[HIGH COURT OF AUSTRALIA.]

RINGSTAD . . . . . APPELLANT;
PLAINTIFF,

AND

GOLLIN & COMPANY PROPRIETARY LIMITED . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 28; *Dec.* 1, 3, 19.

Knox C.J., Isaacs and Starke JJ.

Contract—Construction—Sale of goods—Shipment in monthly instalments—Contract subject to war, &c., causing delay—Postponement of delivery—Long delay—Frustration of contract—Cancellation of contract—Enemy Contracts Annulment Act 1915 (*Cth.*) (*No.* 11 *of* 1915), *sec.* 4 — *Enemy Contracts Annulment Act* 1915 (*N.S.W.*) (*No.* 24 *of* 1915), *sec.* 4.

By a contract in writing, made in March 1916, the defendant sold to the plaintiff a certain quantity of carbide of calcium as to which it was agreed that shipment should be from a continental port in six approximately equal monthly parcels commencing one month after the completion of a prior contract between the same parties. The contract contained the following provisions:—"The above sale is subject to strikes, floods, war, accidents, fire, failure of manufacturers to deliver, non-receipt, non-delivery or mistakes in cables, and/or other contingencies causing delay or non-shipment. Vendors under this contract do not guarantee shipments as above owing to freight or other difficulties beyond their control, but will do their utmost to ship in accordance with shipments stated." The prior contract was completed in May 1917. Before any delivery had been made under the later contract the defendant in April 1919 gave a notice to the plaintiff purporting to cancel the contract. In an action brought in 1922 by the plaintiff against the defendant to recover damages for breach of the later contract by failure to deliver the carbide,

Held, that, on the construction of the contract, notwithstanding the happening of any of the events mentioned in the contract as causing delay or non-shipment, the defendant was bound to ship the carbide in six monthly parcels as and when those causes should cease to operate.

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Held, also, by *Knox* C.J. and *Starke* J., that the long delay in shipment caused by the War did not frustrate the commercial object of the contract and so put an end to it.

By *Isaacs* J.: The test whether the delay put an end to the contract was whether it destroyed the identity of the supply of carbide when resumed with that when interrupted.

Held, also, that sec. 4 of the *Enemy Contracts Annulment Act* 1915 did not entitle the defendant to terminate the contract:

By *Knox* C.J., *Isaacs* and *Starke* JJ., on the ground that the contract was not suspended by operation of law or by the terms of the contract nor could it be suspended by act of the defendant;

By *Isaacs* J., on the ground also, that the section did not apply to a contract made after the commencement of the war.

Decision of the Supreme Court of New South Wales (Full Court), reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales, by writ dated 12th July 1922, by Harold Syr Ringstad (trading as Caning Bales & Co.) against Gollin & Co. Pty. Ltd., in which the plaintiff sought (so far as is material) to recover damages for the breach by the defendant of a contract in writing dated 13th March 1916 for the sale by the defendant of 75 tons of carbide of calcium. The material defences were that the contract was one to which sec. 4 of the *Enemy Contracts Annulment Act* 1915 applied, and that the defendant, in accordance with that Act and before any breach had taken place, by notice in writing terminated the contract; and that it was a term and condition of the contract that the defendant should not be bound to supply the goods unless it were able to obtain the same from the manufacturers within a reasonable time from the making of the contract. The action was tried before *Ferguson* J. and a jury as a commercial cause. From the evidence it appeared as follows:—On 20th August 1914 the plaintiff and the defendant entered into a contract (No. 4770) in writing whereby the defendant agreed to sell to the plaintiff a certain quantity of carbide of calcium, to be shipped as required from a continental port from August 1914 to March 1916. On 13th March 1916 the contract (No. 7277) in respect of which the action was brought was entered into; and it contained the following provisions (*inter alia*):—" Shipment: Per steamers from Continental

Port in six approximately equal monthly parcels commencing one month after completion of contract No. 4770 of 20th August 1914. . . . The above sale is subject to strikes, floods, war, accidents, fire, failure of manufacturers to deliver, non-receipt, non-delivery or mistakes in cables, and/or other contingencies causing delay or non-shipment. Vendors under this contract do not guarantee shipments as above owing to freight or other difficulties beyond their control, but will do their utmost to ship in accordance with shipments stated. In the event of vessel, or vessels, carrying goods under this contract, being lost, vendors are not to be held responsible for delivery of such portion as is lost." At the time contract No. 7277 was made it was not expected that deliveries under contract No. 4770 would be completed for several months; and in fact they were not completed until May 1917. The defendant was not itself a manufacturer of carbide but depended for its supply upon the Alby United Carbide Factories Ltd. From early in 1917 until some months after the Armistice it was impossible to obtain from that company or from any other manufacturers a supply of carbide to fulfil the contract No. 7277. The first shipment of carbide which left for Australia after the Armistice was in May 1919, and the earliest date when the defendant received a supply of carbide from manufacturers available for the fulfilment of that contract was in August 1919. On 16th April 1919 the defendant sent to the plaintiff a notice in writing in the following terms :—" Alby Contracts Nos. 4790, 7277 and 7514.—Referring to the above contracts, which have been unavoidably suspended owing to the War and circumstances beyond our control, we beg to give you formal notification of cancellation of balance of same," &c. The learned Judge asked the jury the following questions as to contract No. 7277, and the jury gave the answers following them respectively :—(1) " Was the non-shipment of the carbide in accordance with this contract caused by war or failure of manufacturers to deliver ? "—" Yes." (2) " If so, did these causes or either of them continue to operate so as to prevent the defendant from making delivery within a reasonable time, having regard to all the circumstances ? "—" No." A verdict was accordingly entered for the plaintiff for £393 15s.

On a motion by the defendant to set aside the verdict and to enter

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a nonsuit or a verdict for the defendant, the Full Court ordered that a verdict should be entered for the defendant.

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

Milner Stephen, for the appellant. The contract was not within sec. 4 of the *Enemy Contracts Annulment Act* 1915. It was not a contract which was suspended by the War, for at the time the notice was given the War as a suspending cause had ended. Not more than a reasonable time for the performance of the contract had, in the circumstances, elapsed when the action was brought. The parties, up to the time the notice was given, treated the contract as still subsisting, and that should be taken into consideration (*International Paper Co.* v. *Spicer* (1)).

[STARKE J. referred to *Metropolitan Water Board* v. *Dick, Kerr & Co.* (2) ; *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft* (3).

[ISAACS J. referred to *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (4).]

At the time the contract was made it was known that contract No. 4770 would not be completed for many months. The effect of the clause providing that the contract is subject to strikes, war, &c., causing delay or non-shipment is not to abrogate the contract in the event of any of those causes operating, but to excuse the respondent from delivering until after those causes have ceased to operate (*De Oleaga & Co.* v. *West Cumberland Iron and Steel Co.* (5)). When those causes ceased to operate, the respondent was bound to deliver within a reasonable time, and a reasonable time had not elapsed (*Veithardt & Hall Ltd.* v. *Rylands Bros. Ltd.* (6)), and the object of the contract cannot be said to have been frustrated (*Larrinaga & Co.* v. *Société Franco-Américaine des Phosphates de Medulla* (7) ; *Bank Line Ltd.* v. *Arthur Capel & Co.* (8)). Sec. 4 of the *Enemy Contracts Annulment Act* only operates on contracts which were in existence when the War commenced ; after the War commenced people could protect themselves in the contracts which

(1) (1906) 4 C.L.R. 739, at p. 762.
(2) (1918) A.C. 119.
(3) (1918) 1 K.B. 331, at p. 338.
(4) (1916) 2 A.C. 397, at p. 407.
(5) (1879) 4 Q.B.D. 472.
(6) (1917) 116 L.T. 706.
(7) (1923) 92 L.J. K.B. 455.
(8) (1919) A.C. 435 at p. 458.

they made. The decision in *Armstrong & Royce Ltd.* v. *Babcock & Wilcox Ltd.* (1) to the contrary is incorrect.

Halse Rogers and *Cassidy*, for the respondent. The provision that the contract was subject to strikes, &c., was not a condition regulating delivery but went to the whole of contract (see *De Oleaga & Co.* v. *West Cumberland Iron and Steel Co.* (2)); so that delay in shipment owing to failure of the manufacturers to deliver put an end to the liability of the respondent for non-delivery. If the delivery was only suspended, there was such a long delay as to make the doctrine of frustration apply (*Bank Line Ltd.* v. *Arthur Capel & Co.* (3)). Sec. 4 of the *Enemy Contracts Annulment Act* applies to this contract. It was a contract which was suspended on account of the War. That section applies to contracts made after as well as before the War commenced. There is no reason for limiting the general words of the section. On the construction of the contract the date for the commencement of the deliveries should be taken as that on which in fact the deliveries under contract No. 4770 were completed.

Milner Stephen, in reply.

Cur. adv. vult.

The following written judgments were delivered :— Dec. 19.

KNOX C.J. Having had the advantage of considering the opinion about to be delivered by my brother *Starke*, I have come to the conclusion that the construction which he has put on the contract is correct, and I agree that the appeal should be allowed.

ISAACS J. On the trial of this action before *Ferguson* J. and a jury, the appellant had a verdict for £393 15s. damages for breach of the respondent's contract by which it agreed to sell and ship carbide of calcium. On appeal the Supreme Court ordered that the verdict be set aside and a verdict entered for the respondent. The ground of that decision was that by force of sec. 4 of the *Enemy*

(1) 1920) 20 S.R. (N.S.W.) 474.
(2) (1879) 4 Q.B.D. 472.
(3) (1919) A.C. 435.

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Contracts Annulment Act 1915 (Federal Act No. 11 and State Act No. 24) the contract had been terminated in April 1919. From that judgment this appeal is brought, and it has been well and closely argued on both sides. If the view taken by the Supreme Court be correct, there is at once an end of the matter; if not, other questions have to be determined.

In my opinion the ground of the decision appealed from cannot be maintained. My opinion rests on two reasons:—First, as the contract is a war-time contract it is not, as I read sec. 4 of the Act, within the provisions of that section. Next, even if some war-time contracts would come within the ambit of the section, this contract does not, because its performance was not "suspended" within the meaning of that word as there used.

With respect to the first reason, it was held by the Full Court of New South Wales, in *Armstrong & Royce Ltd.* v. *Babcock & Wilcox Ltd.* (1), that the section applied to post-war contracts; that is to say, that it applied to all contracts for the *sale or delivery* of goods—not merely sale and delivery—whether made before or after the commencement of the War, and of course whatever their express stipulations might be, so long as they were suspended or suspendable or were claimed rightly or wrongly to be suspended "during or on account of" the War. I have carefully considered the reasons for that decision, and am unable to agree with it. In my opinion the section applies on its true construction to pre-war contracts only. Reading the section as a whole, so as to give an intelligible meaning to each part and so as to avoid repugnancy and absurdity, I construe it as inapplicable to war-time contracts. It was passed in 1915, and, therefore, before decisions given later in 1915, and in 1917, such as *Zinc Corporation Ltd.* v. *Hirsch* (2) and *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (3) and *Hirsch* v. *Zinc Corporation Ltd.* (4), elucidating the meaning and occasions of the suspension and dissolution of contracts by reason of the War. But it was passed after two somewhat disconcerting decisions had already been given, and in relation to a subject matter of great importance to Australia.

(1) (1920) 20 S.R. (N.S.W.) 474.
(2) (1916) 1 K.B. 541.
(3) (1916) 2 A.C., at p. 403.
(4) (1917) 24 C.L.R. 34.

In the case of *Zinc Corporation Ltd.* v. *Skipwith* (1) *Sargant* J. held that, as to certain contracts to supply Broken Hill concentrates, the suspension clause had the effect of merely suspending the contract "during the War," and that the contract was not abrogated by the War but might be resumed after the War. The learned Judge granted an injunction until the trial to prevent the defendants from acting on the assumption that the contracts had been put an end to by the War. Within three days an appeal was heard by a special and very powerful Court of Appeal (2), which allowed the appeal but only on a totally different ground, namely, that other parties interested were not before the Court and, although they were alien enemies, the construction of the contract could not be determined in their absence. The Lord Chief Justice used the expression "suspended during the War." The date of the publication of those cases was 22nd January 1915. Obviously it was a serious position for Australian interests, and in May 1915 the Federal Act was passed.

Doubtless, if the words of an Act or any other document are clear and unambiguous they must, on construction, have their full effect, whatever the result may be. But where there is room for divers interpretations, then it is legitimate to consider which interpretation is the more consistent and the more reasonable having regard to the subject matter. The Act dealt with two distinct classes of contracts: (1) "Enemy contracts" of whatever nature; and (2) "Contracts for the sale *or* delivery of goods" the performance of which was or was claimed to be subject to suspension during or on account of the War. As to the first class, the term "enemy contract" as artificially defined might obviously include a contract whenever made, and public safety required that, in case of enemy contracts, post-war contracts—and those perhaps most of all—should be annulled. Sec. 3 accordingly applied to both pre-war and post-war contracts. But sec. 4 deals with matters of a totally different character and significantly omits all mention of post-war contracts. Whether they are nevertheless to be included depends upon a fair reading of the section by the light of surrounding circumstances. Sub-sec. 1 enables either party to a contract of the nature described

(1) (1914) 31 T.L.R. 106. (2) (1914) 31 T.L.R. 107.

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in the next sub-section to give a notice in writing to the other party and so "terminate the contract," but only as to future supply or future delivery under the contract. "Future" there means subsequent to the *notice*. The contract was therefore to be left in full force as regards all executory obligations up to the time the notice was given. Passing by sub-sec. 2 for the moment, we find that by sub-sec. 3 a notice given prior to the Act is to have the same effect as one given after the Act. That, however, still leaves untouched all executory obligations prior to the date of the notice. Then comes sub-sec. 4, by which "no action shall be brought against any party to a contract, to which this section applies, by reason of any non-performance of the contract after the commencement of the War." In reading this sub-section I apply the principle, so conspicuously acted on in *Forbes* v. *Git* (1), of reconciling where possible all parts of an instrument. If sub-sec. 4 were read apart from the prior provisions for dealing with the contract, it would mean that, whether notice of termination be given or not, no action should be brought for its breach after the commencement of the War, even though it remained merely suspended, or even suspendable though not suspended, and even if after the termination of the War it was not resumed, though it ought to be. That is so erratic a result even with a pre-war contract, as to cause great hesitation in accepting it. Read with sub-sec. 1 it means, as I think, that, where a contract has been "terminated" by force of the prior provisions of the section so as to end all obligations to supply or deliver goods after the notice, then similarly all post-war non-performance, that is, non-supply or non-delivery or non-acceptance, not covered by sub-sec. 1 should be free from action. The result is that all rights and obligations to pay for goods actually supplied or delivered would remain untouched. Now, all these statutory provisions not only work harmoniously and justly where the contract is pre-war, but they were necessary both from an individual and a national standpoint. Producers and merchants in Australia with pre-war contracts on their hands were—particularly in view of the 1915 decisions quoted—in a state of doubt and difficulty that left them helpless and possibly open to future claims for damages. Other

(1) (1922) 1 A.C. 256.

Australian, and indeed Imperial, necessities might be hampered if strict existing contractual obligations were adhered to. A contract merely "suspended" or "suspendable" was a private and public danger. To meet this, sec. 4 was passed. But in all contracts made after the War began, no such difficulty could exist. The parties either provided against the difficulty or they deliberately agreed for suspension only. A contract made during the War, and providing for suspension in certain events which might or might not happen while the War was in progress, could not be properly said to be a contract suspended "during or on account of the War," that is, the War *per se*. Nor can it be imagined that the Legislature in enacting sub-sec. 4 intended that, notwithstanding the most express provisions in a war-time contract between two Australians for suspension only in a given event and not for dissolution of the contract but for resumption after the War had ended, whether that event happened or not the contract might with impunity be broken and that no action whatever should be brought. In my opinion, the words "during or on account of the present War" mean to cover the whole period of the War from beginning to end, and the two expressions "during" and "on account of" are intended to meet the respective cases of "operation of law" and "terms of the contract." "During" is used in the sense employed in the cases above cited, and "on account of" is used in the sense that by the contract itself provision is made for the War as an event creating or permitting a suspension. But this contract is a post-war contract, and, therefore, cannot possibly answer the description including "during or on account of the War" *per se*.

Assuming, however, that sec. 4 includes war-time contracts, so that "during" would apply if necessary to merely the last day of the War and "on account of" would include any event occasioned by the War—a very extensive connotation, it must be admitted; still, is the word "suspended" as used in sec. 4 properly applicable to this contract? The word "suspended" in the section is used in contradistinction to "terminated"—that is, to dissolution of the consensual tie. The inherent idea is, where there is partial or temporary cessation of the mutual obligation created by the contract, that cessation may be made permanent to the extent of unfulfilled

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performance. (See for example per Lord *Phillimore* (then *Phillimore* L.J.) in *Zinc Corporation* v. *Hirsch* (1).) But that would mean that, even if by any chance the party agreeing to supply the goods could in fact supply them, the other party would not be bound to take them. As to the present contract, that could not be said. If the respondent had succeeded in getting the goods earlier and tendered the documents, the appellant would have been bound to accept. That is to say, the " performance " of the contract was not suspended —which means the performance on both sides. The respondent's obligation to supply was suspended in a sense, but the distinction drawn by Lord *Phillimore* applies and leaves this contract outside the definition of sub-sec. 2 of sec. 4 of the Act.

That necessitates the consideration of the rights of the parties independently of the Act. The contract, which is in writing, is one of those detailed but informal bargains that are commonly entered into between merchants. To such contracts the words of *Mellish* L.J. in *The Teutonia* (2) and of *Bowen* L.J. in *The Moorcock* (3) are fitly applied. But in construing a mercantile contract fairly and liberally for the purpose of carrying out the object of the parties and for the purpose of giving it the efficacy intended by the parties, a Court has not a free hand to make what it thinks a reasonable or effective contract. The Court's business is interpretation only, and the words of the contract properly understood must have their own effect. To properly understand them, it is, as Lord *Sumner* recently said in *Hurnandrai Fulchand* v. *Pragdas Budhsen* (4), " no doubt important to appreciate the methods and the point of view of business men, but this is merely a prudent way of qualifying the mind to construe their words, and so to determine their meaning, and is a very different thing from postulating that reasonable men would have been likely to agree to one kind of liability and not to another, and from thus concluding that, whatever the words of the contract say, that kind of liability, and that alone, is the obligation of the contract." Therefore, it is quite correct, as Mr. *Rogers* argued, that we are to ascertain the contractual obligation respecting delivery from the very words of the parties. But it is none the less true that we must look

(1) (1916) 1 K.B., at p. 561.
(2) (1872) L.R. 4 P.C. 171, at p. 182.
(3) (1889) 14 P.D. 64, at p. 68.
(4) (1922) L.R. 50 Ind. App. 9, at p. 34.

at their words, not as isolated expressions, but as component parts of one integral bargain. It is true of a contract, as of any other instrument, as expressed by Lord *Haldane* L.C. in *Toronto Suburban Railway Co.* v. *Toronto Corporation* (1), that "much turns in each case on the context. The document to be construed must be read as a whole, and in interpreting particular words these cannot be read without reference to what comes before and after." Applying all those principles to the present contract, the construction of its provisions, so far as relevant to the present case, is that the primary obligation stipulated for as to shipment is that shipments are to begin one month after the completion of the contract of 20th August 1914, *whenever that might be*, and were then to proceed by six approximately equal monthly parcels. The commencing point was indefinite at the time of making the contract, that is, in March 1916. It was then believed that the shipments under the 1916 contract would not begin for at least six or seven months, and perhaps longer, from known causes. In fact the initial shipment was not, in the events that happened, due even primarily until June 1917, that is to say, fifteen months later. But that primary stipulation was followed by a clause around which much contention has gathered. It is in these terms :—"The above sale is subject to strikes, floods, war, accidents, fire, failure of manufacturers to deliver, non-receipt, non-delivery or mistakes in cables, and/or other contingencies causing delay or non-shipment." For the appellant it was argued that that clause qualified the primary stipulation by relaxing whatever rigidity it possessed in point of time to the extent that a breach of the seller's obligations according to the primary stipulation occurred by reason of any of the specified causes. To that extent, it was argued, the seller was excused, but not beyond that extent, and that with that qualification it was bound to go on and perform its obligation as to shipments. In other words, the two clauses were to be read as one, the times of shipment being regulated according to the happening or non-happening of any of the specified events. This was supported, it was urged, by the next succeeding clause negativing any warranty of shipments as stated where difficulties existed beyond seller's control, but promising best efforts

(1) (1915) A.C. 590, at p. 597.

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to ship as agreed. On the other hand, it was contended for the respondent that the qualifying clause was in effect a provision creating a contingency. The argument was that the primary stipulation was fixed and unaltered. If not interfered with by any of the causes in the next clause, it was to be adhered to, but it was to be " subject to " those events in the sense that, if any of them prevented the performance of the stipulation as to shipments, that terminated the bargain, possibly altogether, possibly as to any particular shipment or shipments affected. At times the argument for the respondent was that the clause was simply one of excuse for the seller. That would, however, leave the bargain one-sided, because it would enable the seller to deliver or not to deliver after the primary period at its pleasure. That cannot be. So the second clause must be either pure contingency or a modification of the first.

The expression " the above sale is subject to strikes," &c., means in my view that the " sale," that is, the contract of sale as set forth up to that point, is to be performed just as already stated, unless certain events supervene, but, if any of those events occur, then to the extent that they necessitate departure from the previous stipulations those previous stipulations are to be modified. This view is supported by the succeeding clause, which would operate even in the absence of the specific events stated in the clause immediately in hand. The result of reading the contract as suggested by the respondent is that a mere non-delivery of a cable, producing by a day the non-shipment of an instalment in strict compliance with the delivery clause, would either abrogate the contract or the instalment. To abrogate the whole contract for mere inability to ship the first instalment in strict conformity with the delivery clause is so opposed to the tenor of the qualifying clause as to be beyond serious consideration. To abrogate the instalment only, would do violence either to the words " the above sale," which covers the whole transaction, or to the argument of contingency, and so be self-destructive. Such a result would, moreover, mean that the purchaser might be compelled to take a sixth only at a time when it was well within the power of the vendor to supply the whole.

I am therefore of opinion that, reading both clauses together, the obligation to deliver did not cease by reason only of the expiration

of the stipulated period of six months, while the War or failure of manufacturers to deliver still operated to prevent delivery. So far as one case can assist another in construing a commercial contract, reference may be made to *King* v. *Parker* (1).

The question remaining is whether the causes mentioned nevertheless operated so long as to put an end to the contract. That depends upon a test that has been stated in various ways, but which finds its latest authoritative expression by Lord *Sumner* in *Bank Line Ltd.* v. *Arthur Capel & Co.* (2). Lord *Sumner* there inclines to prefer the phrase of Lord *Dunedin* in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (3), which is as follows: "An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted." That arises from an implication of the contract itself. (See *Hirsch's Case* (4) and authorities there cited, to which must be added Lord *Sumner's* statement in *Bank Line Ltd.* v. *Arthur Capel & Co.* (5).)

Whether the supply of carbide of calcium in April 1919, or as soon thereafter as deliverable, would have been identical with the supply when interrupted depends upon the circumstances considered from a commercial aspect. To determine this, we have to begin by considering the contract itself. The delivery, as already stated, was not to commence in any event until the expiry of an existing contract, and that event was unquestionably months ahead and was not only indefinite but was known to be subject to possible extensions not measurable. It is therefore out of all question that the parties were building upon any normal or definite expectations as to time. Then the delivery, once it commenced, was projected forward for six months at least, and then came the qualifying clause already discussed. Time, therefore, and even time plus normal business operations, cannot in this case form a decisive test of non-identity so as to entitle the respondent to a ruling in law that, notwithstanding the jury's finding, judgment must be entered for it. The goods sold are not articles of fleeting demand, or passing fashion, nor are they shown to be of abandoned or greatly diminished application in

(1) (1876) 34 L.T. 887.
(2) (1919) A.C., at p. 460.
(3) (1918) A.C., at p. 128.
(4) (1917) 24 C.L.R., at p. 61.
(5) (1919) A.C., at p. 455.

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commerce or industry. They are a regular and constant commercial commodity. It was therefore, to say the least, sufficiently a question of fact for the jury, reviewing the whole circumstances, to say that it was still reasonable to resume the performance of the contract when the respondent renounced it.

Consequently the contract was not dissolved (see per Lord *Sumner* in *Bank Line Ltd.* v. *Arthur Capel & Co.* (1) and Lord *Blanesburgh* (then *Younger* L.J.) in *Matthey* v. *Curling* (2)).

The appeal ought to be allowed, and the verdict for the plaintiff for £393 15s. restored.

STARKE J. The critical question, to my mind, is the construction of the contract. Is the provision in it that shipment shall be per steamers from continental ports in six approximately equal parcels commencing after the completion of contract 4770, a rigid stipulation, subject to a protective provision that the sellers shall not be responsible for delay or non-shipment caused by strikes, floods, war, &c. (*Lubrano* v. *Gollin & Co. Pty. Ltd.* (3)) ? Or is it a flexible stipulation, that is, an obligation to ship "in six . . . monthly parcels . . . after the completion of contract No. 4770" unless "strikes, floods, war, . . . or other contingencies," cause "delay or non-shipment," but, subject to those causes and when those causes cease to operate, to ship the goods ?

In my opinion, the latter is the right construction of this contract. The dates of shipment are uncertain : they are after the completion of contract 4770. Again, the sellers "do not guarantee shipments . . . but will do their utmost to ship in accordance with shipments stated." And the "sale is subject to strikes," &c. It is impossible, I think, coupling together the various clauses of the contract, to insist rigidly upon shipment in six monthly parcels: the words themselves negative that idea, and show that the promise on the part of the sellers is to do their best, having regard to strikes, floods, war, &c. It is quite unnecessary, in this view, to consider the Enemy Contracts Annulment Acts. Performance of the contract was not in any sense suspended by operation of law or by its terms,

(1) (1919) A.C., at p. 455. (2) (1922) 2 A.C. 180, at p. 210.
(3) (1919) 27 C.L.R. 113

nor could it by act of the party be suspended; the contract was always operating according to its terms.

The argument that the long delay in shipment caused by the War put an end to the contract, or, in other words, frustrated its commercial object, is untenable upon the facts of this case, and is disposed of, in my opinion, by the verdict of the jury.

I agree that the appeal should be allowed, and the verdict of the jury restored.

Appeal allowed. Order appealed from discharged. Verdict for the plaintiff restored. Respondent to pay costs in this Court and in the Supreme Court.

Solicitor for the appellant, *B. T. Heavener.*

Solicitors for the respondent, *Sly & Russell.*

B. L.