[HIGH COURT OF AUSTRALIA.]

WENDT . . . . . APPELLANT;
DEFENDANT,

AND

BRUCE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1931.

MELBOURNE, *Feb.* 19.

SYDNEY, *April* 1.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Contract—Sale of land—Completion on fixed date—Failure of vendor to complete on such date—Notice by purchaser making time of essence of the contract and fixing later date for completion—Purchaser remaining in possession after later date so fixed for completion and harvesting growing crop—Election to treat contract as subsisting and not as terminated.

The plaintiff agreed to sell a farm to the defendant on 9th November 1926, the date for completion being 1st March 1928. Simultaneously with the agreement for sale the parties entered into a share-farming agreement for the year 1927 which gave the defendant the right to fallow part of the land during 1927 for his own use after taking possession on 1st March 1928. The defendant entered into possession under the share-farming agreement. The plaintiff failed to produce a clear title by 1st March 1928, and on 15th October 1928 the defendant gave a notice to the plaintiff requiring the agreement to be completed by 5th November and purporting to make that date of the essence of the contract. The plaintiff was ready to settle on 12th December. The defendant, in effect, continued in possession until after 5th November, alleging an agreement with the plaintiff to do so for the purpose of harvesting the crop, but the learned trial Judge found that there was no such agreement and decreed specific performance of the agreement for sale, which decision was affirmed by the Full Court of the Supreme Court.

Held, by *Gavan Duffy* C.J., *Starke*, *Dixon and McTiernan* JJ. (*Evatt* J. dissenting), that the defendant, by continuing in possession of the land and harvesting the crop elected to affirm, and not to put an end to, the contract,

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and was, therefore, precluded from relying upon the plaintiff's failure to comply with the notice fixing 5th November as the final date for completion.

Question of the reasonableness of the notice given considered.

Decision of the Supreme Court of South Australia (Full Court) affirmed.

APPEAL from Supreme Court of South Australia.

The plaintiff, William Herbert Bruce, brought an action against Johann Wilhelm Wendt, claiming specific performance of an agreement in writing, dated 9th November 1926, for the sale of a farm in the Hundred of Gordon, South Australia, containing 1,747 acres for £9,608. The agreement also provided that the vendor was to build a house of a specific design on the land by 1st March 1927, to lay on water to the site of the house, to allow the purchaser to have a quantity of hay then stacked on the land, and to sell a stated quantity of posts which were to be provided by and paid for on 1st March 1928, which day was expressed to be the day for settlement of the sale of the land. The purchaser was to sign covenants with the first and second mortgagees and hand the vendor a mortgage for the balance on 1st March 1928, when possession was to be given and taken. The agreement was expressed to be made subject to the parties entering into a share-farming agreement, simultaneously with the agreement for sale, to crop for the year 1927. The share-farming agreement was entered into accordingly. By it the vendor agreed to the purchaser cropping a certain part of the land sold during the year 1927 on usual terms as to expenses and proceeds, and also gave him the right to fallow another part of the land during 1927 "for his own use, after taking possession on 1st March 1928" as purchaser under the agreement for sale. The defendant entered into possession of the land under the share-farming agreement, and with the aid of his two sons farmed it during the 1927-1928 season, and for the purpose of carrying out those farming operations the sons occupied a house built by the plaintiff on the land. There was some dispute as to whether the house was built, the water laid on, the hay stacked and the posts provided, in accordance with the agreement for sale. The instalment of £900 was paid on 1st March 1927. The plaintiff failed to produce a clear title by 1st March 1928. During March 1928 the defendant's

solicitors informed the plaintiff that the defendant desired to settle. On 24th April there was a meeting of the plaintiff's creditors. Further negotiations took place between the plaintiff and the defendant; and finally, on 15th October the plaintiff received notice in writing, dated 12th October, from the defendant's solicitor requiring that the agreement be completed by 5th November, and purporting to make that date of the essence of the contract. The notice stated that in default of compliance with it the defendant would treat the agreement as at an end. The notice added that "without in any way limiting the effect of the above notice," if for any proper reason the plaintiff was unable to settle on that date, the defendant would agree to "such other and later date within a reasonable period" of the 5th November as the plaintiff might, within seven days of the receipt of the notice, appoint by letter to the defendant. The plaintiff made no application to extend the time for completion. On 12th December the documents were completed and were tendered to the defendant's solicitor with a letter stating that the plaintiff desired to settle at the defendant's earliest convenience. On 20th December the defendant's solicitors wrote to the plaintiff's solicitors stating that, consequent upon the failure of the plaintiff to settle pursuant to the notice of 15th October, the defendant now declined to complete the purchase.

The defendant was away from the land at the beginning of November but, by his two sons, returned to the land and commenced to harvest the crop. The explanation given at the hearing for so continuing in possession was that there had been an agreement between the defendant's solicitor and the plaintiff's solicitor that the defendant's sons should take off the crop, and that, in the event of litigation following, the crop would be held for the plaintiff if he had to take the farm back or for the defendant if he was still the owner. The learned trial Judge definitely found that there was no such agreement, though he found that something was said about the crop at a conversation between the solicitors on 15th November. The defendant originally went into possession under a share-farming agreement for the 1927-1928 harvest. That agreement also gave him the right to fallow in 1927 "for his own use, after taking

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possession on the 1st day of March 1928 . . . as purchaser" under the agreement for sale and purchase. It appeared that the defendant did fallow in 1927, that in 1928 when he was in as equitable owner he sowed a crop, that he was in possession on 5th November 1928, that he then remained in, and that he reaped the crop in 1928-1929 by means of his two sons, who stayed on the land after the writ was served in January 1929 and until March of that year.

The statement of claim set out the two agreements referred to, and alleged that the defendant remained in possession after the expiration of the share-farming agreement and was still in possession. The defence substantially was that by the notice of 15th October 1928 the defendant made time of the essence of the contract, and that on the expiration of the time thus fixed the plaintiff was not ready and willing to complete, whereby he repudiated the agreement for sale, and that the defendant accepted the repudiation. There was also a counterclaim for repayment of the instalment of £900 and for damages for neglect to carry out the agreement. By his reply the plaintiff joined issue, and set up that he would rely on the fact that the defendant remained in possession after the day fixed by the notice and until after the issue of the writ as a waiver of any delay by the plaintiff.

The learned trial Judge (*Richards* J.) found that the time fixed by the notice of 15th October 1928 was not a reasonable time so as to make 5th November of the essence of the contract, and further that if the notice was to be treated as fixing a time in this way the defendant by his conduct in remaining in possession waived any right he might have otherwise had to treat the contract as at an end. His Honor also found that there was no evidence of any definite election to rescind until 20th December, and, as no reason appeared why he could not have elected immediately on 5th November or within a few days thereof and there were no circumstances making the intervening six weeks a "reasonable waiting," the defendant should be taken to have already elected not to exercise any right he had to rescind, and accordingly gave judgment for the plaintiff and decreed specific performance of the agreement for sale:—*Bruce* v. *Wendt* (1).

(1) (1930) S.A.S.R. 66.

The defendant appealed to the Full Court of South Australia, which dismissed the appeal substantially on the same grounds as those found by the learned trial Judge.

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

Cleland K.C. (with him *Kearnan*), for the appellant. Time was not originally of the essence of the contract, but the letter of 15th October 1928 made it so. The appellant was justified in making time of the essence of the contract by notice, and the notice given was reasonable. Upon the failure of the respondent to complete at the expiration of the time limited by the notice, he committed a breach of contract and thereupon a cause of action became vested in the appellant. The appellant could then forthwith have issued a writ for damages for breach of contract and return of deposit or, subject to the next proposition, for specific performance. The terms of the notice given by the appellant (that in the event of failure to complete he would treat the contract as at an end) may have amounted to an election by him to follow his common law remedy for damages, and, if that be so, his equitable remedy for specific performance was not open, but, be that as it may, the cause of action for damages and return of the deposit was not affected or prejudiced. The appellant was under no obligation after the respondent's breach of contract, by failure to complete, to do anything further to perfect his cause of action, or to formally or to further rescind the contract. The judgment appealed from, erroneously applies to this case the principles of law applicable to an "anticipatory breach" by refusal to perform before the time for performance has arrived. In such a case it is conceded that the other party has a right to elect whether he will treat the contract as at an end and at once sue for damages, or whether he will wait until the time of performance has arrived and then proceed. Where, as here, an actual breach takes place at the time of performance there is a definite cause of action and (apart from the terms of the notice) the defendant can at once sue for damages or specific performance. The defendant (but not the plaintiff) could, no doubt, elect which remedy he would adopt to enforce his cause of action, that is, either to sue for damages or for specific performance. That cause of action cannot be

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discharged by any performance or tender by the respondent without the consent of the appellant; for the appellant, after breach, is entitled to damages or compensation provided through the process of law, and he is not bound to accept any other satisfaction of his legal right. A contract may be wholly or partly discharged (before there has been any breach) by a waiver of the right to insist upon its performance; but after a breach of contract has taken place the contract cannot be rescinded, but the cause of action which arises may be discharged by release, accord and satisfaction, agreement for valuable consideration, &c.: nothing short of some such discharge is effective. There was no evidence justifying any finding that the appellant's cause of action had not arisen or was discharged. The appellant's conduct in remaining in possession and taking off the crop was not referable to any intention to treat the contract as still subsisting, particularly in face of his continued assertions to the contrary, but was referable (a) to the agreement or understanding that he should take off the crop in the interests of and on account of whichever party should ultimately be held to be entitled to the proceeds, (b) to his duty to minimize damages, and (c) to his right in the circumstances in any event, to the crop, upon which he had expended labour, seed, wheat and manure. The appellant never at any time asserted that he did so as equitable owner of the property, and the absence of such an assertion was sufficient to displace any inference which could be based on his conduct. The appellant having been already in possession under the two agreements, no such inference could be drawn as might have been the case had the appellant taken possession after, and notwithstanding, the respondent's failure to complete. In the circumstances, even if he had done so, the law would imply that the appellant was in possession without prejudice to his cause of action, which arose on the respondent's failure to complete pursuant to notice. In any event the respondent, having been in default and having committed a breach of contract, was not entitled to specific performance of that contract. The respondent's delay and conduct were such that a Court of equity in its discretion would and should refuse to decree specific performance. The respondent was never at any material time ready and willing to complete the contract. [Counsel referred to the following:

Stickney v. *Keeble* (1); *Maclaine* v. *Gatty* (2); *Steedman* v. *Drinkle* (3); *Santley* v. *Wilde* (4); *Halsbury's Laws of England*, vol. VII., pp. 423, 441, 454; *Mills* v. *Haywood* (5); *Lamare* v. *Dixon* (6); *Webster* v. *Donaldson* (7); *Burroughs* v. *Oakley* (8).]

Ligertwood K.C. (with him *Wright*), for the respondent. The notice served by the appellant did not allow reasonable time for completion, having regard to all the circumstances which were known to the purchaser. Upon non-completion by the vendor at noon on 5th November the contract did not immediately—and without more—come to an end. Some act of rescission by the appellant was still necessary to determine it (*Bentsen* v. *Taylor, Sons & Co.* [2] (9); *Hartley* v. *Hymans* (10)). The appellant's notice was a threat to bring the contract to an end—not an offer or invitation to the respondent to determine it. A stipulation in a lease or contract that it shall be void for default by the lessee or a contracting party makes it not void but voidable by the lessor or other contracting party (*Davenport* v. *The Queen* (11); *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France* (12); *R.* v. *Paulson* (13)). A fortiori, a threat for the express purpose of procuring performance is not an avoidance of the contract. The result of the notice and non-completion was that the appellant acquired about noon on 5th November a right to treat the contract as broken at law and in equity and to refuse to perform it—to resist a claim for specific performance and to recover his deposit and £900, subject to some charge possibly for his use and occupation from 1st March 1928. Until he did elect the contract was not determined, and, when he wished to determine it, it was necessary for him to show his election to the respondent with reasonable clearness and freedom from ambiguity. At any rate open conduct of the appellant inconsistent with rescission would amount to notice of his election not to rescind but to continue the contract, and such election,

(1) (1915) A.C. 386.
(2) (1921) 1 A.C. 376, at p. 393.
(3) (1916) 1 A.C. 275.
(4) (1899) 1 Ch. 747, at p. 763.
(5) (1877) 6 Ch. D. 196, at p. 204.
(6) (1873) L.R. 6 H.L. 414, at p. 421.
(7) (1865) 34 Beav. 451; 55 E.R. 710.
(8) (1819) 3 Swanst. 159, at p. 170; 36 E.R. 815, at p. 817.
(9) (1893) 2 Q.B. 274.
(10) (1920) 3 K.B. 475.
(11) (1877) 3 App. Cas. 115, at pp. 128-129.
(12) (1919) A.C. 1.
(13) (1921) 1 A.C. 271, at p. 277.

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when once made and notified, would be irrevocable and would determine his then existing right to rescind. There was no rescission before the appellant's solicitor's letter of 12th December, and up to that date he remained in full possession of the whole of the land without any protest by him in respect of his reason for doing so, and without any tender to the respondent of possession or use of any part of the land, and it was not until the respondent's solicitors showed their full preparedness for settlement that any definite statement was made that the appellant would not complete. Whatever rights the appellant might have supposed himself to have in respect of the crop, he could not, on rescission, justify his continuance in possession of the land he had not cropped, or of the house. The appellant's voluntary continuance in full possession up to 12th December was a notification to the respondent that the appellant had elected not to rescind. In *Lamare* v. *Dixon* (1) the breach had not been rectified before the action was commenced and it is not analogous to the present case.

Cleland K.C., in reply. *Steedman* v. *Drinkle* (2) and *Bentsen* v. *Taylor, Sons & Co.* [2] (3) have no application to the facts in the present case. The respondent is not entitled to a decree for specific performance. There was a breach on 5th November, and nothing short of an accord and satisfaction will satisfy the appellant's liability.

Cur. adv. vult.

April 1.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND STARKE J. In November 1926 Bruce entered into a contract to sell to Wendt some 1,747 acres in the Hundred of Gordon, South Australia, for the price of £9,608. The method by which the purchase-money was to be paid under the contract is unimportant. Settlement in respect of the sale and purchase was to be made on 1st March 1928, when Bruce was to hand to the purchaser a duly executed transfer of the land under the *Real Property Act* 1886, and Wendt was to execute certain

(1) (1873) L.R. 6 H.L. 414. (2) (1916) 1 A.C., at p. 279.
(3) (1893) 2 Q.B. 274.

covenants and a mortgage to Bruce, and possession was to be given and taken. At the same time, a share-farming agreement was entered into between the parties, whereby Bruce agreed to Wendt cropping for wheat, during 1927, part of the land sold, and the crop harvested was to be divided equally. Wendt entered into possession under this agreement and farmed the land. But no settlement was made under the contract of sale on 1st March 1928, the agreed date, owing to Bruce being unable to hand to Wendt a duly executed transfer of the land, pursuant to the contract. However, Wendt remained in possession of the land, and proceeded to farm part of it during 1928. This operation was outside the share-farming agreement and must be attributed to Wendt's position as a purchaser under the contract of sale. Settlement under the contract of sale had not been made on 12th October 1928, and on that date Wendt served a notice upon Bruce fixing a place, and a time, namely 5th November, for settlement, and intimating that he would treat the contract as at an end in case of default on the part of Bruce. Default was made on the part of Bruce, and no settlement was effected. Bruce alleged that the notice was unreasonable in all the circumstances of the case, but we agree with *Piper* J. that it was a reasonable notice, and in any case we shall so assume.

As Wendt had by his notice made time the essence of the contract —a condition of the contract, both at law and in equity—then, that condition being unfulfilled owing to the default of Bruce, Wendt had the right, if he had taken no substantial benefit under the contract, to refuse to be further bound by it; or, if he did not choose so to act, then he might stand to the contract, reserving to himself the right to bring action for such damage as he might have sustained—that is, to treat the breach, as the books say, as a breach of warranty sounding in damages only. Which course did Wendt choose? He said that he treated the contract as at an end, but he remained in possession of the land and took off the crop which he planted in 1928. Now, a man who has his option whether he will affirm a particular act or contract must elect either to affirm or to disaffirm it altogether; he cannot adopt that part which is for his own benefit, and reject the rest: he cannot blow hot and cold. And the election once made is finally made. (See notes to *Smith*

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Gavan Duffy C.J. Starke J.

v. *Hodson* (1); *Scarf* v. *Jardine* (2).) The facts in the present case show that Wendt desired discharge from the obligations of the contract so far as they were disadvantageous to him, but that he retained possession of the land and harvested a crop to protect his own interests. It is clear, we think, that the authority for these acts must be referred to the contract which he claimed to have repudiated. The case is a typical instance of blowing hot and cold, and it is clear, in our opinion, that Wendt did not wholly disaffirm the contract. Bruce was guilty of delay in settling pursuant to the contract, but Wendt did not elect to disaffirm the contract but to keep it on foot. In these circumstances the Supreme Court of South Australia acted within its jurisdiction and discretion in decreeing specific performance, and this appeal should be dismissed. (See *Hipwell* v. *Knight* (3); *Fry* on *Specific Performance*, 6th ed., p. 521; and compare *Stickney* v. *Keeble* (4); *Steedman* v. *Drinkle* (5).)

Wendt counterclaimed damages for breach of the contract. It may be that he is entitled to nominal damages for default in settlement on the appointed day, but that is a matter this Court need not discuss, for further consideration of the action is reserved and his claim for damages will then be dealt with.

DIXON J. The question upon this appeal is whether a decree for specific performance was rightly made in a vendor's action to enforce a contract for the sale of some agricultural land. The contract was made on 19th November 1926, and was for the sale of a piece of land containing about 1,747 acres at a price of £5 10s. per acre. Of the purchase-money, £4,000 was to be paid in cash, £4,367 was to be satisfied by the purchaser taking over mortgage debts with which the land was encumbered, and the balance of £1,241 was to be secured to the vendor by a mortgage given by the purchaser. The sale was to be completed on 1st March 1928, and possession was not to be given under the contract until that date, although of the purchase-money payable in cash, £100 was paid as a deposit upon signing the contract and £900 was payable on 1st March 1927. But

(1) (1790) 2 Sm. L.C., 12th ed., 146.
(2) (1882) 7 App. Cas. 345, at p. 360.
(3) (1835) 1 Y. & C. (Ex.) 401; 160 E.R. 163.
(4) (1915) A.C. 386.
(5) (1916) 1 A.C., at p. 279.

in the meantime the vendor was to erect a house on the land of a specified design and complete it before 1st March 1927, to lay on water, and to supply some fencing posts. Further, by another agreement of the same date, the vendor agreed that for the next wheat season, that of 1927-1928, the purchaser should cultivate 700 acres of the land as a share-farmer, and should be entitled to fallow the land which was under crop in 1926, the fallowing being "for his use after taking possession on the 1st day of March 1928 of the said block as purchaser thereof under an agreement for sale and purchase entered into simultaneously herewith by the parties hereto." Up to 1st March 1928 the parties substantially performed the provisions of these agreements. But the vendor was not then in a position to complete the contract, because his land was encumbered with greater liabilities than the contract provided for. The purchaser, who had in fact used and occupied the land for the purpose of his share-farming agreement, remained in possession, and sowed 1,400 acres of wheat for the ensuing season. The vendor's solicitors made some efforts to rearrange the encumbrances, which included other land as well as the land sold, so that the sale might be completed according to the terms of the contract. The purchaser's solicitors, after some complaints of the delay and a request for an assurance that the sale would be completed, at length on 13th October 1928 served on the vendor a notice fixing 5th November 1928 as the date for settlement, and notifying him that if he failed to complete the sale upon that day, the purchaser would treat the contract as at an end and act accordingly. At this time the vendor's attempts to rearrange the encumbrances upon his various lands so as to enable him to complete the contract were proving successful, but when the residue of the purchase-money payable in cash was tendered to him by the purchaser's solicitors on 5th November 1928 he was not in a position to carry out his contract. The vendor's solicitors, however, asked the purchaser's solicitors whether the purchaser would sign some application forms for the purposes of taking over the mortgage liabilities contemplated by the contract in a way which, although convenient, he was not strictly required to follow. His solicitors did not at once determine the contract but agreed to consult the purchaser, and after failure to comply with the notice no election

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to treat the contract as at an end was communicated by the purchaser or his solicitors before 12th December 1928. In the meantime the purchaser retained possession of the land. His sons had occupied the house and worked the land, but at the beginning of November they happened to be away from it. But on 19th November they returned with harvesting implements, and commenced to harvest the growing crop. The work of and incidental to harvesting continued until March of the following year. An attempt was made at the trial to show that the harvesting was done in the interests of both parties in pursuance of an arrangement made between their solicitors. The purchaser failed, however, to establish any such arrangement. The truth appears to be that the purchaser himself considered that he was entitled to the crop which he had grown, but his solicitor, fearing the legal consequences of his client's action of retaining the land and harvesting the crop, opened inconclusive discussions of the matter with the vendor's solicitors, and then allowed his client to go on with the work, expecting probably that the vendor would not be able to put himself in a position to complete at least within any short time. The action was tried before *Richards* J., who held that the time limited by the notice of 15th October 1928, namely, three weeks, was unreasonably short, and that the notice did not operate to enable the purchaser to put an end to the contract, but that in any case, by retaining possession and dealing with the crop, the purchaser had conclusively elected to continue the contract on foot. Upon appeal, the Full Court of South Australia affirmed this judgment upon the ground that the purchaser had after 5th November 1928 elected to keep the contract open. *Angas Parsons* and *Napier* JJ. refrained from deciding whether insufficient time had been given by the notice, but *Piper* J. expressed the opinion that the time was not unreasonable. In my opinion the Courts below were right in their view that the purchaser, by continuing in possession of the land and harvesting the crop, manifested an election to affirm and not to put an end to the contract and was therefore precluded from relying upon the vendor's failure to comply with his notice of 12th October 1928. It is, therefore, unnecessary for me to consider the question, which is really one of fact, whether a reasonable time was allowed

by the purchaser's notice to the vendor. If one party to a sale has delayed in the performance of an act which he must do to carry out the contract and the other party notifies him that, unless he does the act within some specified time which in all the circumstances is in fact reasonable, he intends to put an end to the contract, the party not in default, if the notice is not complied with, may at his election treat the contract as at an end, so that he is discharged from its further performance, or may continue to insist upon its performance by the party in default, he himself remaining bound by the contract. But after failure to comply with a notice, the party not in default cannot himself exercise rights which he possesses only if the contract continues on foot and, after he has done so, treat the contract as nevertheless discharged by default. The law enables him to choose between rights; and that choice is exercised, whatever he may desire, when he proceeds to do what he could only lawfully do in virtue of one of the two sets of rights between which he may elect. "Whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election" (per Lord *Blackburn*, *Scarf* v. *Jardine* (1)). In my opinion the purchaser had no right or title to harvest the crop and deal with it if the contract were at an end. If, however, the contract were on foot and still open, he was entitled to deal with the crop as he chose. What he did was justifiable if he had elected one way, namely, not to put the contract to an end, and would not be justifiable if he had elected the other way. Before the purchaser could again put the vendor in default and obtain a new election to determine the contract, the vendor became ready and willing to perform the contract according to its terms, and therefore, in my judgment, became entitled to insist upon its performance by the purchaser.

I therefore think that the judgments below are right, and that the appeal should be dismissed with costs.

(1) (1882) 7 App. Cas., at p. 361

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Evatt J.

EVATT J. The respondent to this appeal succeeded in obtaining from the Supreme Court of South Australia an order for specific performance by the appellant of an agreement dated November 9th, 1926, for the sale and purchase of certain land. The main grounds of appeal are that the respondent committed a breach of the contract by failing to complete the same on November 5th, 1928, and that there was nothing in the subsequent conduct of the parties which sufficiently altered the situation created by breach of contract to justify an order for specific performance.

As to the first point, I agree with the judgment delivered in the Full Court of South Australia by *Piper* J. He came to the conclusion that the notice given by the appellant to the respondent fixing November 5th, 1928, as the date for completion was reasonable in the circumstances of the case and operated to make completion by the date mentioned as of the essence of the contract. But completion did not take place on that day, and the appellant thereupon became entitled to rescind the contract.

The contract, however, then became voidable, not void, and the appellant was at liberty to keep it on foot or to rescind it. But he was under no obligation to decide immediately. Subject to the effect of certain conduct on his part, the appellant was entitled to wait and see.

One of the critical questions in this case is whether, between November 5th, 1928, on which date the breach took place, and December 12th, 1928, when the appellant purported to cancel the agreement, the latter is to be taken as having elected to affirm the agreement and keep it in force.

Express confirmation or election there was none. It is also clear that between November 5th and November 19th the appellant was not, nor were his sons, in actual physical occupation of the subject property. It was upon the latter date that the sons entered the land with implements in order to harvest the crop of wheat which had previously been sown by the appellant. It is said that this harvesting, and the possession of the land for the purpose of harvesting, amount to a concluded election by the appellant to go on with the agreement.

Of course, entry or re-entry into occupation or possession may, under certain circumstances, evidence an unequivocal election to affirm a contract. The circumstances of each case, however, must be carefully looked at to see whether they bear such an interpretation. In the present case the evidence on this point is extremely important.

The appellant was told by his solicitor on November 5th (the day of completion and the day of breach by the respondent) that he must not take the crop off the land unless an arrangement was made to that effect. R. Homburg, the solicitor, gave evidence as follows:—

"I said to defendant in my office on November 5th, 'Don't take that crop off until I have communicated with my brother at Tanunda but I must see the solicitors first.' I later communicated with my brother."

The solicitor mentioned gave evidence of an arrangement with the respondent's solicitor, prior to the harvesting of the crop by the appellant's sons:—

"I am not sure whether I or Mr. Williamson mentioned it. I am inclined to believe he did. He said 'What about the crop.' I said 'I have got a lot of sympathy for Mr. Bruce and I will strongly recommend to my client that his sons shall take off the crop and in the event of any litigation following the crop can be held either for Mr. Bruce if he has to take the farm back or for Mr. Wendt if he is still the owner of the farm.' I don't remember the exact words—I did not take a note of this matter. I am not sure but I believe that Williamson said I think that is a good suggestion.' I communicated with defendant—I had promised Williamson I would do so. . . . I have no doubt that I made an agreement with Williamson. I regard that I made an agreement with Williamson that defendant's sons would take off the crop."

Mr. Homburg's brother, an auctioneer at Tanunda, swore that he informed the appellant prior to the crop being taken off as follows:—

"I have received a telephone message from my brother. He has had interview with Bruce's solicitors about the crop and arranged that you shall take it off. If Bruce is to take back the land then he must pay you for the expense you have been put to in connection with the planting and harvesting the crop."

The last piece of evidence is confirmed by the appellant's own evidence:—

"Homburg said he had notice from Robert Homburg that he had seen plaintiff's solicitor and that I should tell the boys to go on and take the crop off. That is all. Mr. Fritz Homburg told me to take particulars of the crop and save them up. I can't remember now if he said why that should be done. . . . I then gave instructions to my boys about the crop. My boys were home on 5th November and left home on 19th November for Taldra."

The learned trial Judge, *Richards* J., said "I cannot believe that the conversations said to have taken place between the two Homburgs

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and between one of them and the defendant have been concocted for the purpose of the defence. The two Homburgs were very definite on the matter; and my note made at the time concerning the defendant is that he appears to be truthful and of average memory."

The learned Judge declined to find that the arrangement sworn to by Mr. Homburg, the solicitor, was in fact made with the solicitor Williamson. Yet it is clear from Williamson's own evidence that some conversation as to taking off the crop occurred on or about November 15th. In cross-examination Williamson said:—

> "Homburg may have said something to this effect 'What I will do to help Bruce is to get Mr. Wendt's sons to take off the crop and the crop will then be protected for either Wendt or Bruce.' That was following on I think the question as to whether or not the application form would be signed. . . . I did not approve of the suggestion that Wendt's sons should take off the crop. Mr. Homburg was making a long statement . . . I just sat under this long statement Homburg was making. I did not get a chance to get in a word. I did not give Homburg any reason to suppose that I tacitly assented to what he was suggesting. I did not do or say anything that would indicate the contrary. I did not treat it as an offer or as a statement of intention. I took it as something he might be willing to arrange. It did not strike me that it would be in the interests of my client to have the crop taken off. I did not think it better that crop should lie on the ground."

Williamson says that it was on November 15th, also, that he was informed by Homburg that he (Homburg) "thought that he could take it that Mr. Wendt would not go on." At a later stage of the trial, Williamson was recalled and asked a number of questions by the learned trial Judge. He then said:—"My mind is not a blank as to whether the crop was mentioned as a suggestion. I remember that it was not mentioned as a suggestion. I am not prepared to deny that Homburg may have mentioned it, I do not remember a single word he said about the crop or that he mentioned it at all. On the subject of the crop my mind is a blank. I know well that it was never arranged that the crop should be taken off. I don't know that that is an important fact in this case I have not considered it." I must say that it seems to me clearly proved that the appellant would not have taken the crop off the land if he had not received an assurance by Fritz Homburg, the auctioneer, that he, the appellant, could and should do so. It is certain that this assurance was given. Objection was taken to the evidence of conversations between the appellant and the Homburgs, but I am

of opinion that the evidence was properly admitted in the circumstances of the case. I am equally satisfied, and so apparently was the learned trial Judge, that Mr. R. Homburg, the solicitor, gave the message to his brother which resulted in the entry to take the crop off. The solicitor could hardly have done so had he not believed that Williamson was acquiescing in the proposed course of action. And there may have been such acquiescence by Williamson without any concluded agreement in the sense negatived by the learned trial Judge.

In these circumstances, I am not satisfied that the respondent has succeeded in proving that the harvesting of the wheat crop by the appellant was an election to affirm the contract of purchase.

Election must be gathered from unequivocal acts, and those acts should amount to a considered affirmation of the contract (*Abram Steamship Co.* v. *Westville Shipping Co.* (1)). Possession in this case was taken or retained by the appellant for the purpose of taking off the crop and for no other purpose, in the definite belief that an arrangement had been made with the respondent. And it is quite clear that the appellant intended to disaffirm the agreement between the parties.

The onus of proving election by the appellant to affirm the contract, or waiver of the breach of it, lay upon the respondent. Assuming, as I think one must, that the knowledge of his solicitor should be imputed to him, I doubt very much whether the respondent regarded the harvesting as an implied announcement by Wendt that he was going on with the purchase. If the circumstances leave the matter *in dubio* the doubt should, I think, in a suit of this character be resolved in favour of the appellant who, in any view of the matter, was lulled into a complete sense of security. Whilst the case is probably unique, it bears this resemblance to *Lamare* v. *Dixon* (2), that the appellant, like the defendant in that suit, was placed in a most difficult situation being almost "under duress" in the matter. "The Lord Chancellor says that this was an adhering to and insisting upon the agreement," said Lord *Chelmsford* at p. 422, "and undoubtedly, in a sense, that is correct. But we must have some regard to the situation in which Lamare was placed."

(1) (1923) A.C. 773, at p. 779.

(2) (1873) L.R. 6 H.L. 414.

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The work performed by the appellant in taking the crop off was very much in the nature of an operation of salvage, undertaken for the benefit of both parties.

On the evidence summarized above, election is not satisfactorily proved. No rule of law requires that possession, of itself, must be treated as conclusive of a final election. The appellant desired not to affirm but to disaffirm the contract. The respondent's solicitor was quite aware of this at the time when harvesting was started. The appellant's conduct in taking off the crop is satisfactorily explained by the evidence. He believed that he was not only performing a service necessary in the interests of both parties, but that he was carrying out a definite agreement come to by the legal representatives of both parties. Taking the crop off, in the circumstances, no doubt, "wore the aspect of an assertion of right to the benefit of the . . . contract" (*Westville Shipping Co.* v. *Abram Steamship Co.* (1)). In truth, however, it was not intended as an assertion or exercise of any right under the agreement, nor do I think it was understood as such. There is no case of estoppel as distinct from election suggested, owing, I suppose, to the absence of evidence that the respondent acted on the faith of any implied representation.

The Court should not, in my opinion, have decreed specific performance, and the appeal should be allowed.

McTIERNAN J. I have read the judgment of my brother *Dixon*, and agree with his reasons and the conclusion at which he has arrived. In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Homburg, Melrose & Homburg.*

Solicitors for the respondent, *Baker, McEwin, Ligertwood & Millhouse.*

H. D. W.

(1) (1922) S.C. 571, at p. 584.