[HIGH COURT OF AUSTRALIA.]

ANDERSON . . . . . APPELLANT;
PLAINTIFF,

AND

G. H. MICHELL & SONS LTD. . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1941.

ADELAIDE, *Sept.* 17.

MELBOURNE, *Nov.* 7.

Rich A.C.J., Dixon and McTiernan JJ.

Arbitration—Classification, construction and effect of arbitration clauses—Whether arbitration condition precedent to liability or action—Whether time limit for arbitration extends also to action.

An agreement to refer disputes, whether existing or future, to arbitration can, apart from statutes which give the courts a discretion to stay an action if the claim falls within an agreement to refer, be enforced only by an action for damages against the party who refused to carry it out. If a contract creates unconditional liabilities no agreement, whether contained in the same or a subsequent contract, to refer disputes to arbitration will disable the party entitled from enforcing the liabilities by action or will detract from the competence of the court to entertain and determine the suit, although the party may by suing expose himself to an action for breach of his contract to refer.

A contract so framed that it would produce no unconditional liabilities, no liabilities which did not depend on the award or determination of arbitrators, referees or other third parties gives, unless renounced, no complete cause of action until an award or determination has been obtained. On the other hand, once it appears that liabilities are meant to arise independently of arbitration, complete and absolute even though disputed, then an attempt altogether to replace the appointed legal remedies by a reference to arbitration will be regarded as repugnant and an attempt to exclude the jurisdiction of the courts as contrary to public policy. But although this is the basal distinction, an agreement which in point of expression makes arbitration a condition precedent, not to the liability or cause of action, but to the right to bring or maintain an action, is construed as affecting, not the jurisdiction or remedy, but the obligation. Where there are promises to pay money or to do any act or acts expressed without reference to arbitration an agreement in the same instrument

H. C. OF A. 1941. ANDERSON v. G. H. MICHELL & SONS LTD.

to refer disputes to arbitration is to be treated as distinct and collateral unless the contrary appears from express language or necessary intendment.

The appellant and the respondent entered into a contract for the sale of certain lambs by the appellant to the respondent. The contract contained clauses providing for the terms of payment, the date of delivery and other usual matters, and an arbitration clause in the following terms:—"Should any dispute arise hereunder between the purchaser and vendor the matter shall be settled by arbitration in the usual manner (as provided by the *Arbitration Act* 1891-1934 (South Australia) or any statutory modification or re-enactment thereof for the time being in force) within twenty days of the date nominated herein for delivery to be given and taken." The respondent refused to accept delivery upon grounds which it was unable to sustain. After the expiration of the twenty days mentioned in the arbitration clause, and without arbitration having been sought by either party, the appellant brought an action for damages for non-acceptance.

Held that upon the true construction of the arbitration clause arbitration was not made a condition precedent to liability or to the commencement of an action nor was the time provided for arbitration a limitation of the period within which an action might be brought.

Pompe v. *Fuchs*, (1876) 34 L.T. (N.S.) 800, *Atlantic Shipping & Trading Co. Ltd.* v. *Dreyfus*, (1922) 2 A.C. 250, *Ayscough* v. *Sheed Thomson & Co. Ltd.*, (1924) 31 L.T. 610, and *Ford* v. *Compagnie Furness (France)*, (1922) 2 K.B. 797, considered and explained.

Hain v. *Ingram*, (1938) 38 S.R. (N.S.W.) 597; 55 W.N. 223, disapproved.

Decision of the Supreme Court of South Australia (*Napier* J.), (1940) S.A.S.R. 285, reversed.

APPEAL from the Supreme Court of South Australia.

Andrew Peter Anderson as seller and G. H. Michell & Sons Ltd. as purchaser entered into a written contract for the sale and purchase of certain lambs. The contract was as follows:—"I/We have this day sold to G. H. Michell & Sons the following lines of stock: 4,000 @ per head 20s., pick of. Terms—Cash to agent for vendor undernamed on delivery. Interest to be charged on overdue payments, whether by arrangement or otherwise. Commission.....% to be paid by vendor. Delivery to be given and taken at: 2,000 at Minchins, 2,000 at Stansbury; on or before 30/11/38 from which date the stock shall be at the risk of the purchaser, subject to any extension of time for delivery being given as hereinafter provided. The vendor to keep lambs on their mothers, who must be kept on reasonably good feed and water, and to pay careful attention to them until delivery to purchaser. Until payment in full of the purchase money or of any approved cheque or document given and accepted as payment in full, the property in the stock shall

not pass to the purchaser, but he shall hold said stock as agent for and in trust for the vendor. On default in payment of the purchase price or any part thereof the vendor shall as against the purchaser have the same rights of seizure or sale as if he were a grantee of a valid bill of sale thereover. In the event of inability of buyer to secure trucks or transport on dates arranged for delivery or of congestion of any works, or strikes, labour difficulties, stoppage of works, fire, breakdown of machinery or any unavoidable circumstances preventing buyer from taking actual delivery, an extension of time shall be given by vendor (maximum period three weeks) after which time agistment charges to be mutually agreed upon between buyer and seller. The remedies available to the vendor against the purchaser hereunder for unpaid purchase moneys shall pass to and vest in the agents effecting the sale if such agents shall pay the purchase price. Should any dispute arise hereunder between the purchaser and vendor the matter shall be settled by arbitration in the usual manner (as provided by the *Arbitration Act* 1891-1934 (South Australia) or any statutory modification or re-enactment thereof for the time being in force) within twenty days of the date nominated herein for delivery to be given and taken. The vendor undertakes to comply with requirements of *Travelling Stock Waybills Acts* 1911 and 1936 where necessary. This agreement shall be interpreted according to the laws of South Australia. Agent: (sgd.) D. Brinkworth. I/We have perused the contents of this contract and agree to the conditions therein. Confirmed by the vendor: (sgd.) A. P. Anderson, (sgd.) J. Burnett Jnr. pro buyer. 30/8/1938."

Anderson brought an action in the Supreme Court of South Australia against G. H. Michell & Sons Ltd. claiming damages for breach of this contract. Anderson alleged that he was at all relevant times ready and willing to deliver the lambs, and in fact delivered 1,900 thereof, but that the defendant refused or alternatively failed to take or accept delivery of the balance of the lambs. The defendant, in addition to defences not material to this report, set up that the matters in issue constituted a dispute arising under the contract, that such dispute was not settled by arbitration within twenty days of the date nominated in the contract for delivery, that a reference to arbitration was not demanded or made within the said twenty days, and that the said twenty days had expired before the commencement of the action.

The action was heard before *Napier* J., who held that Anderson's claim was barred by the contract, and ordered judgment to be entered for the defendant: *Anderson* v. *G. H. Michell & Sons Ltd.* (1).

From that decision Anderson appealed to the High Court.

(1) (1940) S.A.S.R. 285.

H. C. OF A. 1941. ANDERSON v. G. H. MICHELL & SONS LTD.

Alderman (*Lempriere Abbott* with him), for the appellant. The respondent was the dissatisfied party, and it was for it to take steps to arbitrate. This it failed to do. In all cases in which a right of action has been held to be barred by an arbitration clause, it was the person complaining who was barred. On this ground, as well as on the ground that the wording of the contract is different, the case of *Hain* v. *Ingram* (1) is distinguishable: See also *The Dawlish* (2). The arbitration clause says nothing as to what is to happen if no arbitration takes place. On this point there is a conflict of authority (*Ayscough* v. *Sheed Thomson & Co. Ltd.* (3); *Pinnock Bros.* v. *Lewis & Peat Ltd.* (4)). If any words are to be implied in the contract, they must not be more than may be inferred to be the parties' intention, and it is straining that intention too far to say that, after twenty days, neither party could sue the other for anything whatever (*Pompe* v. *Fuchs* (5); *Bede Steam Shipping Co. Ltd.* v. *Bunge Y Born, Limitada, S.A.* (6); *H. Ford & Co. Ltd.* v. *Compagnie Furness* (*France*) (7); *Atlantic Shipping and Trading Co. Ltd.* v. *Louis Dreyfus & Co.* (8)). There is no dispute arising "hereunder," that is, under the contract. There is a mere refusal to pay what is due.

Villeneuve Smith K.C. (with him *Ross*), for the respondent. The contract must be construed, not in the light of the evidence, but as on demurrer. The document was the appellant's document, and it does not lie in his mouth to complain of it (*Moore* v. *Harris* (9)). The dispute arose the moment the parties were not *ad idem* as to performance of the contract. There is no such thing as a unilateral dispute, and both parties here had a complaint. There was no need for the respondent to seek arbitration, because it needed nothing more than it already had. It was for the appellant to set arbitration proceedings on foot, if he claimed redress. The appellant's contention is, in effect, that the arbitration clause became nugatory at the end of twenty days. In *Bede Steam Shipping Co.* v. *Bunge Y Born, Limitada, S.A.* (10) both parties relied on the arbitration clause. The circumstances here were such as to demand urgency (*H. Ford & Co. Ltd.* v. *Compagnie Furness* (*France*) (11)). Had there been no time limit in the arbitration clause, we could have had proceedings stayed (*Jones* v. *Birch Bros. Ltd.* (12)). The absence from the

(1) (1938) 38 S.R. (N.S.W.) 597; 55 W.N. 223.
(2) (1910) P. 339.
(3) (1923) 129 L.T. 429; (1924) 131 L.T. 610.
(4) (1923) 1 K.B. 690.
(5) (1876) 34 L.T. 800.
(6) (1927) 43 T.L.R. 374.
(7) (1922) 2 K.B. 797.
(8) (1922) 2 A.C. 250.
(9) (1876) 1 A.C. 318.
(10) (1927) 43 T.L.R. 374.
(11) (1922) 2 K.B. 797, at p. 803.
(12) (1933) 2 K.B. 597, at p. 609.

arbitration clause of words negativing any other remedy is immaterial (*R.* v. *Churchwardens of All Saints, Wigan* (1); *Pompe* v. *Fuchs* (2)). The general rule is that the time named in a time contract is obligatory (*Atlantic Shipping and Trading Co. Ltd.* v. *Louis Dreyfus & Co.* (3)). *Hain* v. *Ingram* (4) is indistinguishable. [Counsel also referred to *Roper* v. *Lendon* (5); *Mason* v. *Harvey* (6); *Davidson* v. *Campbell & Sons* (7).]

Alderman, in reply.

Cur. adv. vult.

THE COURT delivered the following written judgment:— Nov. 7.

The sole question for decision in this appeal is whether, upon the proper interpretation of a contract made by the appellant as seller with the respondents as buyers for the sale of certain lambs, the former may maintain an action against the latter for non-acceptance, notwithstanding that he did not first submit his claim to arbitration and notwithstanding that the time named in the contract for going to arbitration expired before the commencement of the action.

The contract consists in a printed form used by the stock and station agents through whom the contract was negotiated. It is framed as a contract for the sale of stock of any description, but it contains a particular provision for the case of lambs forming the subject of the sale, a provision requiring the vendor to keep lambs on their mothers and to keep the latter on reasonably good feed and water and to pay careful attention to them until delivery.

The more general clauses of the document provide for the following matters: (1) terms of payment and interest; (2) date of delivery; (3) the passing of the risk; (4) the retention by the seller of property until actual payment of the purchase money and what are to be his rights upon default; (5) an extension of time for taking delivery if the buyer proves unable to take delivery owing to some kinds of circumstance beyond his control; (6) subrogation to the agents of remedies against the buyer if the agents pay the purchase money; (7) compliance by the seller with the requirements of certain legislation affecting travelling stock.

Towards the end of the printed form there occurs the clause upon which the appeal turns, that providing for arbitration within a given time. It is as follows:—

(1) (1876) 1 App. Cas. 611.
(2) (1876) 34 L.T. 800.
(3) (1922) 2 A.C. 250.
(4) (1938) 38 S.R. (N.S.W.) 597; 55 W.N. 223.
(5) (1859) 1 E. & E. 825 [120 E.R. 1120].
(6) (1853) 8 Ex. 819 [155 E.R. 1585].
(7) (1919) 36 W.N. (N.S.W.) 59.

H. C. OF A. 1941.

ANDERSON v. G. H. MICHELL & SONS LTD.

Rich A.C.J. Dixon J. McTiernan J.

> "Should any dispute arise hereunder between the purchaser and vendor the matter shall be settled by arbitration in the usual manner (as provided by the *Arbitration Act* 1891-1934 (South Australia) or any statutory modification or re-enactment thereof for the time being in force) within twenty days of the date nominated herein for delivery to be given and taken."

The respondents in refusing finally to accept delivery of the lambs stated as reasons that the lambs were unfit to take, and that the appellant had failed to comply with the contract with regard to time and place of delivery. At the trial the respondents failed to establish these and other justifications which they set up, and they have not attacked the findings against them. They relied, however, upon the arbitration clause, saying that no reference was sought or obtained within the twenty days or at all and that before writ issued, that time had expired, a defence which was held fatal to the action.

Upon analysis, the defence appears to include two distinct grounds. One is that by the contract, in case of dispute, no cause of action is complete unless an arbitration has taken place, or arbitration is made a condition precedent to bringing suit. The other is that the time limit stated for arbitration is, *scilicet* by implication, made applicable also to the commencement of an action or other proceeding to enforce a disputed claim, so that even if an action commenced within the twenty days might be maintained although there had been no reference, yet no action brought after that time could succeed. Upon the facts what might be a third position does not arise, namely, that an arbitration would be futile if it was not demanded and did not take place within the twenty days.

In our opinion neither of the two grounds forming the defence raised under the arbitration clause is sustainable. They both depend upon the interpretation of the contract, and so the appeal turns in each case on what is properly a question of construction. But it is necessary to be clear, particularly with reference to the first ground, what precisely that question is.

An agreement to refer disputes, whether existing or future, to arbitration could, apart from statute, be enforced only by an action for damages against the party who refused to carry it out. Statute now gives the courts a discretion to stay an action if the claim falls within an agreement to refer, a power which in the present case the Court was not asked to exercise. If a contract creates unconditional liabilities no agreement, whether contained in the same or a subsequent contract, to refer disputes to arbitration will disable the party entitled from enforcing the liabilities by action or will detract from the competence of the court to entertain and determine

the suit. The party may by suing expose himself to an action for breach of his contract to refer but, having regard to the measure of damages, that is a risk which he could lightly encounter.

Apart from the statutory power of staying an action, the most express agreement to refer to arbitration and not to litigate could not prevent recourse to the courts or exclude their jurisdiction; that is, where the liabilities in question are absolute: Cf. *Re Smith & Service and Nelson & Sons* (1), per *Bowen* L.J.; *Doleman & Sons* v. *Ossett Corporation* (2), per *Fletcher Moulton* L.J.

But that assumes the existence of a complete cause of action, of a liability ripe for enforcement. A contract so framed that it would produce no unconditional liabilities, no liabilities which did not depend upon the award or determination of arbitrators, referees or other third parties gives, unless renounced, no complete cause of action until an award or determination has been obtained. Such a contract is considered not as attempting either to impose a restraint upon the enforcement by legal process of actionable rights or to exclude the jurisdiction of competent courts, things bad on grounds either of repugnancy or of public policy, but as doing no more, and no less, than deferring the conditions under which a contractual right shall arise, a matter governed by the intention of the parties. The obligation undertaken by a contracting party may be to pay a sum ascertained or fixed by a specified person or upon his certificate that certain events have happened or certain conditions have been fulfilled, or it may be to pay only when, if there be a dispute, it has been settled in some appointed manner, as by arbitration. In all such cases, since the jurisdiction of the courts is to enforce rights and obligations according to their tenor, and since without a complete cause of action no action will lie, the intention of the parties is carried into full effect, and no question is regarded as arising as to the principle that the jurisdiction of the courts may not be ousted by agreement or the principle that an agreement to refer to arbitration is not enforced specifically but only by an action of damages for breach. The basal distinction is between, on the one hand, the constituent facts and conditions forming the title to substantive rights and, on the other hand, the jurisdictions and remedies provided by law for the enforcement of those rights. Where contract is the source whence substantive rights arise it would be to go beyond the agreement of the parties if a liability, which according to their expressed intention is to be inchoate until arbitration, were treated as unconditional and actionable, though no arbitration had taken place.

(1) (1890) 25 Q.B.D. 545, at pp. 553, 554.
(2) (1912) 3 K.B. 257, at pp. 267, 268.

H. C. OF A. 1941.

ANDERSON v. G. H. MICHELL & SONS LTD.

Rich A.C.J. Dixon J. McTiernan J.

On the other hand, once it appears that liabilities are meant to arise independently of arbitration, complete and absolute even though disputed, then an attempt altogether to replace the appointed legal remedies by a reference to arbitration will be regarded as repugnant and an attempt to exclude the jurisdiction of the courts as contrary to public policy: Cf. *Dobbs* v. *National Bank of Australasia Ltd.* (1). But although this is the basal distinction, an agreement which in point of expression makes arbitration a condition precedent, not to the liability or cause of action, but to the right to bring or maintain an action, is construed as affecting, not the jurisdiction or remedy, but the obligation: See *Board of Trade* v. *Cayzer, Irvine & Co. Ltd.* (2); *Swanson* v. *Board of Land and Works* (3).

Further, "it is not essential in order to exclude a right of action at law that the contract should in terms prescribe that the award of the specially constituted tribunal shall be a condition precedent of any legal proceedings" (*Cipriani* v. *Burnett* (4)). Thus the contract consisting of the rules governing a competition, sweepstake, horse race, or the like, should be interpreted as meaning that "in order to ascertain who is to have the stakes it must first be determined who is the winner, not in the opinion of a jury, but of the persons appointed to decide it, viz. the judge or the stewards": Cf. *Brown* v. *Overbury* (5), per *Alderson* B. But the nature and subject matter of those transactions, as well as common understanding, make such a conclusion inevitable.

In spite of the intermittent appearance of a tendency to search and discover in contracts containing arbitration clauses some ground for saying, notwithstanding the absence of express words, that arbitration is made a condition precedent to liability, it remains true that where there are promises to pay money or to do any act or acts expressed without reference to arbitration an agreement in the same instrument to refer disputes to arbitration is to be treated as distinct and collateral unless the contrary appears from express language or necessary intendment: See *Dawson* v. *Fitzgerald* (6), per *Jessel* M.R.

There are no express words in the contract under decision making arbitration a condition precedent to liability or suit, and to produce that result some positive reason must appear showing that the parties so intended. What ground is there for saying that the mind of the parties was not simply that all disputes should be submitted to

(1) (1935) 53 C.L.R. 643, at pp. 652-654.
(2) (1927) A.C. 610.
(3) (1928) V.L.R. 283.
(4) (1933) A.C. 83, at p. 88.
(5) (1856) 11 Ex. 715, at p. 717 [156 E.R. 1018, at p. 1019].
(6) (1876) 1 Ex. D. 257, at p. 260.

arbitration, but involved the further proposition that an arbitration must be held before any obligation could arise or any liability to suit ?

But for the limitation of time, perhaps it might be enough to say that it is an ordinary arbitration clause and that no ground appears for implying such a stipulation. The clause, however, requires that the settlement of disputes by arbitration shall be within twenty days, and this limitation of time is a matter upon which reliance is placed in a double aspect. It is used as evidence of an intention that a speedy determination by arbitration was to be the sole remedy open to buyer or seller ; and this is treated as some warrant for the conclusion that to achieve the result the parties agreed not merely that arbitration should be the exclusive means of settling disputes, but, what is a different thing, that it should be a condition precedent to liability arising or to an action being maintained.

But the presence in the clause of a limitation of time is also used for another and independent purpose. Reliance is placed upon it in support of the second of the two grounds into which, we have said, the defence that proved fatal to the action may be analysed, namely, the contention that an implication should be made that not only shall the time for arbitration be confined to twenty days from the nominated date for delivery, but the time for commencing an action shall likewise be so limited.

Though there is thus a double aspect to the use made of or reliance placed upon the limitation of time in the clause, the fact is that the contention depends much more upon the reading given to a number of decided cases than upon any considerations supplied by the contents of the document, and it is necessary to discuss these authorities.

In order of date the first is *Pompe* v. *Fuchs* (1876), a decision of the Queen's Bench Division reported only in the *Law Times Reports* (1), and given upon a demurrer to a defence. The proceedings were under the *Judicature Act* at a time when demurrer was still retained. The terms of the contract must be collected from various paragraphs in the pleadings. It is not set out textually. The transaction was a sale of jute to be shipped from Calcutta to London. The action was brought by the buyers against the sellers, and its purpose was to recover under an express provision of the contract a " fair allowance " because the jute was found inferior to the average quality of jute previously imported. The provision was to the effect that the seller guaranteed the jute to be of the average quality of jute of that mark as hitherto imported, and agreed that if it were found on final landing to be inferior a fair allowance should be made to

(1) (1876) 34 L.T. (N.S.) 800.

H. C. OF A. 1941. ANDERSON v. G. H. MICHELL & SONS LTD. Rich A.C.J. Dixon J. McTiernan J.

the buyers. The contract was, however, made subject to the terms that "in the event of any dispute arising out of the contract, every such dispute to be referred . . . to two London jute brokers (or their umpire) for arbitration, buyer and seller each nominating one, such reference to be subject to the provisions of the *Common Law Procedure Act* 1854 and the award may be made a rule of . . . court . . . , on application of either party. Any reference to arbitration to be demanded within fourteen days of final landing of the jute." It is to be noticed that the action was brought not for damages as for breach, but for a "fair allowance" as stipulated, and that the "fair allowance" had not been agreed or fixed. Further, the contract required that the inferiority should be found on final landing, and it required that arbitration should be demanded within fourteen days of final landing. Arbitration had not been demanded until after the expiration of that time. What, as we understand it, the Court decided is that the "fair allowance" must in case of dispute be fixed by arbitrators, that is to say, it was a contract to pay what the arbitrators considered a fair allowance and not what, according to the findings of a judge or a jury, was a fair allowance. *Cockburn* C.J., whose judgment alone is reported, said: —"It appears to me that there is here no separate agreement to refer to arbitration, but the whole contract must be read together. One term of the contract is that a fair allowance is to be made for inferior quality, but no complaint about quality is to be entertained, and no allowance to be made, unless the reference to arbitration, which is the remedy provided for the settlement of such a complaint, be demanded within fourteen days of the landing of the jute" (1). It will be seen that (*a*) it is the combination of the provision as to a fair allowance with the arbitration clause and the time limit that led to the conclusion that no allowance for inferior quality was recoverable unless settled by arbitration, and (*b*) the conclusion is confined to complaints of inferior quality, and does not extend to disputes about other matters. In *Pinnock Bros.* v. *Lewis & Peat Ltd.* (2) *Roche* J., as he then was, expressed the view that the decision was based upon terms in the contract which are not set out in the reported statement of the facts. It is true that at least two paragraphs of the defence which might be expected to refer to the contract are omitted from the report, and apparently *Roche* J. thought that the statement of *Cockburn* C.J., that no complaint about quality was to be entertained and no allowance made unless &c., was founded upon some express term of the contract. But, however this may be, the case does no more than provide a further

(1) (1876) 34 L.T. (N.S.), at p. 801. (2) (1923) 1 K.B. 690, at p. 696.

example of what is a commonplace, that is, of an agreement to pay what in the opinion of third persons is fair and ought to be paid.

In *Atlantic Shipping & Trading Co. Ltd.* v. *Louis Dreyfus & Co.* (1) the question for decision was whether a charterer's action against a shipowner for damages arising from the unseaworthiness of the ship must fail because the charterer had not claimed arbitration or appointed an arbitrator within three months of the final discharge of the vessel. The charter contained an arbitration clause which concluded as follows:—"Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred." In the House of Lords this was construed as meaning that a "cause of action shall not be complete . . . unless the specified conditions have first been satisfied" (per Lord *Sumner* (2), in whose opinion Lords *Buckmaster*, *Atkinson* and *Carson* concurred). But because of the restriction of liability which would result from the time bar the clause was construed as not operating upon the underlying condition of seaworthiness. The Court of Appeal (3) had regarded the provision that non-compliance meant waiver as against public policy, because, as Lord *Sumner* explains, they regarded it as meaning that the charterer was to have no access to His Majesty's courts for raising his claim. Thus the question was not between arbitration as a condition precedent and a collateral agreement for arbitration; but between an invalid attempt actually to exclude jurisdiction or, at all events, recourse to the courts, and arbitration as a condition precedent. Plainly the case turned entirely on the express statement that the claim should be deemed to be waived and absolutely barred. Lord *Dunedin's* opinion contains some expressions which ought not, perhaps, to be read too literally—See per *Scrutton* L.J. in *Czarnikow* v. *Roth, Schmidt & Co.* (4)—but they do not affect the present case.

In *Ayscough* v. *Sheed Thomson & Co. Ltd.* (5) no question arose, or was referred to, with respect to the distinction between arbitration as a condition precedent and a collateral agreement for arbitration, but incidentally the meaning was considered of a provision that a reference with respect to the quality of goods should be claimed within three days after the landing of the goods sold or after the sighting of the draft or of the received invoice. The three days had expired, but afterwards the parties signed submissions referring the dispute to arbitrators, and they dismissed the claim on the ground that it

(1) (1922) 2 A.C. 250.
(2) (1922) 2 A.C., at p. 258.
(3) (1922) 37 T.L.R. 417.
(4) (1922) 2 K.B. 478, at p. 489.
(5) (1923) 129 L.T. 429 (C.A.); (1924) 131 L.T. 610 (H.L.).

H. C. OF A. 1941.

ANDERSON v. G. H. MICHELL & SONS LTD.

Rich A.C.J. Dixon J. McTiernan J.

was out of time. In an action for damages subsequently brought by the buyer the Court of Appeal and the House of Lords held that the decision of the arbitrators was conclusive, but Lords *Cave*, *Finlay* and perhaps *Wrenbury* made observations suggesting that they agreed in the construction given by the arbitrators to the clause. Lord *Cave* (1) said that there was a good deal to be said for the view that the rule means that where the objection is to the quality or condition of goods—a matter which it seemed ought to be investigated as promptly as possible—then the claim must be made and arbitration claimed within the three days or the claim fails altogether. His Lordship intended by the word "altogether" to cover legal proceedings, as appears from what he had said earlier. But the clause was not a general arbitration provision; it formed part of a warranty as to quality; and it is clear that the tentative views expressed have their source in the special nature of the provisions.

The decision of *Lush* and *Bailhache* JJ. in *H. Ford & Co. Ltd.* v. *Compagnie Furness (France)* (2) depends entirely on the effect of a clause that on non-compliance with the agreement to refer within a stipulated time the claim should be deemed to be waived and absolutely barred. On the other hand, *Roche* J. in *Pinnock's Case* (3) treated a general arbitration clause as collateral notwithstanding that it was accompanied by a stipulation that notice should be given within fourteen days from specified events, varying according to the nature of the dispute, and he did not extend the time limit from arbitration to proceedings by action.

In our opinion, the foregoing authorities do not justify a construction of the arbitration clause in the contract now in question which would make arbitration a condition precedent to liability, or to the commencement of an action, or a construction which would convert the time expressly provided for arbitration into a limitation of the period within which an action might be brought.

The parties did not turn their attention to the question whether they would make arbitration a condition precedent to cause of action or suit. They made an absolute contract creating unconditional rights and liabilities covering a large variety of matters incident to a sale, and they superadded an arbitration clause. In this they stipulated, in the interests of expedition no doubt, that the arbitration should take place within twenty days of delivery. But they went no further.

(1) (1924) 131 L.T., at p. 612.
(2) (1922) 2 K.B. 797.
(3) (1923) 1 K.B. 690.

To give the clause a wider operation than its language expresses needs implication, and we can see no ground upon which an implication could be based.

In the Supreme Court of South Australia judgment was given for the defendants on the authority of *Hain* v. *Ingram* (1). There the contract was not unlike that in the present case, but the arbitration clause began by saying that should any dispute occur in respect of the contract or the property sold the same should not vitiate the contract, but the matter in dispute should be settled by arbitration. Possibly this may suggest that the parties regarded a dispute as something which would spell failure of performance, and required arbitration as a means of carrying through the contract. Even so it would seem to be hardly a sufficient reason for saying that arbitration was made a condition precedent to action or cause of action. But the decision of the Full Court of New South Wales in favour of the defendant appears to concede that arbitration was not a condition precedent, and to proceed upon the view that the limitation of time extended to legal proceedings. *Jordan* C.J. said: "It is clear that such a provision would not oust the jurisdiction of a court of law to settle disputes by litigation notwithstanding the agreement to refer them to arbitration; but, in our opinion, a party who invokes the jurisdiction of a court cannot thereby free himself from conditions as to time which would bind him if he had recourse to arbitration in the manner contemplated by the contract" (2).

With respect, it appears to us that in the absence of some express agreement limiting the time for commencing an action or some sufficient indication of an actual intention so to agree, the party had nothing to free himself from. Restrictions upon a contracting party's capacity or opportunity to enforce the contract ought not lightly to be implied.

For the reasons already given we are unable to agree in the view taken in *Hain* v. *Ingram* (1) and followed in the Supreme Court of South Australia.

We think that the appeal should be allowed, the judgment of the Supreme Court should be discharged, and in lieu thereof interlocutory judgment should be entered for the plaintiff for damages to be assessed. The cause should be remitted to the Supreme Court for the assessment of damages and otherwise to be dealt with according to law.

(1) (1938) 38 S.R. (N.S.W.) 597; 55 W.N. 223.

(2) (1938) 38 S.R. (N.S.W.), at p. 601; 55 W.N., at p. 225.

H. C. OF A. 1941. ANDERSON v. G. H. MICHELL & SONS LTD.

The defendants respondents should pay the costs of the appeal and of the action up to the date of the judgment appealed from: further costs to be dealt with by the Supreme Court.

Appeal allowed. Judgment of the Supreme Court discharged and in lieu thereof enter interlocutory judgment for the plaintiff for damages to be assessed. Case remitted to the Supreme Court for assessment of damages and otherwise to be dealt with according to law. Costs of the appeal and of the action up to the date of the judgment appealed from to be paid by the respondents: further costs to be dealt with by the Supreme Court.

Solicitors for the appellant, *Lempriere Abbott & Cornish.*
Solicitors for the respondent, *Thomson, Buttrose, Ross & Lewis.*

C. C. B.