 1st March 1923, and not afterwards; and so long as he retains his power of choice the purchaser cannot be bound. His choice is to be manifested by his course of action on that day—either by giving or not giving the requisite notice. No anticipatory intimation as to how that choice is *intended* to be exercised can be of any legal force—unless by some process dehors the contract converted into a binding obligation—no matter how convenient or courteous the anticipatory intimation may be.

The respondent's letter of 23rd February 1923 was very definite on the point that the respondent insisted that the agreement should be carried out and that "a settlement on the sale is fixed under the agreement *for 1st March next.*" It also enclosed a statement "showing the stocks to be taken over by 'the appellant with the values thereof' and 'the total amount of purchase-money of which one-third will be payable in cash on or before 1st March.'" It offered inspection and discussion as to prices, and also referred to the sub-lease. But it was beyond the power of the writer to alter the contract, or to convert 23rd February into 1st March, or to identify in law the stocks remaining on the former date with those which might remain on the latter date. Nor could he impose on the other contracting party any legal obligation to inspect or discuss. Further, he could not avoid the responsibility of doing all that the contract in law required of him to notify his "willingness" on 1st March as to any or all of the stocks then remaining which the appellant was to take over. The letter at most is an intimation on

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23rd February of a then present intention that the stocks mentioned shall remain on 1st March 1923—six days later—and of present intention on the part of the writer to be on 1st March " willing " to sell those and *no others*, notwithstanding there was over £6,000 worth in stock. There is nothing in the letter of 23rd February binding the respondent to adhere to his stock-sheets either as to stocks included or stocks omitted. Nor, indeed, did he himself think so. During the period that elapsed between 23rd February and 1st March 1923—a period of (say) five business days, a Saturday and a Sunday intervening—he sold in the interim contract period, in the ordinary course of business and out of the stocks referred to in his letter, what his evidence describes as " about £100 worth," that is, at the rate of over £6,000 a year. The sales in the interval were apparently in quantity a very fair ordinary disposition of goods, especially when he probably sold portion of the residue of the £6,000 worth of stocks. The respondent was, of course, entitled to sell what he pleased to others during this period under the final provision of clause 1 of the agreement. But it is a very clear proof that he did not consider that his letter of 23rd February was in fact even a definitive appropriation of all the goods to the appellant under clause 4. Otherwise he would have been selling what he believed to be another man's goods, and there is no trace by offer of proceeds or otherwise of his so considering the goods he sold during that interim period.

The letter of 23rd February 1923 cannot, therefore, as I conceive, be taken to be such " notice " by the respondent that he has exercised the option contemplated by the contract as to convey with the necessary certainty to the appellant on 1st March the knowledge of the goods he had to pay for. I should, if necessary, be prepared to go to the length of saying, carrying out the underlying principle of *Vyse* v. *Wakefield* (1), that the " notice " had to be given in such reasonable time on 1st March as to enable the appellant to comply with the obligation of paying one-third on that day. The respondent was right in insisting in his letter of 23rd February 1923 on that payment (if due at all) being made on 1st March. There was nothing else which could possibly be suggested as a notice by the respondent

(1) (1840) 6 M. & W. 442.

so as to satisfy the requirement of the contract. He must therefore fail, unless relieved from the obligation, a matter to be considered later.

2. *The Sub-Lease.*—Clause 10 of the agreement provides: "The vendor will sub-let to the purchaser as from 1st March 1923, subject to a right of passage-way to the vendor and his staff for the purpose of using the lift, the lease of the premises at present held by the vendor in respect of the ship-chandlery department, such sub-lease being subject to the approval of the Melbourne City Corporation, and the purchaser will pay to the vendor a weekly rental of £6 for the said shop." Other terms are indicated, and then the last clause is: "All shelving and other fittings in the said shop to be taken over by the purchaser as aforesaid shall be purchased by the purchaser from the vendor at the cost price thereof less 25 per cent discount, and the amount thereof shall be paid by the purchaser to the vendor on 1st March 1923." No lease was tendered. The defence did not raise any question as to whether the approval of the Melbourne City Corporation was applied for or obtained. But it was explicitly admitted at the trial by the respondent "that no approval in fact was given by the City Corporation to a sub-lease." It must be assumed that, if necessary, the approval was applied for (*Rules of the Supreme Court* 1916 (Vict.), Order XIX., rule 14). But the admission quoted stands, and must have whatever effect the law gives it. There can be no question that, apart from any accepted renunciation of the contract, so as to attract the doctrine of *Hochster* v. *De la Tour* (1), the admission entitles the appellant to judgment under the second head of claim, namely, damages for non-payment of rent. But the more important matter in this connection is the effect of the respondent's failure to get the approval on the other part of the contract, that is, clause 4. If clause 4 and clause 10 are interdependent, if the contract is entire so far as the later period is concerned, then (apart from accepted repudiation—whatever that might effect) the failure as to clause 10 is an answer to the claim under clause 4. Sir *Frederick Pollock* (*Contracts*, 9th ed., p. 284) says: "If . . . there be any presumption either way in the modern view of such cases, it is that, in mercantile

(1) (1853) 2 El. & Bl. 678.

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contracts at any rate, all express terms are material." And he quotes Lord *Cairns* in *Bowes* v. *Shand* (1): "Merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." (See *Wilkinson* v. *Clements* (2).) In *Measures Brothers Ltd.* v. *Measures* (3) *Kennedy* L.J. said: "Covenants are to be construed as dependent or independent according to the intention of the parties and the good sense of the case." This was adopting Lord *Kenyon's* words in *Morton* v. *Lamb* (4), that learned Judge adding "and on the order in which the several things are to be done."

Looking at the agreement with this aid and remembering the recital and evidence quoted as to the purpose of the parties, it appears to me hardly doubtful that the two provisions, clauses 4 and 10, are mutually dependent. Test it. Suppose the respondent refused to sell any of the stocks on 1st March, could he nevertheless insist on the appellant taking the sub-lease, assuming the stipulated approval given? I should say that would be preposterous. That connects the clauses. As clearly, to my mind, could the respondent not insist on the appellant purchasing the whole stock of £6,300 remaining on 1st March 1923, and yet fail to give a valid sub-lease of the premises to keep the stock on. Apart from the manifest business injustice of throwing the whole stock of that particular business on the appellant on 1st March and yet denying him the benefit of clause 10, the provisions of clauses 13 and 16 are opposed to independence of the clauses. Further, although the agreement is under seal, the fact that, apart from clause 10, there is no actual consideration for the unilateral power given to the respondent in clause 4 is a potent element in establishing the interdependence of the two clauses. We then have to see what were the mutual rights and obligations of the parties under clause 10.

The "lease" held by the respondent from the City Corporation contained a covenant that the respondent would "not assign or sub-let without leave"—a covenant which was agreed to be construed according to the 5th section of the *Landlord and Tenant Act* 1915. That section, with the Third Schedule which it enacts, provides that

(1) (1877) 2 App. Cas., at p. 463.
(2) (1872) L.R. 8 Ch. 96, at p. 110, per *Mellish* L.J.
(3) (1910) 2 Ch. 248, at p. 262.
(4) (1797) 7 T.R. 125, at p. 130.

a covenant by a lessee that he "will not assign without leave" prohibits in the present case the premises from being assigned, transferred or set over to the appellant without the consent in writing of the Melbourne City Corporation first had and obtained. There is power of re-entry for breach of covenant. On the authority of *Mason* v. *Corder* (1) the respondent failed to satisfy the condition of procuring the City Corporation's approval. This had to be done not later than 1st March, because clause 10 and the Third Schedule of the *Landlord and Tenant Act* make this explicit. I think the effect of the express insertion of the words "subject to approval of the Melbourne City Corporation" was to protect the respondent from any action if, having tried his best to get the approval, he failed. (See *Lehmann* v. *McArthur* (2).) But that does not determine the question whether, if the approval were not obtained, and therefore the appellant were unable to get the premises, he was nevertheless bound to take the complete stock, if the respondent so desired. In my opinion, in that event—which has happened—the respondent could not force the goods on the appellant, and for this reason, as well as for the independent reason already stated, the action should fail.

3. *Repudiation.*—On 1st March the appellant wrote a letter raising objections to the respondent's method of proceeding with the contract on the basis of the letter of 23rd February. This letter has been treated as a repudiation of the whole contract. I do not so read it. It is a reply to two letters, the first of which asked for particulars of alleged breaches of agreement, and suggested that, if there were grounds for dispute, the matter could be referred to arbitration as provided in the agreement; the second intimated that "as a settlement on the sale is fixed under the agreement for 1st March I now send you stock sheets and statement showing the stocks to be taken over by you and the values thereof and the total amount of the purchase-money," adding "of which one-third will be payable in cash on or before 1st March." Read with those letters, I fail to see a repudiation of the contract. It is not an express repudiation, and in the circumstances I do not think it is a fair result of the letter to make it say, in effect, in Lord *Blackburn's*

(1) (1816) 2 Marsh. 332. (2) (1868) L.R. 3 Ch. 496, at pp. 500, 503.

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words in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1), "if you go on and perform your side of the contract I will not perform mine." The appellant was invited to state his objections and with a view to arbitration in case he had any; and, as the arbitration is so wide as to extend to disputes as to construction of the agreement itself, I have no hesitation in saying it would be a harsh interpretation to put on the words that they meant a refusal to recognize any obligation that might be established as an essential feature of the agreement. So far from that, the concluding passage of the letter is opposed to such an interpretation. To hold that, whenever a merchant writes insisting on his view of a contract, he runs the risk, if incorrect, of being considered as repudiating the whole agreement, would be dangerous. Lord *Blackburn's* test is the just one. The appellant's letter never even mentioned the sub-lease, but confined itself to replying to the respondent's inquiries. The case of *Gueret* v. *Audouy* (2) is very much in point.

But further, and assuming it were ever so plain a refusal to proceed with the contract, what is the legal effect of it? To begin with, we must never lose sight of the fact that 1st March 1923—*not before and not after*—is the agreed date for the respondent's exercise of his option, without which the circle of mutual obligation as to the goods was impossible of completion. It is not a case where the option was exercisable within an indefinite reasonable time after 1st March. No recognition of this could be more distinct than that contained in the respondent's own letter of 23rd February. To have any effect, therefore, as a repudiation, the appellant's letter must at least have been received by the respondent before the respondent was bound to exercise his option. If once he was in default in that respect, there is an end of any reference to repudiation by the appellant. The onus of establishing the necessary repudiation is on the respondent. But, beyond the fact that the letter bears date 1st March, there is no evidence when it was written or posted or received. The hour on 1st March when it was written is unknown; how it was sent is unknown, or at what time. Its receipt is never expressly acknowledged, and it is never referred to in later correspondence. It may have been (which is sufficient), and it probably

(1) (1884) 9 App. Cas. 434, at p. 442. (2) (1893) 62 L.J. Q.B. 633.

was, received on 2nd March. The respondent's letter of the following day by no means regards the appellant's letter as a renunciation of the contract. It complains that the appellant has "failed to carry out" his agreement. It claims damages, for "failure to carry out your agreement"; it notifies him that "all the chandlery goods in question are now held on your account and at your risk," which points rather to an adherence to the contract than to its abrogation; and the letter concludes with a very distinct adherence, because it says: "You will be held responsible as from the 1st inst. for the rent of the shop, which under the agreement you *are* liable to pay." The law is not doubtful on the point now dealt with. It is that where one party by anticipatory notification refuses to perform his contract at all or, what is the same thing, in some essential particular, the other party may elect either to ignore the refusal or to accept it and at once terminate the contract. If he ignores it, the contract runs its normal course as if there had been no anticipatory refusal; if he terminates the contract, further performance is impossible, and whatever damage the party electing has sustained through the breach may be recovered, treating the breach as having occurred at the moment of election. Election to terminate the contract prematurely is necessary to the right to treat any anticipatory declaration of *intention* as a repudiation (*Michael* v. *Hart & Co.* (1), with the cases there cited; *Bradley* v. *H. Newsom, Sons & Co.* (2)). But where, as here assumed, the repudiation is not an *act*, either of commission or omission, but a mere *declaration of intention* (see per Lord *Sumner* in *Bradley* v. *H. Newsom, Sons & Co.* (3)), the election of the other party cannot take place when once the time for performance has passed, for then the contract has been allowed to run its normal course and any breach that has occurred must be dealt with on the normal footing. More particularly must this be so when the time has already passed for the recipient's own performance and without that performance having taken place. Here 1st March had passed; and, as the time for designating the goods had passed, and therefore the time for creating any debt in respect of them and for paying one-third of that debt had passed,

(1) (1902) 1 K.B. 482.
(2) (1919) A.C. 16, particularly at pp. 35, 51, 54.
(3) (1919) A.C., at p. 39.

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and the time for procuring the consent of the City Corporation had also passed, the contract had run its normal course and was not susceptible of premature termination, even had it been attempted. But, further, there was no such attempt. There was no suggestion of election. The letter of 2nd March contains no reference to election; the writ of summons was not issued until 11th April, and the statement of claim is devoid of any allegation of election. "The determination of a man's election shall be made by express words, or by act." (*Com. Dig.*, "*Election*," C. 1). But *Michael* v. *Hart & Co.* (1) is decisive that in the circumstances here no such election took place. And see *Benjamin on Sales*, 6th ed., at p. 643.

It only remains to be observed that, as already intimated, even the most express election on 1st March to terminate the contract would not have advanced the respondent's case. He had no power to exercise his option, except during the continuance of the contract, and to have terminated it without such power having been exercised would have left the transaction in such utter uncertainty as to subject matter that no Court could have enforced it or ascertained the measure of damages. The principle of *Taylor* v. *Brewer* (2) applies.

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

RICH J. I agree that the appeal should be allowed. There were various points raised during the argument, but as I find one of them fatal to the respondent I need not touch upon the others. The operation of the contract between the parties began in May 1922, but its operation in respect of the obligation, the subject of this appeal, did not begin till 1st March 1923. From the nature of the stipulation to purchase the goods in question, the obligation of the appellant is necessarily dependent on what goods the respondent still had on that date, and which of them he was then willing to sell. I also think it was dependent on his informing the appellant of his willingness to sell such of the goods as he was in fact then willing to sell. He did not so inform the appellant, and I do not regard his previous notification as complying with this requirement. I also

(1) (1902) 1 K.B., at pp. 491-492.

(2) (1813) 1 M. & S. 290.

think that what was relied on by learned counsel for the respondent as repudiation cannot be so regarded, and, in fact, was not so accepted. It comes to this, that there were no definite goods which could be identified to correspond with the terms of clause 4 of the agreement.

Without saying more, I think that on this ground alone the appellant must succeed.

STARKE J. The judgment of the Court below cannot, in my opinion, be supported. The plaintiff's claim was based upon an agreement under seal dated 27th May 1922. Now, this agreement recites that the plaintiff was desirous of selling and disposing of all his stocks in connection with his business of ship-chandler in manner thereinafter appearing. And it contains (*inter alia*) the following clauses :—[His Honor then set out clauses 1, 4, 10 and 16 of the contract].

The breaches of this agreement alleged by the plaintiff are that the defendant refused to take over the stocks of ship-chandlery pursuant to clause 4, and to pay rent as provided in clause 10. It is clear, to my mind, that clause 4 did not in itself constitute a sale, or an agreement for the sale, of goods. As the late Lord *Parker*, then a Justice of the High Court attached to the Chancery Division, said in *Von Hatzfeldt-Wildenburg* v. *Alexander* (1), "the law does not recognize a contract to enter into a contract," but "the true meaning of" that phrase, in the words of *Sargant* L.J. in *Chillingworth* v. *Esche* (2), "is that the Court will not enforce a contract to make a second contract part of the terms of which are indeterminate and have yet to be agreed, so that there is not any definite contract at all which can be enforced, but only an agreement for a contract some of the terms of which are not yet agreed." And see also *Warrington* L.J. in *Coope* v. *Ridout* (3). An agreement that on 1st March the purchaser shall purchase such stocks as the vendor shall be willing to sell and dispose of to him is indefinite, and certainly not an agreement "to enter into a determinate contract." It is not an agreement enforceable by law. But it is said that the correspondence

(1) (1912) 1 Ch. 284, at p. 289. (2) (1924) 1 Ch. 97, at p. 114.
(3) (1921) 1 Ch. 291, at p. 297.

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which took place between the plaintiff and the defendant on and between 24th January 1923 and 1st March 1923 makes the agreement definite, and so enforceable by law. This correspondence was as follows:—On 24th January the plaintiff forwarded a price list of stock, but remarked in his covering letter that it was subject to stock being available and to alteration. On 6th February the plaintiff suggested to the defendant that he would take stock and that the defendant "come down and go through the stock and check it so that everything can be fixed up in proper order for 1st March." On 14th February the defendant replied that the suggestion did not meet with his approval because the plaintiff had broken the agreement and slaughtered the stock. So far there had been no definition of what the plaintiff was willing to sell and dispose of. On 16th February the plaintiff asked for an appointment with the defendant and insisted upon the observance of the agreement, but to this request the defendant did not reply. On 23rd February the plaintiff wrote as follows to the defendant:—"I wish to make it clear to you that I shall insist on the terms of the agreement of 27th May 1922 being carried out by you, and as a settlement on the sale is fixed under the agreement for 1st March next, I now send you stock sheets and statement *showing the stocks to be taken over by you* and the values thereof, and the total amount of the purchase-money, of which one-third will be payable in cash on or before 1st March. All the stocks to be taken over by you are available for your inspection at any time, on your making an appointment, and if you wish to discuss the matter of prices I shall be prepared to go into the same with you. I would also point out to you that under clause 10 of the agreement you are bound to take a sub-lease of the shop, and I shall be glad to know whether you desire a draft of the deed to be submitted to your solicitor for perusal or if you will make an early appointment to sign the deed, which provides for a weekly rental of £6 from 1st March for the balance of the term of the head lease to my firm—about fifteen months." On 1st March the defendant replied that he estimated present stock in the business at about £6,000 or £7,000, and that he was not prepared to allow the plaintiff to pick out items valued at £3,862—the dregs of the stock—after the good and

most saleable parts were gone. He concluded: "It was never intended that I should take over an almost unsaleable balance of stock, and I don't intend to do it."

Now, the critical question is whether the letter of 23rd February 1923 was, or could in point of law be treated as, a definitive selection by the vendor of the stock within the provisions of clause 4. In my opinion, it was not, and could not be, so treated. At best, it was but an intimation of the vendor's intention as to the goods he would select for the purchaser to take over on 1st March, but it was not definitive, nor binding upon the vendor and purchaser alike. There was nothing to prevent the vendor, on 1st March, selecting the goods he was then actually willing to sell and dispose of. There was not in truth the mutual assent that is necessary for a sale, or for an agreement for the sale, of goods. Thus under the agreement the vendor was at liberty to continue selling goods to others until 1st March, and the letter of 23rd February in no wise interfered with that right. Moreover, we find that the vendor actually exercised this right, and before 1st March sold goods mentioned in the stock sheets for a sum amounting in the aggregate to about £100. Consequently, in my opinion, the provisions of clause 4 of the agreement, whether that clause is taken by itself or coupled with the correspondence and acts above referred to, did not constitute a sale, or an agreement for the sale, of any goods.

The claim for rent can be more shortly dealt with. If the stipulation in clauses 4 and 10 are dependent upon one another, then the performance of each is conditional upon the performance of the other. And whether this is so is a question of construction, and "there is no way of deciding the 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 stipulations as dependent upon, or as independent of, each other (cf. *Bentsen* v. *Taylor, Sons & Co.* (1); *Barnard* v. *Faber* (2)). Looking at this contract, I think there can be no doubt that the stipulations are dependent the one upon the other. The vendor carried on the business of a ship's chandler upon the premises

(1) (1893) 2 Q.B. 274, at p. 281. (2) (1893) 1 Q.B. 340, at pp. 343-344.

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the subject of the sub-lease stipulated for in clause 10. Clause 4 contemplates a sale to the purchaser of such stocks, in connection with the business, as the vendor was willing to sell, and clause 10 deals with the premises upon which the purchaser could continue that business with the stocks acquired pursuant to clause 4. Indeed the provisions that on 1st March 1923 the purchaser shall purchase (clause 4), and that the vendor will sub-let as from 1st March 1923 (clause 10), connect the two clauses together, and make it clear how material the one stipulation is to the other. Even if the stipulations were independent of each other I have some doubt whether the plaintiff could succeed. It was admitted that "no approval in fact was given by the City Corporation to a sub-lease." The view that the subject matter of the sub-lease was an approved sub-lease is not satisfactorily met by the statement that the time had not arrived for getting the consent of the City Corporation. But it is unnecessary for me to express a concluded opinion upon this point, having regard to the view I have taken of other aspects of the case.

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

Solicitors for the appellant, *W. B. and O. McCutcheon.*
Solicitor for the respondent, *E. Fitzgerald.*

B. L.