[HIGH COURT OF AUSTRALIA.]

WESTRALIAN FARMERS LIMITED . . APPELLANT;
DEFENDANT,

AND

COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LIMITED (IN LIQUIDATION) } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1935-1936.

MELBOURNE, 1935, *Nov.* 13-15. 1936, *Feb.* 13.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Contract—Determination—Resolutive Condition—Agency agreement—Delivery of goods after determination of contract—Commission—Whether payable under contract.

The plaintiff had an agreement with an American manufacturer which regulated the import into and sale in Australia of the manufacturer's goods. The plaintiff and the defendant entered into an agreement whereby the plaintiff appointed the defendant its "agent" for the sale of the manufacturer's goods and the defendant agreed to purchase from the plaintiff stipulated quantities of the goods at a fixed price plus a percentage. The fixed price was to be paid to the manufacturer, and the percentage was to be paid to the plaintiff on the arrival of each consignment of the goods in Australia. Orders for the goods were to be sent direct to the manufacturer by the defendant, and the defendant was to take delivery of the goods in America. The goods were to be at the defendant's risk from the time of delivery, but the defendant was not to acquire any property in the goods until payment had been made to the manufacturer. It was provided that the agreement between the plaintiff and the defendant should immediately terminate and be at an end if the agreement between the plaintiff and the manufacturer was determined. The latter agreement was determined on 3rd February 1925, but the defendant had no knowledge of that fact until April 1925. The plaintiff ordered some goods from the manufacturer and took delivery of them in America before 3rd February 1925, but they did not arrive in Australia until after that date.

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

Held, by *Starke*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Latham* C.J. dissenting), that, in respect of those goods, the defendant was liable to pay the plaintiff the percentage stipulated in their agreement: the defendant's obligation to the plaintiff had arisen before, and was not extinguished by, the termination of their agreement, payment of the percentage being merely postponed until the arrival of the goods in Australia.

Effects of the termination of a contract under a resolutive condition discussed.

Decision of the Supreme Court of South Australia (*Reed* A.J.) affirmed.

APPEAL from the Supreme Court of South Australia.

Commonwealth Agricultural Service Engineers Ltd. (in liquidation) brought an action against Westralian Farmers Ltd., claiming commission on the sale of certain tractors. The parties agreed upon a statement of the facts which was substantially as follows:—

1. An agreement in writing dated 11th October 1923 was made between the plaintiff of the one part and the defendant of the other part.

2. An agreement in writing was made between the plaintiff and the defendant dated 30th August 1924.

3. The agreement between the plaintiff and the manufacturing company referred to in the agreement dated 11th October 1923 determined on 3rd February 1925, which determination was not communicated to the defendant until about April 1925 and until then the defendant had no knowledge of such determination.

4. The defendant duly complied with the agreements referred to in pars. 1 and 2 for the first year ending 22nd August 1924.

5. The plaintiff company passed an effective resolution for winding up on 3rd June 1925.

6. From 22nd August 1924 to 3rd February 1925 the defendant pursuant to the agreements referred to in pars. 1 and 2 ordered from the manufacturing company and took delivery at Racine of seventy-three tractors as per the schedule hereunder written. [The schedule showed delivery of forty-one tractors, with commission thereon amounting to £1,099 9s. 2d., and also delivery of thirty-two tractors, with commission thereon amounting to £1,051 9s. 1d.]

7. The defendant has paid to the manufacturing company the cost of all of the said seventy-three tractors. The defendant has paid commission to the plaintiff on the above-mentioned forty-one

tractors and has refused to pay commission to the plaintiff on the balance of thirty-two tractors. The commission payable thereon, if due by the defendant, amounts to £1,051 9s. 1d.

8. Pursuant to the terms of letters and telegrams which passed between the plaintiff and the defendant, the defendant purchased and took delivery of ten tractors from the plaintiff's stocks in Australia. The defendant on 31st January 1925 paid to the plaintiff the purchase money for such tractors and a commission of twelve and a half per cent.

9. Thirty-six tractors were shipped by the plaintiff at Port Adelaide to the defendant between 18th February and 2nd April 1925.

10. The defendant duly paid to the plaintiff all amounts due in respect of the thirty-six tractors including the commission of twelve and a half per cent.

11. During the period from 3rd February 1925 to 23rd August 1925 the defendant took delivery at Racine from the manufacturing company of a further one hundred and fifty tractors which were shipped on various dates from 10th February 1925 to 2nd June 1925, both dates inclusive. The plaintiff makes no claim for commission in respect of these tractors.

12. If the defendant is liable to pay commission to the plaintiff on the thirty-two tractors mentioned in par. 6 hereof, then judgment is to be entered for the plaintiff for the sum of £1,051 9s. 1d., otherwise judgment is to be entered for the defendant.

The plaintiff had an agreement with the company referred to as the manufacturing company for the sale throughout Australia of the products of that company, principally tractors. By the 1923 agreement the plaintiff appointed the defendant its agent for the State of Western Australia for the sale of all machinery and goods manufactured by the manufacturing company. Clause 3 of the agreement provided that it should be deemed to have commenced on 22nd August 1923, and that it should continue until 31st December 1931 unless the same should be sooner terminated in the manner thereinafter provided. The 1924 agreement altered some of the provisions of the 1923 agreement and added some further provisions. It was provided by the additions that the defendant should send orders direct to the manufacturer, should accept delivery

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

of all machinery and goods at Racine, should pay to the manufacturing company on behalf of the plaintiff the price of the same payable by the plaintiff together with certain charges and expenses, and that machinery and goods, as and when delivered to the defendant at Racine, should be at the defendant's sole risk, but the defendant was to obtain no property in the goods until payment had been made to the manufacturer. On arrival of the goods at Fremantle the defendant was to transmit to the plaintiff a commission equal to twelve and a half per cent of the price paid to the manufacturer.

The dispute in the case arose in respect of the period from 22nd August 1924 to 3rd February 1925, this period being portion of the second year. The plaintiff's agreement with the manufacturing company came to an end on 3rd February 1925, and pursuant to clause 24 of the 1923 agreement the plaintiff's agreements with the defendant terminated on that day. Until about April 1925 the defendant had no knowledge of such determination, and the agreements contained no express provision dealing with this situation.

Fullagar K.C. and *Piper*, for the appellant.

Wilbur Ham K.C. and *Kriewaldt*, for the respondent.

Cur. adv. vult.

1936, Feb. 13.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Supreme Court of South Australia under which the plaintiff company (respondent) recovered from the defendant company (appellant) the sum of £1,051 9s. 1d., with costs, for commission at the rate of twelve and a half per cent on certain tractors supplied to the plaintiff.

By an agreement in writing dated 11th October 1923 as varied by another agreement in writing dated 30th August 1924 the plaintiff company (described in the agreements as " the importing company ") appointed the defendant company (described as " the dealer ") as agent of the plaintiff for the State of Western Australia for the sale by the defendant of machinery, including tractors, manufactured by the J. I. Case Threshing Machine Co. (Incorporated) of Racine,

Wisconsin, U.S.A. The latter company is described in the agreements as "the manufacturing company." Clause 3 of the first agreement provided that the agreement should be deemed to have commenced on 22nd August 1923 and that it should continue until 31st December 1931, "unless the same be sooner terminated in manner hereinafter provided." Clause 24 was, so far as relevant, in the following terms:—"This agreement shall also immediately terminate and be at an end in any of the following events . . . (*f*) If the existing contract between the importing company and the manufacturing company shall be determined at any time prior to the thirty-first day of December One thousand nine hundred and thirty-one." On 3rd February 1925 the contract referred to in par. *f* of clause 24 was determined. The rights of the parties which are in controversy depend upon the effect of the determination of this contract in immediately "terminating" and bringing "to an end" the agreements between the plaintiff and the defendant.

Clause 5 of the agreement of 1923, as amended by the agreement of 1924, provided that the plaintiff should supply or cause to be supplied to the defendant certain machinery, which the defendant agreed to purchase at specified prices plus certain percentages. In the case of tractors the additional percentage, also described as a "commission," was twelve and a half per cent. This clause also provided that, on the defendant completing the purchase in any one year of specified minimum quantities the plaintiff should not be entitled to any commission on the price of any goods purchased by the dealer in such year in excess of the said minimum quantities. In the year beginning on 22nd August 1924 the minimum number of tractors to be purchased was ninety. (In consequence of certain adjustments made between the parties the case was conducted upon the basis that the number for the year mentioned was eighty-seven.) The schedule to the first agreement provided that orders for machinery to be purchased were deemed to be given during the first week of the year. Under the agreements as amended orders were to be sent direct by the defendant to the Racine company. The plaintiff was to give delivery of the machinery at Racine (clause 9 as amended) and the defendant agreed (clause 10 as amended) to accept delivery

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

Latham C.J.

of all the machinery at Racine and to pay to the Racine company on behalf of the plaintiff the specified prices and other charges. The goods were to be at defendant's risk from the time of delivery at Racine, but it was to obtain no property in them until payment had been made for them in cash to the Racine company. The payment of commission was dealt with in clause 24 of the 1924 agreement by the following provision:—"The dealer" (defendant) "shall pay to the importing company" (plaintiff) "the percentage payable by the dealer under clause 5 of the principal agreement as amended hereby by remitting the amount thereof to the importing company on arrival of each consignment of machinery and goods at Fremantle aforesaid." It is under this provision that the commission is to be paid to the plaintiff. Other payments in respect of the goods were to be made to the manufacturing company at Racine.

The agreements were terminated, as already stated, on 3rd February 1925, though the defendant did not become aware of such termination until April 1925. Between 22nd August 1924 and 3rd February 1925, the defendant ordered and paid for seventy-three tractors, which were delivered at Racine before 3rd February 1925. On forty-one of them the defendant paid commission, but the defendant disputes any liability to pay on the other thirty-two tractors.

The defendant's first objection is based on the fact that the defendant ordered from the plaintiff forty-six tractors, of the description mentioned in the agreements, and manufactured by the Racine company, to be delivered from Adelaide, for which the plaintiff was to be paid and was actually paid in Adelaide. The defendant claims credit for such payment as under the agreements of 1923 and 1924.

The plaintiff in reply to this claim relies on the fact that of the Adelaide tractors thirty-six were ordered after 3rd February 1925, so that these tractors cannot be regarded as having been ordered under the original agreements, which had terminated on that date. In my opinion, this is a complete answer, unless it can be shown that the parties made an agreement that these tractors were to be considered as falling within the original agreements.

The plaintiff contends that these "Adelaide" tractors were purchased under new and separate agreements, which expressly and independently provided for the payment of the commission, and that the defendant cannot properly claim credit for such commission as having been paid under the agreements of 1923 and 1924.

As a separate defence to the plaintiff's claim the defendant relies on the clause providing that commission is payable upon arrival of machinery at Fremantle and upon the fact that forty-eight of the tractors supplied direct from Racine arrived at Fremantle on 15th April 1925, i.e., after the main agreements had been terminated on 3rd February 1925.

In the Supreme Court the plaintiff succeeded and obtained judgment for £1,051 9s. 1d. (an agreed sum) and costs.

The defendant first contended that the substance of the contract was that a certain number of tractors should be purchased from the plaintiff and that it was immaterial whether delivery was taken and payment made at Racine or at Adelaide. The terms of the contract answer this contention. The tractors to which the agreement of 1923 as varied in 1924 applied were tractors to be ordered from the Racine company, to be delivered at Racine, to be paid for at Racine and to be shipped to Australia. It is impossible to disregard these express provisions. It is true that when it is necessary to decide whether a breach of contract by one party entitles another party to be discharged (if he so elects) from further performance, distinctions are drawn between the relative importance of stipulations in a contract. But no such question arises in this case. The question, so far as the contention now under consideration is concerned, is not whether some terms of the contract were and others were not of the essence of the contract, but whether (apart from any new agreement, express or implied) tractors ordered direct from the plaintiff at Adelaide were tractors supplied under the agreements of 1923 and 1924. The question may be tested by asking whether, if the defendant had ordered any tractors to be delivered from Adelaide, the plaintiff would have been bound by the agreements to supply them. The answer is clearly in the negative. There may have been various reasons why the contract provided for orders to be sent to Racine

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

Latham C.J.

and for deliveries to be made and the price &c. to be paid in Racine, but speculation on this subject is not necessary. The contract is clear in its terms, and these terms cannot be disregarded. The tractors ordered from Adelaide cannot be regarded as falling within the original agreements.

But then it is said that the parties varied the original agreements by agreeing to accept as a form of substituted performance the ordering and supply of tractors from Adelaide rather than from Racine. The force of this argument depends entirely on the facts. If the parties did so agree, effect should be given to their agreement. But it is not possible to find evidence of such an agreement. The whole matter, so far as there is evidence relating to it, depends upon correspondence. That correspondence shows an express ordering of tractors from Adelaide and the supply of those tractors upon the express terms that "the usual commission" should be paid—a stipulation which would have been unnecessary and out of place if the parties had regarded the supply of tractors from Adelaide as something done by way of performance of the original contract. The letters which passed between the parties contain no agreement that the tractors should be regarded as delivered under the agreements in question. On the other hand, they record quite independent transactions in relation to which the parties made separate bargains.

A further contention, however, is based upon the clause which provides that commission shall be payable upon the arrival of machinery at Fremantle. On this part of the case I regret that I differ in opinion from the other members of the Court, and I therefore think it proper to examine the question in detail.

The thirty-two tractors from Racine did not arrive at Fremantle until after 3rd February 1925. The contract had then terminated and ended. It is contended for the defendant that there was no obligation to pay commission until the tractors arrived at Fremantle, that the determination of the contract necessarily prevented any new obligations from arising under it, and that therefore the obligation to pay commission on these tractors never came into being. This is a question of the construction of the contract. The parties expressly contemplated the possibility of the termination of the

contract before it had been completely performed. What did the parties mean when they said that upon the happening of any one of a number of specified events the agreement should be " immediately terminated and be at an end " ? Certainly the contract was not to remain in existence as a source of new obligations. The defendant, for example, could not impose any obligation on the plaintiff by ordering further tractors. But the determination of a contract does not involve a complete severance of all legal connection between the parties so that they become legal strangers. Obligations which have already accrued continue to exist. The determination of the contract does not undo the past. (See *McDonald* v. *Dennys Lascelles Ltd.* (1), per *Starke* J. (2), and per *Dixon* J. (3).) The position would be different if the contract had provided for some form of *restitutio in integrum*. In such a case effect would be given to the agreement of the parties. But there is no such provision in the contract now under consideration.

If goods have been delivered under a contract of sale, the price being payable upon delivery, and the contract is determined after delivery but before payment, the determination of the contract does not destroy the already accrued obligation to pay the price. If the seller of goods in such a case sues for the price, he is in a position to prove that all the facts entitling him to payment came into existence while the contract was still alive. The determination of the contract would not be held to be retrospective in operation unless there was a clear agreement to that effect. If, the contract being determined, the vendor nevertheless delivers the goods though he is not bound to do so, and the buyer accepts them, the price is recoverable upon a quantum meruit, i.e., upon a new contract implied from the acts of the parties, and not upon the original contract.

It is, I think, clear that when a contract has been determined, a party cannot, by purporting to act under it, impose any obligation on the other party the foundation of which obligation can be found only in the terms of the contract itself. Action by a party which can be discovered to have legal significance as a source of obligation

(1) (1933) 48 C.L.R. 457. (2) (1933) 48 C.L.R., at p. 469.
(3) (1933) 48 C.L.R., at pp. 476, 477.

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

Latham C.J.

only by reference to the terms of a contract cannot be effective to impose an obligation upon any other party if the contract has been determined before the action has been performed. The determined contract cannot at the same time be "ended," and yet be alive so that an act, which, apart from the contract, could not impose an obligation upon anybody, nevertheless does impose an obligation upon another person because and only because he had made the contract which had "ended."

But there may be another class of case—where, if the contract is still alive, the terms of the contract impose an obligation on one party, and confer a right upon the other party, when a specified event happens, that event not consisting in an act by either party. If the contract had been determined before the specified event happened, so that the liability had not yet accrued or the right come into existence at the time of determination, then, in my opinion, the liability never accrues and the right never comes into existence. The future event upon the happening of which the existence of the obligation depends is an event which possesses no legal significance as between the parties unless the contract is applied to it. But, *ex hypothesi*, the contract no longer exists, and therefore the liability never becomes a legal obligation and the corresponding right is never created. A party endeavouring to enforce the obligation would fail because he was not able to prove that, while the contract was still alive, all the facts necessary to support his claim had come into existence. This reasoning is, in my opinion supported by principle, and I have not found any authority to the contrary effect.

The effect of the termination of a contract by an event which the parties did not expressly contemplate has been considered by the Courts in various cases. The abandonment of the Coronation procession in 1902 was responsible for several decisions, the effect of which is well stated by *Channell* J. in *Blakeley* v. *Muller & Co.* (1). Referring to *Krell* v. *Henry* (2), the learned Judge says:— "In *Krell* v. *Henry* (2) it does not appear whether there was any express contract as to when the money was payable. If the money

(1) (1903) 2 K.B. 760n.

(2) (1903) 2 K.B. 740.

was payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for" (1). In *Chandler* v. *Webster* (2), another "Coronation case," the position in the case of a contract held to be determined by the failure of an event upon the happening of which (it was held) the possibility of the performance of the contract depended, was explained in the following words: "The parties thenceforth are both free from any subsequent obligation cast upon them by the agreement; but, except in cases where the contract can be treated as rescinded *ab initio*, any payment previously made, and any legal right previously accrued according to the terms of the agreement will not be disturbed" (3). These English decisions have been compared with the different principles of Scotch law in a manner which brings out their significance clearly (see *Cantiare Can Rocco, S.A.* v. *Clyde Shipbuilding and Engineering Co. Ltd.* (4), in the judgments of Lord *Dunedin* and Lord *Shaw of Dunfermline*). Viscount *Finlay* recognizes that "the results of the English view might be startling if the whole contract price had been paid in advance" (5)—i.e., before the consideration for the price had been received. Although it is stated in the judgments of the Earl of *Birkenhead* (6), Viscount *Finlay* (7) and Lord *Dunedin* (8) that the decisions in the Coronation cases are still open to review in the House of Lords, it does not appear to be doubted that the principles applied in these cases were the principles long ago enunciated in *Taylor* v. *Caldwell* (9) and *Appleby* v. *Myers* (10). The possibility of review of these decisions relates (apart from any question as to whether the facts justified the application of the principles mentioned) to the propriety of applying a doctrine of restitution as upon a failure of consideration in accordance with the principles of the civil law. It is not based upon any doubt whether, after a contract had been determined, a new obligation (which had not come into being at the time when the contract ended) could arise under it.

(1) (1903) 2 K.B. (n.). at p. 762.
(2) (1904) 1 K.B. 493.
(3) (1904) 1 K.B., at p. 501.
(4) (1924) A.C. 226.
(5) (1924) A.C., at p. 244.
(6) (1924) A.C., at p. 233.
(7) (1924) A.C., at p. 241.
(8) (1924) A.C., at p. 247.
(9) (1863) 3 B. & S. 826; 122 E.R. 309.
(10) (1867) L.R. 2 C.P. 651.

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

Latham C.J.

Further illustrations of this principle are to be found in the decisions as to the effect of war in certain cases in preventing the accrual of future obligations under a contract while preserving obligations already accrued (see the cases mentioned in *Hirsch* v. *Zinc Corporation Ltd.* (1)). The cases on what is called "frustration" illustrate the same principle (see, e.g., *Horlock* v. *Beal* (2)).

The authorities mentioned relate to the determination of a contract by the lawful act of a party (election to discharge after breach), or by some external event which prevents the lawful continuance of contractual relations (war), or by what is often called "impossibility of performance" or (perhaps more accurately) by the operation of a condition found by the Court to be implied in the contract as a condition of its continuance ("frustration"). They all agree in either declaring or necessarily implying that when a contract has been determined, no new obligation can thereafter arise by virtue of that contract.

In this case the parties expressly agreed that upon the happening of any one of a number of events the contract should "immediately terminate and be at an end." In my opinion these words mean that, as held by the Courts in the various cases mentioned, obligations which already exist under the contract are not extinguished, and also that the contract no longer exists as an element in the creation of any obligation which did not already exist before the contract "terminated" or "ended." Upon an examination of the contract in this case it must be admitted that, if it had not ended or terminated under clause 24, no commission would ever have been payable in respect of any tractors which did not arrive at Fremantle. The obligation to pay commission arose only when the tractors so arrived. That obligation arose directly out of the contract and not otherwise. It could arise only by giving to the contract an effect, an active operation, on the day when tractors arrived at Fremantle. But, if the contract had terminated and ended before the day on which certain tractors arrived, it could have no effect or operation on that day. A contract which has terminated can no longer be relied upon by any party

(1) (1917) 24 C.L.R. 34.

(2) (1916) 1 A.C. 486.

as the source of a contractual obligation which becomes an obligation, so as to ground a right of action, only after the contract has terminated.

The tractors in respect of which it is sought to make the defendant liable for commission are tractors which arrived at Fremantle after 3rd February 1925, the day when the contract terminated. For the reasons which I have stated the defendant was not, in my opinion, under an obligation to pay commission on these tractors.

I think, therefore, that the judgment of the Supreme Court should, for the reason given, be set aside and judgment entered for the defendant.

STARKE J. The respondent recovered a judgment in the Supreme Court of South Australia against the appellant for a sum of £1,051 9s. 1d., and from that judgment an appeal is brought to this Court. The claim arose under a somewhat complicated agreement, made in October 1923, between the respondent (therein called the importing company), and the appellant (called the dealer), which was varied by another agreement between the same parties in August 1924. Apparently the importing company had an agreement with an American machine company which regulated the import into and the sale in Australia of the American company's manufactures. The agreement between the importing company and the dealer appointed the dealer its agent for the sale of machinery and goods manufactured by the American company. It is what is often called an agency agreement, but it really created the relation of seller and buyer. It is enough for the purpose of this appeal to say that the dealer agreed with the importing company that "it doth hereby purchase from the importing company during the continuance of this agreement the respective quantities of machinery and goods detailed and set out in the schedule." As to gas and oil tractors the schedule provided in respect of the second year (which is the period in question here): "Minimum amount: Ninety, in six equal monthly shipments of 8 each and thereafter six monthly shipments of 7 each." The price was that set out in the manufacturer's export machinery list prices, less discounts, but plus a percentage of twelve and a half upon gas and oil tractors. Payment, other

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

Starke J.

than the percentage, was to be made to the American company at its establishment in Racine, Wisconsin, U.S.A., on behalf of the importing company, plus all charges of every description to port of shipment. Until such payments were made the dealer had no property in the machinery, though if it took delivery the same was at its risk. The dealer was to pay to the importing company the percentage payable by the dealer by remitting the amount thereof to the importing company on arrival of each consignment of machinery and goods at Fremantle in Western Australia. Another clause of the agreement provided that on the dealer completing the purchase in any one year of the minimum quantity of the machinery and goods mentioned in the schedule the importing company should not be entitled to any percentage or commission on the price of any machinery and goods purchased by the dealer in such year in excess of the minimum quantity. A condition of the agreement was that it should immediately terminate and be at an end if the contract between the importing company and the American company were determined—as I understand happened. It is admitted that the agreement between the importing company and the dealer terminated on 3rd February 1925, though the dealer had no knowledge of the fact until April 1925.

It is unnecessary to consider the transactions of the first year of the agreement, for the parties have agreed that between 22nd August 1924 (the commencement of the second year of the agreement) and 3rd February 1925, the dealer ordered, and took delivery of at Racine, Wisconsin, U.S.A., seventy-three tractors. The dealer paid to the American company the cost of these seventy-three tractors. It also paid to the importing company the twelve and a half per centum upon forty-one of these tractors, but refused to pay the percentage upon the remaining thirty-two. It is the percentage upon the thirty-two tractors that is in contest in this appeal.

These thirty-two tractors arrived in Fremantle on 15th April 1932, that is, after the termination of the agreement on 3rd February 1925. The termination of the agreement did not operate as from the making of the contract, but only so far as it still remained executory on either side. Obligations arising before the termination of the contract remained unaffected, obligations which had not arisen before its

termination were put an end to and destroyed. (See *Salmond and Winfield, Principles of The Law of Contracts* (1927), pp. 283, 289.) The parties did not contest this general position. The critical question is whether the obligation to pay the percentage arose before the termination of the contract. The dealer purchased the thirty-two tractors at the American company's list prices less discounts but plus the percentage. It actually paid the price, other than the percentage, at Racine in U.S.A., and took delivery of the tractors there, and the property in the tractors passed to it. All that remained to be done was for the dealer to pay the balance of the purchase money, the percentage. On these facts, the obligation of the dealer to pay the percentage would have been clear, but for the twenty-fourth clause of the agreement of variation of August 1924. It provided : " The dealer shall pay to the importing company the percentages payable by the dealer . . . by remitting the amount thereof to the importing company on arrival of each consignment of machinery and goods at Fremantle." This clause, however, merely delays or postpones payment of the percentage until arrival of the goods at Fremantle, but otherwise leaves untouched the obligations of the contract. It does not affect the liability to pay the percentage arising out of an obligation which had arisen before the termination of the contract.

Another argument advanced on the part of the dealer was that it had actually ordered, and paid the cost of and percentages on, ninety tractors during the second year of the agreement, and that the importing company was not entitled to any percentage on the price of tractors purchased by the dealer in excess of that number. The argument fails on the facts. The dealer makes up its ninety tractors in the following manner : Forty-one tractors were delivered and paid for at Racine, U.S.A., and the percentages thereon were paid on arrival of the goods at Fremantle ; ten tractors were delivered from the importing company's stocks in Australia before the termination of the contract and payment was duly made ; thirty-six were delivered from the importing company's stocks in Australia after the termination of the contract and payment was duly made ; three were treated by the parties on the argument of this appeal as adjusted in account. In his reasons for judgment the learned trial Judge

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

Starke J.

said:—"It is clear that these tractors were not ordered by the defendant from the manufacturing company or delivered to the defendant at Racine, so that prima facie they are not part of the subject matter of the agreements. Unless both parties agreed, or the plaintiff is precluded from denying, that they should be treated as such, the defendant cannot get the benefit of them. The only circumstances so far as I can see which in any way support the defendant's contention, are that in every case the price was arrived at on the basis of net factory cost plus usual charges, and the plaintiff stipulated for the usual commission. But as the parties in no other way treated the tractors as under the agreements mentioned, and the defendant did not claim that they were until many months later, I cannot see that the circumstances mentioned can have the effect suggested. Indeed the parties appear to have treated these tractors quite separately from the others as is shown by the accounts and correspondence at the important times; and the plaintiff did nothing to lead the defendant to think that it was giving credit for the tractors against the minimum number for the year." I agree and have nothing to add.

The result is that the appeal should be dismissed.

DIXON AND EVATT JJ. By the judgment under appeal the respondent company, which is the plaintiff in the action, recovered from the appellant company, the defendant, a sum representing a percentage of twelve and a half per cent upon the price of thirty-two tractors. Up to 3rd February 1925, the relations of the two companies were governed by an agreement which on that date came to an end *ipso facto* as a result of the occurrence of a condition subsequent.

The appellant was held liable for the percentage under the terms of the agreement. This necessarily means that the liability for the sum recovered accrued before the agreement ceased to operate. The commencement of the action was within six years of that event. The agreement, which consisted of an original contract and a contract of variation, constituted the appellant what the parties called the agent for Western Australia for the sale of machinery and goods manufactured by an American company at Racine in Wisconsin.

An agreement subsisted between the American manufacturer and the respondent company by which, apparently, the respondent company undertook the distribution in Australia of the machines and implements which the former produced. It was the termination of this agreement with the American manufacturer on 3rd February 1925 which, under a resolutive condition contained in the agreement between the respondent and the appellant, brought the latter to an end. Although the parties described the appellant company as the agent for Western Australia for the sale of the machinery and goods manufactured by the American company, the agreement between them actually did not establish any relation of principal and agent. The appellant company engaged with the respondent to use its utmost efforts to sell in Western Australia the machinery and goods manufactured by the American company. The respondent company agreed to supply or cause to be supplied to the appellant company the machinery and goods mentioned in a schedule to the agreement. The appellant agreed to purchase such machinery and goods from the respondent company. It agreed to do so at the prices set out in the American company's price list less discounts and plus certain specified percentages. The schedule included gas and oil tractors and for those machines it specified twelve and a half per cent. The agreement contained provisions requiring the appellant to give its orders for the goods direct to the American manufacturer by cable, to accept delivery of the goods at Racine, to pay the American manufacturer for the goods on behalf of the respondent company, to establish banking credits in New York sufficient in amount to enable it to pay the American manufacturer cash for the goods and to allow sight drafts for the price to be drawn upon it payable at the bank where such credits were established. The appellant company undertook to send to the respondent company copies of its orders forthwith after cabling them to the American company. The respondent company undertook within a reasonable time of the American manufacturer's receipt of the orders to furnish the appellant company with the goods and to deliver them at Racine. The amount payable to the American manufacturer on behalf of the respondent consisted of the list prices less discounts together with packing and delivery charges at Racine

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

Dixon J. Evatt J.

and railway freight, insurance and other charges from Racine to New York or other place of shipment. Until payment of this amount, no property passed to the appellant company, although the goods were at its risk from delivery at Racine. Payment to the American manufacturer of the list price plus charges satisfied the appellant company's liability to the respondent company except for the percentages. These were governed by a provision in the agreement which provided that the appellant company should pay the percentages payable by remitting the amount to the respondent company on arrival of each consignment of machinery and goods at Fremantle.

The quantity of goods which the appellant company was required to order was regulated by clauses of the agreement and the schedule, the effect of which in combination, so far as material, was as follows. During the continuance of the agreement the appellant company agreed to purchase from the respondent company in every period of twelve months ending on 22nd August a specified number of each class of goods mentioned. If it purchased more than the specified number of any class, the excess might be reckoned in part satisfaction of the obligation for the ensuing year. Up to the specified number in each year the appellant company was obliged to pay the percentages provided in the agreement. But for goods in excess of that number the appellant was relieved of the percentages otherwise payable. In terms the agreement provided that on the appellant company's completing the purchase in any one year of the respective minimum quantities of the machinery and goods mentioned in the schedule, the respondent company should not be entitled to any percentage or commission on the price of any machinery or goods purchased by the appellant company in that year in excess of the minimum quantities mentioned in the schedule. For gas and oil tractors the minimum number was ninety in the twelve months with which we are concerned, namely, the twelve months from 22nd August 1924. Owing to the termination of the agreement on 3rd February 1925, it did not operate throughout the whole of that annual period. After 22nd August 1924 and before its termination on 3rd February 1925 the appellant had ordered from the American manufacturer seventy-three tractors in all. It had paid for them and they had

all been delivered at Racine. But thirty-two of them had not arrived at Fremantle before the date upon which the agreement terminated. It is the percentage upon these thirty-two tractors which is in dispute.

The first ground upon which the appellant company denies its liability to pay the percentage upon these tractors is that under the terms of the agreement no such liability could arise until the goods arrived at Fremantle and before this happened the contract ceased to have any further executory operation. When a contract comes to an end by reason of the occurrence of an event upon which the parties have by an express provision made it terminate, the question whether an inchoate liability arising thereunder does or does not become enforceable must in the end be governed by the intention of the parties. It is a rule of law that when a simple contract is discharged by the election of one party to treat himself as no longer bound after the other has committed a breach of the contract, rights and obligations which have already arisen from the partial execution of the contract shall remain unaffected (see *McDonald* v. *Dennys Lascelles Ltd.* (1)). No doubt it is open to the parties to provide in advance for such an event and by a stipulation to the contrary to produce some other effect. When the parties themselves have provided for the determination of the contract on a given contingency, the consequences flow altogether from their contractual stipulation and are governed by their intention, either actual or imputed. In the present case, however, all the agreement expressly says is that in any of the specified events it shall immediately terminate and be at an end. In applying such a compendious provision to a continuing relationship of the complicated character which the agreement establishes some guidance may be found in the nature of the agreement and of the obligations to which it gives rise. But primarily it remits the inquiry to a general consideration of what is involved in the sudden termination of an executory agreement under which liabilities are accruing from day to day. We are concerned only with a liability to pay a liquidated demand. In general the termination of an executory agreement out of the performance of which pecuniary demands may arise imports that, just

(1) (1933) 48 C.L.R., at pp. 476, 477.

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

Dixon J. Evatt J.

as on the one side no further acts of performance can be required, so, on the other side, no liability can be brought into existence if it depends upon a further act of performance. If the title to rights consists of vestitive facts which would result from the further execution of the contract but which have not been brought about before the agreement terminates, the rights cannot arise. But if all the facts have occurred which entitle one party to such a right as a debt, a distinct chose in action which for many purposes is conceived as possessing proprietary characteristics, the fact that the right to payment is future or is contingent upon some event, not involving further performance of the contract, does not prevent it maturing into an immediately enforceable obligation.

In the present case the thirty-two tractors had been delivered before the termination of the contract. On behalf of the respondent company, which under the agreement occupies the position of a vendor, the price payable to the vendor's supplier had been paid by the appellant company and the property had under the agreement passed to it. In point of law the percentage formed part of the price payable to the respondent company as vendor. Its payment, however, was by the terms of the contract deferred until the arrival of the goods at Fremantle. This contingency depended upon external events constituting no part of the performance of the contract. The right to payment, no doubt, was at the time of the termination of the agreement contingent but it was a debt otherwise completely vested in the respondent company as creditor. The termination of the agreement did not prevent it becoming absolute on the occurrence of the contingency.

For these reasons we are of opinion that the determination of the agreement affords no answer to the respondent company's claim.

The second ground relied upon by the appellant company for denying that in respect of the thirty-two tractors it incurred any liability for a percentage is that, independently of these tractors, it had taken the full number of ninety during the year commencing 22nd August 1924. To make up the number it included the forty-one tractors delivered at Racine and it took into account forty-six with which the respondent had supplied it out of its Adelaide stocks. It

is true that these figures amount only to eighty-seven in all but the respondent made no point of the deficiency of three.

The substantial question is whether the direct supply by the respondent company of forty-six tractors out of its local stocks operated as a contribution towards the quota of ninety upon which the agreement required the appellant to pay the percentage.

It appears that some time prior to October 1924 ten tractors which the respondent company had obtained from the American manufacturer on its own account for sale in South Australia had been shipped by it to Perth from Adelaide. On 4th October 1924, the appellant company advised the respondent company that it would accept drafts for these tractors, whereupon the latter drew upon it for a sum in sterling representing an amount in dollars composed of the American manufacturer's price, packing charges and freight to New York and freight and insurance to Australia together with a percentage added of twelve and a half. The goods appear to have been shipped or transhipped from Adelaide before entry for home consumption and payment of customs duty. The drafts were accepted and were paid at maturity. In the following January, in response to a question from the appellant company whether the respondent company could spare any tractors from a shipment arriving in Adelaide at the end of February, it replied that it would supply ten if the appellant paid the usual commission, i.e., the percentage. This offer was not then accepted, but on 17th February 1925, that is, after the termination of the agreement, the appellant company sought twelve tractors which the respondent company agreed to supply. In the telegrams and letters between the parties the price was expressed as " net factory cost plus usual charges and commission f.o.b. Adelaide " and the terms were stated to be similar to those of the previous supply from Adelaide stocks. The commission is the twelve and a half per cent on tractors. Later a further number of tractors was supplied in the same manner, making up in all forty-six, ten of which only were supplied before the termination of the agreement. In the course of the correspondence the appellant company more than once expressed its thanks for the supply by the respondent company of the tractors of which

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

Dixon J. Evatt J.

it found itself in need and said that it would do the same for the respondent company if that company should at any time be short of machines.

Upon this scanty material the Court is called upon to decide whether the tractors supplied from Adelaide should be reckoned in to make up the ninety specified by the agreement.

The documents supply little if any indication of the manner in which the parties regarded the matter at the time, and none but ambiguous and uncertain inferences can be drawn from the situation in which they stood. No doubt, unless it felt certain of selling at least one hundred and thirty-six in the year current, the supply of forty-six tractors from another source might make the appellant company feel uncertain of its ability to dispose of ninety from Racine. But we do not know what were its anticipations. We do know, however, that orders for one hundred and fifty-three had been sent by it to the American manufacturer and that delivery of these were taken at Racine between 3rd February 1925 and 23rd August 1925. Again, the manner in which the respondent company might be supposed to regard the diversion of Adelaide stock to Western Australia must depend to a great extent upon the terms governing its relationship to the American manufacturer, and we do not know what those terms were.

The appellant company has put its case in two ways. In the first place, it has claimed that the purchase of the tractors from the Adelaide stock is a transaction which of its own nature satisfies the requirements of the agreement between the parties and on the terms of that agreement entitles the appellant to count in the forty-six tractors to make up the requisite ninety. In our opinion this contention is answered by a consideration of the true nature of the requirements of that agreement. The purchase of ninety tractors contemplated by the agreement is the ordering in pursuance of the agreement of ninety tractors from the manufacturer, followed by acceptance of delivery at Racine and payment therefor to the manufacturer in America. It must be a purchase from the manufacturer for importation into Western Australia. A purchase of tractors from the stock of the respondent company imported by it into South Australia is not a transaction of the character which the

contract contemplates in requiring a purchase of ninety tractors and relieving only the excess from liability to the percentage.

In the second place, the appellant company claims that the transaction amounted to a substituted mode of performance which was accepted by the respondent company, or, in other words, that by mutual consent tractors were taken from Adelaide stocks instead of from the manufacturer at Racine in relief of the obligation to take ninety from Racine and pay the percentage thereon. The answer to this contention lies in the absence of any evidence or indication of a common intention that the tractors should be supplied or accepted under the agreement, or in relief of the appellant company's obligations thereunder. The existence of any such intention on either side does not appear. There is no foundation to support such an inference. Indeed the express insistence in agreeing to supply the tractors upon the payment of twelve and a half per cent commission goes some distance to negative such a view, as do also the expressions of gratitude by the appellant company. An answer independent of these considerations was made on behalf of the respondent to the claim to include thirty-six of the forty-six tractors from Adelaide stock. That answer was that the rights and liabilities under the agreement were crystallized upon its termination on 3rd February 1925, and that, as these tractors were supplied after that date, they could not be delivered under the contract, which was no longer in force and could not affect the matter. This answer appears to us to be conclusive, unless the appellant company can establish either that the respondent is precluded from setting up the termination of the agreement on that date, or that by a new agreement, whether express or tacit, between the parties, the tractors were to be taken in to make up the ninety as if the agreement had not determined. The fact is that the appellant company did not become aware of the termination of the agreement until sometime in April 1925, although, no doubt, on its side the respondent company knew or had the means of knowing it. In these circumstances, the first element to found an estoppel is readily discoverable, viz., a representation or common assumption that the agreement continued in force (see *Thompson* v. *Palmer* (1)). But no distinct

(1) (1933) 49 C.L.R. 507, at p. 547.

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

Dixon J. Evatt J.

evidence of the other elements appears in the statement of facts. It might not be difficult to suppose they exist, if it were not for one consideration which, in our opinion, is inconsistent, not only with the view that the respondent company is estopped from setting up the termination of the agreement, but also with the conclusion that a new agreement was expressly or tacitly made. That consideration is that, as we have already said, there is nothing to support the inference that either of the parties intended to act under the agreement in supplying on the one side, or on the other, in accepting, the tractors from Adelaide stock.

For these reasons we are of opinion that the appeal should be dismissed with costs.

McTIERNAN J. I agree that the appeal should be dismissed.

It is conceded that the minimum number of tractors, on which the plaintiff's " percentages " are payable for the year in question, is eighty-seven, although the minimum number which the defendant was obliged to purchase for that year was ninety. It was a term of the contract that the plaintiff should not, in respect of any tractors purchased by the defendant in excess of the minimum, be entitled to " percentages " or " commission," which under the contract was calculated on the manufacturer's price less all discounts allowed to the plaintiff. The defendant submits two views of the contract, on either of which it is contended that the plaintiff's claim to its " percentages " on a consignment of thirty-two tractors which arrived in Fremantle from Racine after the contract came to an end should fail. The first view of the contract was that the manufacturer was the seller of the tractors; the second view is that the plaintiff was the seller and as such agreed with the defendant for a substituted method of performing the contract, which took the form of a series of independent sales comprising forty-six tractors from the plaintiff's stock in Adelaide instead of from Racine.

The first view is quite opposed to the express provisions of the contract. It becomes unnecessary to consider the argument which was based on that view, namely, that percentages are really commissions on sales from the manufacturer to the defendant, and that

the promise to remit these sums in their character as commissions, being executory, lapsed after the contract terminated on 3rd February 1935. The second view of the contract, which is the true one, is that the plaintiff was the seller of the tractors ; but the whole tenor of the correspondence between the parties disposes of the defendant's further contention that the orders for the forty-six tractors which were ordered from Adelaide were intended to be a substituted method of performing the contract. The correspondence treats these transactions as *ab extra* the contract. It follows, therefore, that the payment in respect of these forty-six tractors of a sum equivalent to the " percentages " stipulated in respect of tractors sold under the contract cannot be regarded as having been made in discharge of defendant's obligation to pay such " percentages " in respect of eighty-seven tractors.

Before the contract came to an end the defendant had in the relevant period discharged its obligation to pay the stipulated percentages in respect of forty-one tractors which had arrived at Fremantle from Racine before that time. The thirty-two tractors in respect of which the plaintiff recovered judgment for a sum for its " percentages," at the rate stipulated in the contract, arrived at Fremantle from Racine after an event happened upon which the contract was expressed to terminate and be at an end. The thirty-two tractors having arrived after the termination of the contract, the question remains whether the plaintiff as the seller of the goods is entitled to recover its " percentages " in respect of them. The defendant's promise was " to pay to the importing company " (the plaintiff) " the percentages payable by the dealer " (the defendant) " under clause 5 of the principal agreement as amended hereby by remitting the amount thereof to the importing company on arrival of each consignment of machinery and goods at Fremantle aforesaid." The answer to this question depends on what the parties intended by the term of the contract, namely, that " it should terminate and be at an end " upon the happening of any one of a number of events. Now it is clear that it was not intended that upon the happening of any such event this term should operate to undo the past operation of the contract and to destroy rights and liabilities which had accrued

H. C. OF A. 1935-1936.

WESTRALIAN FARMERS LTD. v. COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD.

McTiernan J.

under the contract (cf. *Blore* v. *Giulini* (1) and *Hartshorne* v. *Watson* (2)). The natural meaning of these words in this contract is, that upon the happening of any one of the events, upon which the contract would terminate, no acts of performance purporting to be done under the contract by either party could create any rights or obligations in addition to those which had already accrued. The " percentages " which the plaintiff claims are part of the price at which it sold to the defendant the thirty-two tractors which reached Fremantle after the contract terminated. The total price consisted of this sum and an amount equivalent to the manufacturer's price less discounts. The latter amount the defendant had already, in conformity with the express terms of the contract, paid on the plaintiff's behalf direct to the manufacturers in America. The plaintiff's right to the outstanding balance of the price represented by the " percentages " does not depend on any act of performance by either party under the contract after it came to an end. The arrival of the goods at Fremantle was not dependent on the subsistence of the contract after the goods were consigned to that port. Payment of the " percentages " could not be demanded before that time, but all conditions necessary to create the plaintiff's right to payment were fulfilled in accordance with the contract while it was still in existence. The past operation of the contract would *pro tanto* be avoided if the term providing for the termination and ending of the contract were construed so as to defeat the plaintiff's accrued right to the price of any parcel of the tractors not in excess of the minimum number delivered at Racine to the defendant before the termination of the contract.

The judgment of the Supreme Court of South Australia in favour of the plaintiff should be affirmed.

Appeal dismissed.

Solicitors for the appellant, *Piper, Bakewell & Piper.*

Solicitors for the respondent, *Ingleby, Wallman & Kriewaldt.*

H. D. W.

(1) (1903) 1 K.B. 356.

(2) (1838) 4 Bing. N.C. 178 ; 132 E.R. 756.