

[HIGH COURT OF AUSTRALIA.]

MINISTER FOR SUPPLY AND DEVELOPMENT AND ANOTHER } APPELLANTS ;
DEFENDANTS,

AND

SERVICEMEN'S CO-OPERATIVE JOINERY MANUFACTURERS LIMITED AND ANOTHER. } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Sale of Goods—Passing of property—Specific goods in deliverable condition—Purchaser in possession of goods as bailee—Contract of sale requiring “net cash before delivery.”—Seller’s right of action for price though property has not passed—Sale of Goods Act 1895-1943 (No. 630 of 1895—No. 36 of 1943) (S.A.), ss. 17, 18,* 28, 49.*

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March 6-8;

The Commonwealth let to S. Ltd. premises which contained machinery the property of the Commonwealth and permitted the tenant to use the machinery while negotiations for its purchase by the tenant were proceeding. Subsequently a contract for the sale of the machinery to S. Ltd. was entered into in terms of a document dated 3rd October 1946 which stated: “Net cash before delivery. £3,243 1s. 8d. . . . Delivery obtainable from” the leased premises. The purchase price was never paid. The Commonwealth, by letter, demanded payment of the price and stated that, if it was not paid, legal proceedings would be taken for its recovery. Thereafter the Commonwealth obtained possession of the machinery by resuming possession of the leased premises. S. Ltd. proceeded against the Commonwealth for detinue and alternatively conversion of the machinery, claiming that the property therein had passed to it on 3rd October 1946 by virtue of rule 1 of s. 18 of the *Sale of Goods Act 1895-1943* (S.A.) and, in the alternative, that the Commonwealth’s demand for payment of the purchase price acknow-

SYDNEY,
April 26.
Latham C.J.,
Williams and
Webb JJ.

* The provisions of these sections, so far as here material, are set out in the judgment of Latham C.J., *post*.

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ledged that the property had passed. It contended that, even if s. 18 of the Act did not apply, a finding by the trial judge that the property in the machinery had passed to it was warranted by the letter of demand and the circumstances generally of the case.

Held :—

(1) The effect of the term of the contract, "Net cash before delivery", was that the property in the machinery was not to pass to S. Ltd. until the price had been paid.

(2) The Commonwealth was not debarred by its demand for payment of the purchase price from asserting its proprietary right to the machinery. By *Latham C.J.* and *Williams J.* (*Webb J.* dissenting), the contract, by requiring payment before the passing of the property, gave the Commonwealth a right of action for the price (as distinct from a right to recover damages for a breach of the contract) notwithstanding that the property had not passed; there was, therefore, no inconsistency between the letter of demand and the claim of the Commonwealth that the property had never passed. By *Webb J.*, in demanding payment of the price, the Commonwealth did not take the stand that delivery had been given by it and accepted by S. Ltd., but, in intimating that proceedings would be taken to recover the price, it did take such a stand; nevertheless, it did not appear that S. Ltd. had accepted the letter of demand as determining the matter, and the evidence was not sufficient to support a finding that there had been constructive delivery of the machinery so as to pass the property to S. Ltd.

Decision of the Supreme Court of South Australia (*Paine A.J.*) reversed.

APPEAL from the Supreme Court of South Australia.

In an action in the Supreme Court of South Australia the plaintiffs were Servicemen's Co-operative Joinery Manufacturers Ltd. and Geoffrey Thomas Clarke and the defendants were the Minister for Supply and Development and the Commonwealth of Australia.

The plaintiffs' statement of claim was substantially as follows :—

1. The plaintiff Servicemen's Co-operative Joinery Manufacturers Ltd. (hereinafter called the plaintiff society) is a society registered under the *Industrial and Provident Societies Act 1923-1935 (S.A.)*.

2. By two debenture trust deeds dated 21st February 1946 and 18th October 1946 respectively between the plaintiff society and the plaintiff Clarke as trustee for certain debenture holders the plaintiff society charged in favour of the plaintiff Clarke payment of all moneys for the time being secured by the said deeds upon its undertaking and all its property present and future whatsoever and wheresoever.

3. The plaintiff society on or about 17th January 1949 was and still is the owner of a certain wood-working machine and equipment situated at Salisbury in the State of South Australia valued at the sum of £5,726 10s. 0d.

4. On 17th January 1949 the plaintiff Clarke pursuant to the terms of the deed dated 21st February 1946 as trustee for the debenture holders thereunder or alternatively as receiver and manager under the terms of the deed entered into and took possession of the undertaking of the plaintiff society and all its property present and future, including the said wood-working machine and equipment.

5. On 18th January 1949 the defendants, by a letter written and sent by their solicitor, the Commonwealth Crown Solicitor, to the plaintiffs' solicitors, claimed that the wood-working machine and equipment referred to in par. 3 hereof was the property of the defendants or one of them and that neither the plaintiff society nor the plaintiff Clarke as such trustee as aforesaid had any right to dispose of the same by way of sale or otherwise howsoever and claimed delivery of the wood-working machine and equipment to the defendants.

6. On or about 9th March 1949 the defendant Commonwealth in pursuance of a notice of acquisition under the *Lands Acquisition Act* 1906-1936 went into possession of premises at Salisbury formerly occupied by the plaintiff society in which the wood-working machine and equipment was then and still is situated and thereby obtained possession of the wood-working machine and equipment and wrongfully deprived the plaintiff Clarke of the possession thereof and detained and still detains the same from the plaintiffs and refuses to deliver the same to the plaintiffs or to either of them.

7. By reason of the facts set out in the last preceding paragraph the defendant Commonwealth of Australia converted the wood-working machine and equipment to its own use and wrongfully deprived the plaintiffs or one or other of them of the same.

The plaintiffs claim: 1. (a) A declaration that the plaintiff society is the owner of the wood-working machine and equipment and that the plaintiff Clarke is entitled to the immediate possession of the same and that the defendants are not the owners nor is either of them the owner thereof and that they have not nor has either of them any lien or interest therein. (b) Such further or other order as to the court may seem fit. 2. (a) An order for the return of the wood-working machine and equipment or £5,726 10s. 0d. its value to the plaintiff society or alternatively

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to the plaintiff Clarke. (b) Damages for the detention of the wood-working machine and equipment at the rate of £10 per week from on or about 9th March 1949 up to the date of the return of the same. 3. Alternatively damages for the conversion of the wood-working machine and equipment.

The defence was substantially as follows :—

1. The defendants do not admit that the plaintiff society is a society registered under the *Industrial and Provident Societies Act* 1923-1935.

2. The defendants do not admit that there is any, or any valid, debenture trust deed between the plaintiff society and the plaintiff Clarke.

3. The defendants deny that the plaintiff society is or was at any material time the owner of the wood-working machine and equipment referred to in par. 3 of the statement of claim or any part thereof and say that the machine and equipment is and was at all material times the property of the Commonwealth of Australia or of the Minister for Supply and Development and they say that there has never been any transaction between either of the defendants and the plaintiff society or any one else whereby the plaintiff society became the owner of the machine and equipment or any part thereof or whereby either defendant parted with any interest in the machine and equipment.

4. The defendants do not admit that the plaintiff Clarke duly or at all entered into and took possession of the undertaking of the plaintiff society or of its property or of the machine and equipment either as alleged in par. 4 of the statement of claim or otherwise.

5. The defendants admit that the Commonwealth Crown Solicitor as solicitor and agent for the Commonwealth sent the letter of 18th January 1949 referred to in par. 5 of the statement of claim.

6. The Commonwealth admits that by notification under the *Lands Acquisition Act* 1906-1936 published in Commonwealth of Australia *Gazette* No. 30, dated 12th February 1948, it acquired an interest in land on which the machine and equipment were situated at the date of the notification and it admits that it duly acted in pursuance of such notification by taking possession of the land, but it denies that it thereby or at all obtained or had possession of the machine and equipment or any part thereof or that it thereby or at all deprived the plaintiff Clarke of the possession thereof or of any part thereof or that either plaintiff has ever asked for or been refused possession of or delivery of the machine and equipment or any part thereof or that it detained or detains

from either plaintiff the machine and equipment or any part thereof.

7. The defendants deny that they have or that either of them has converted the machine and equipment or any part thereof to its or his own use or has wrongfully deprived the plaintiffs or either of them of any part of it.

8. The defendants deny that the machine and equipment is of the value of £5,726 or any sum approximating that amount.

The reply of the plaintiffs was substantially as follows:—

1. As to pars. 1 and 2 of the defence the plaintiffs join issue.

2. As to par. 3 of the defence the plaintiffs join issue on the denials contained therein. The plaintiffs deny and each of them denies that the wood-working machine and equipment are the property of the Commonwealth of Australia. The plaintiffs admit and each of them admits that the wood-working machine and equipment was prior to 3rd October 1946 the property of the defendant Commonwealth but say that the machine and equipment was on that day sold by the defendant Commonwealth to the plaintiff society and that the property therein passed on that date to the society. Save as aforesaid the plaintiffs deny the allegations contained in par. 3 of the defence.

3. As to pars. 4, 5, 6, 7 and 8 the plaintiffs join issue on all the allegations contained therein in so far as the same consist of denials or refusals to admit any allegations in the statement of claim.

4. The defendants are estopped from saying that the wood-working machine and equipment are the property of the defendant Commonwealth by reason of the following facts:—(a) The defendants have permitted the machine and equipment to remain in the possession of the plaintiff society from 3rd October 1946 until 17th January 1949 and in the possession of the plaintiff Clarke as trustee for the debenture holders or alternatively as receiver and manager under the terms of the deed referred to in par. 4 of the statement of claim from 17th January 1949 to 18th January 1949 without making any claims to the ownership thereof, but have at all times during the said period treated the plaintiff society as the owner thereof and themselves or one of them as creditors or a creditor of the plaintiff society entitled to the purchase price of the machine and equipment. (b) By letters dated 20th November 1946 and 22nd April 1947 the defendants demanded payment of the purchase price of the machine and equipment from the plaintiff society without making any claim to the ownership thereof. (c) At a meeting of the unsecured creditors of the plaintiff society held on 19th May 1947 the Munitions Department as representing the

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defendant Commonwealth was shown in the list of unsecured creditors presented to the said meeting as an unsecured creditor of the plaintiff society for the sum of £3,243 1s. 8d. the purchase price of the machine and equipment and the machine and equipment were included in a list of assets of the society and a representative of the defendant Commonwealth attended at the meeting and was supplied with a copy of the list of unsecured creditors and assets respectively. (d) At the meeting a resolution was passed unanimously that subject to the consent of the Minister of Munitions on behalf of the defendant Commonwealth all unsecured creditors should hold over their claims for eighteen months, that thenceforward all purchases by the plaintiff society would be on the basis of cash on delivery and all working expenses of the plaintiff society be paid for in cash and a supervisory committee was appointed from amongst the creditors then present. (e) The supervisory committee held a meeting thereafter at which a representative of the defendant Commonwealth attended and the affairs of the plaintiff society were carried on in accordance with the said resolution. (f) Neither at the said Meeting referred to in sub-par. (c) hereof nor at the meeting of the said committee referred to in sub-par. (e) hereof nor in any other way until 18th January 1949 did the defendants make any objection to the lists of unsecured creditors and of assets referred to in sub-par. (c) hereof or make any claim to the ownership of the wood-working machine and equipment. (g) By reason of the facts set out in sub-paragraphs (a) to (f) hereof the plaintiffs say that the defendants impliedly represented to the plaintiff society and to the plaintiff Clarke as trustee for the debenture holders or alternatively as receiver and manager under the terms of the deed that they acknowledged the ownership of the machine and equipment by the plaintiff society and that the defendant Commonwealth was only an unsecured creditor of the plaintiff society for the purchase price thereof. (h) By reason of the said representations the plaintiff society and the plaintiff Clarke as such trustee for the debenture holders or alternatively as such receiver and manager as aforesaid acted to their detriment in that the affairs of the plaintiff society were carried on in pursuance of the resolution referred to in sub-par. (d) hereof on the assumption and in the faith that the property in the machine and equipment was in the plaintiff society and that the defendant Commonwealth was merely a creditor for the purchase price thereof and the plaintiff Clarke as such trustee or alternatively as such receiver and manager as aforesaid altered his position on the faith of the said representations in that he and the debenture holders per-

mitted the affairs of the plaintiff society to be carried on as aforesaid and refrained from exercising any of his or their rights under the debenture trust deeds referred to in the statement of claim from 19th May 1947 until 17th January 1949.

5. By reason of the facts set out in the last preceding paragraph the defendants have waived any claim which they may have had to the ownership of the machine and equipment or any right of disposal of the machine and equipment (if any, which is denied) which might have been reserved by them by the terms of the contract of sale thereof of the plaintiff society.

On the trial of the action before *Paine* A.J. it appeared that the plaintiff society, which was registered under the *Industrial and Provident Societies Act* on 1st February 1946, entered into negotiations with departments of the Commonwealth for the purchase of the wood-working plant referred to in the pleadings, which was situated as to the greater part in premises known as the carpenters' shop, being part of an ammunition factory belonging to the Commonwealth at Salisbury (S.A.), and as to rest of the plant in what was known as the paint shop (also at Salisbury), and also for a lease of the two shops. The society obtained the lease and entered into possession of the premises and of the wood-working plant on 8th March 1946. Thereafter it used the premises and plant for the purposes of its business. While it had possession of the plant the society—as the trial judge found—“kept it maintained and repaired at its own expense, insured it and in all respects acted as owner of the plant”. On 29th August the society sent to the Directorate of Machine Tools and Gauges an order, No. 307, stating: “Please supply the under-mentioned goods on our account” and referring to a list, attached to the order, which itemized the wood-working plant and stated a price for each item. On 3rd October 1946 the Commonwealth Disposals Commission sent the society a “sales advice” to the effect that “your order No. 307, 29/8/46 is accepted for . . . the items, and at the prices set out hereunder. . . . Wood-working machines and equipment as per attached schedule” (which set out the plant in question). “Net cash before delivery £3,234 1s. 8d. . . . Delivery obtainable from Carpenters Shop, Ammunition Factory, Salisbury, S.A.” The society made no payment on account of the purchase price. At the meetings referred to in par. 4 (c) and (e) of the plaintiffs' reply as above set out a representative of the Commonwealth was present, but he stated that he had no authority to vote or give any consent. Further details of the facts appear in the judgments hereunder.

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Paine A.J. was of opinion that, although no price had been agreed on, there was an oral contract for the sale of the plant when the society entered into possession of the leased premises in March 1946 and that, unless the position was altered by the "sales advice" of 3rd October 1946, there had been a delivery of the plant which passed the property therein to the society in March 1946. As to the "sales advice" his Honour said: "Seeing that delivery had been completely given on or about 11th March 1946, the phrase 'net cash before delivery' appears entirely inapt to the existing position at 3rd October 1946. . . . I can see no proof of any intention by the parties . . . that the property was not . . . to pass to the society when delivery of possession was actually given and taken in March 1946, nor can I see any evidence that the term 'net cash before delivery' in view of the actual position on 3rd October 1946 was intended as a condition which would suspend the passing". He concluded that the property in the plant had passed to the society, at latest, on 3rd October 1946 and that as on 17th January 1949 the society was the owner of the plant and Clarke was entitled to possession thereof. To give the parties an opportunity to agree on the form of the final order, his Honour adjourned further consideration of the action. The action subsequently came on for further consideration before *Napier* C.J., and judgment was entered as follows:—Declare that the plaintiff society is and was on the 17th day of January 1949 the owner of the wood-working machine and equipment referred to in the statement of claim and that the plaintiff Geoffrey Thomas Clarke is and was on the 17th day of January 1949 entitled to the immediate possession thereof and that the defendants are not and were not on the said 17th day of January 1949 nor is or was either of them on that date the owner or owners thereof and that they have not and had not on the said 17th day of January 1949 nor has or had on the said date either of them any lien or interest thereon; adjudged that the plaintiffs do recover against the defendants the sum of £4,897 10s. 8d. and their costs of action to be taxed.

From this decision the defendants appealed to the High Court.

H. G. Alderman K.C. (with him *M. C. Kriewaldt*), for the appellants. There was no evidence to support the view of *Paine* A.J. that there was a contract for the sale of the goods in question in March 1946. In the absence of such a contract there could not at that time have been a passing of the property as on a sale. Moreover, his Honour's views in this regard are inconsistent with the case

presented by the plaintiffs on the pleadings and at the trial. In par. 2 of their reply the plaintiffs admitted that the goods were the property of the Commonwealth prior to 3rd October 1946 but alleged that on that date the property passed to the society. The only contract relied on by the plaintiffs was that constituted by the order of 29th August and the sales advice of 3rd October 1946; that is to say, a contract necessarily in the terms of the sales advice. *Paine A.J.* erroneously treated the contract thus constituted as "unconditional" within the meaning of rule 1 of s. 18 of the *Sale of Goods Act* 1895-1943 (S.A.). The term "net cash before delivery" cannot be dismissed as irrelevant simply because the plaintiffs were allowed to use the goods before sale. It is part of the contract, and effect must be given to it. The only construction to which it is reasonably open is that the property in the goods is not to pass until delivery and that the price must first be paid. Pending fulfilment of the contract by the plaintiffs, they did not even have possession of the goods as against the defendants. The plaintiffs were gratuitous bailees of the goods and were in possession merely as agents for the owners. The fact that the defendants through their solicitor subsequently demanded payment of the purchase price has no such significance as the plaintiffs seek to attach to it. Even if it was inconsistent with the contract, it could not vary the terms of the contract. Moreover, there is no inconsistency. Payment of the price is a condition precedent to delivery. The contract, therefore, gives the defendants a right to recover the price before delivery; their remedy is not limited to damages for breach of contract. [He referred to the *Sale of Goods Act* (S.A.), ss. 28, 49; *Brandt v. Bowlby* (1); *James v. The Commonwealth* (2); *Benjamin on Sale*, 7th ed. (1931), p. 892.]

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[THE COURT intimated that it did not at this stage desire to hear counsel for the appellants on the question of estoppel.]

K. L. Ward K.C. (with him *J. J. Bray*), for the respondents. The ultimate conclusions of *Paine A.J.* do not necessarily go beyond the scope of the pleadings. His conclusions are not dependent on the view which he expresses tentatively as to the existence of an oral contract at an early stage. It is true that he refers to his "conclusion" that the property in the goods passed in March 1946; but the main significance of his references to what took

(1) (1831) 2 B. & Ad. 932 [109 E.R. 1389]. (2) (1939) 62 C.L.R. 339, at p. 377.

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place before 3rd October 1946 is in relation to the conduct of the parties as throwing light on their intention as to the passing of the property, a matter to which s. 17 (2) of the *Sale of Goods Act* required him to have regard. It is submitted that he correctly applied rule 1 of s. 18 of the Act to the sales advice of 3rd October 1946. The term "net cash before delivery" does not prevent the contract from being unconditional within the meaning of that rule. This is made clear by the concluding words of rule 1 referring to the postponement of the time of delivery; they show that a requirement of payment before delivery is not a "condition" which will take a case out of the rule. Delivery and the passing of the property need not coincide. Moreover, it is—as *Paine A.J.* indicated—inapt to speak of payment before delivery when the party contracting as purchaser already has the goods, and it is not a provision which shows an intention that the property is not to pass until payment. It is further submitted that, even if the proper construction of the sales advice is against the plaintiffs, the position was altered by the letter of 22nd April 1947, referred to on the matter of estoppel in par. 4 (c) of the plaintiffs' reply. This letter, which was written by the Commonwealth Crown Solicitor on behalf of the defendants, demanding payment of the purchase price of the goods, has an importance which is not confined to the question of estoppel. Having regard to the remedies open to the defendants, it is submitted that the letter constitutes an admission that the property in the goods had passed to the plaintiffs. The *Sale of Goods Act*, by s. 49 (2), provides that, if the price is payable on a day certain irrespective of delivery, the seller may maintain an action for the price notwithstanding that the property in the goods has not passed. That is not this case; and, apart from such cases in which the Act expressly gives a right of action for the price, there is no form of action in which the seller can recover the price before the passing of the property. There is no debt until the property has passed. The only remedy lies in damages for a breach of the contract. [He referred to *McEntire v. Crossley Bros. Ltd.* (1).]

[*H. G. Alderman* K.C., by leave, referred to *Colley v. Overseas Exporters* (2).]

Accordingly, a claim such as is made in the letter for the price of the goods is necessarily based on the assumption that the property has passed. This letter is also relied on, together with the other facts mentioned in par. 4 of the reply, as creating an

(1) (1895) A.C. 457, at p. 464.

(2) (1921) 3 K.B. 302, at p. 306.

estoppel as against the defendants, so far, at all events, as the plaintiff Clarke is concerned.

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H. G. Alderman K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Supreme Court of South Australia (*Paine A.J.*) in an action in which the respondents, the Servicemen's Co-operative Joinery Manufacturers Limited and G. T. Clarke, sued for the return of certain wood-working machinery or for damages for its conversion. The plaintiff Clarke is a trustee for debenture holders who have security over all chattels belonging to the plaintiff company. Judgment was given for the plaintiffs for £4,897 10s. 8d.

The machinery in question belonged to the Commonwealth. It was in buildings belonging to the Commonwealth at Salisbury, South Australia, which had been a large munitions plant during the recent war. The plaintiff company took a lease of portion of the premises known as the carpenters' shop. Most of the machinery in question was in that shop at the time when the agreement for the lease was made. Some of the machinery was in another building at Salisbury—a paint shop, of which the company also had a lease. The company wished to buy the machinery and negotiations took place with the Commonwealth for the purchase. A number of departmental documents transferred the responsibility for dealing with the machinery from the Explosives Factory, Salisbury, to the Machine Tools Pool, the selling agent for which was the Disposals Commission. These documents were interpreted by the learned trial judge as constituting, or providing evidence of, a contract between the Commonwealth and the company for the sale of the machinery. His Honour held that the machinery was sold to the plaintiff on or before 11th March 1946—i.e., when the company entered into possession of the carpenters' shop which contained most of the machinery. Examination of the documents shows, however, that these documents do not represent any dealing between the Commonwealth and the company. They were inter-departmental communications which were not brought to the knowledge of the plaintiff company. They merely record steps taken which ended in final approval being given to the transfer of the machinery to the books of the Disposals Commission.

The respondents did not rely upon any contract made in March, either in their pleadings or in argument. They contended that a

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contract for the sale of the machinery was made between the Commonwealth and the company on 3rd October 1946 under which the property in the machinery then passed to the company. If this was the case, then the machinery became part of the security in relation to which the debenture holders have rights, and the only right of the Commonwealth is to sue the company for the price agreed to be paid.

The company was allowed to use the machinery while it was in the buildings of which it had obtained a lease. The legal position of the company was that it was in possession of the machinery as gratuitous bailee for use—under the bailment known as *commodatium*. The Commonwealth could have resumed possession of the machinery at any time.

Between March and October 1946 Commonwealth authorities frequently by telephone and on three occasions by letter asked the company to submit an order for the machinery. The members of the company were ex-servicemen and the Commonwealth gave them some latitude and did not press for the order “as hard as we would otherwise” have done (letter from Area Controller Machine Tools and Gauges, 29th August 1946). But the company did not act in the matter until 29th August 1946, when it sent to the Directorate of Machine Tools and Gauges Order No. 307 in the following terms:—“Please supply the undermentioned goods on our account and forward per . . .” A schedule was attached to this order describing the goods and stating the price of each item. On 3rd October the Commonwealth Disposals Commission, as the selling agent for the Director of Machine Tools and Gauges sent to the company a sales advice in the following terms:—

“Servicemen’s Co-op. Joinery Manufacturers Ltd.,
PENFIELD, S.A.

Dear Sir,

Your Order No. 307, 29/8/46 is accepted for the quantities, the items and at the prices set out hereunder in present condition with all faults, if any, and where now located, and/or in the attachment hereto bearing the same sales advice number as this acceptance:—

Woodworking Machines and Equipment as
per attached schedule.

Net cash before delivery . . £3,243 1s. 8d.

This is the only account you will receive.

Payment to be made to Collector of Public Moneys, 142 North
Terrace, ADELAIDE, S.A.

Delivery obtainable from Carpenters Shop, Ammunition Factory,
Salisbury, S.A.

Your offer to purchase and this acceptance shall constitute the contract. Kindly acknowledge receipt of this communication by return post to Director of Machine Tools and Gauges, 499 Little Collins Street, Melbourne, C.1, quoting Sales Advice No. above.

Yours faithfully,

N. Mackintosh

for Director of Machine Tools and Gauges."

The company did not pay the amount due. Various requests for payment were made, but the company wrote, e.g., on 28th March 1947, saying that they were unable at present "to settle your account", but an assurance was given that "as soon as the plywood position is relieved and we can get back to full production we will finalize your account".

The sales advice sent to the plaintiff company by the Commonwealth Disposals Commission introduced into the transaction terms which were not included in the order sent by the company on 29th August 1946. But the letter of 28th March 1947 to which I have referred and other correspondence shows that the company accepted the terms contained in the counter-offer constituted by the sales advice.

The result, therefore, is that the Commonwealth agreed to sell the machinery specified in the schedule to the order (which is the machinery in respect of which this action is brought) to the company for £3,243 ls. 8d. on the terms of net cash before delivery, and delivery to be obtainable from the Carpenters' Shop, Ammunition Factory, Salisbury.

The rights and obligations under the contract are clear enough. The terms of the contract exclude the ordinary rule that payment and delivery are concurrent conditions—*Sale of Goods Act* (S.A.) 1895-1943, s. 28. Payment, by this contract, has been made a condition precedent to delivery. The vendor becomes bound to deliver under the contract only after the price has been paid. Then delivery is to take place at the carpenters' shop. Most, but not all, of the machinery was in the carpenters' shop, and was in the possession of the company as bailee. As bailee the company could do no more than use the machinery in the place where it was, subject to the right of the Commonwealth to terminate the bailment at any time. The company had no right to remove or dispose of the machinery. If delivery were made under the contract the company would become the owner of the goods and could do as it

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pleased with them. No physical change in the locality of the goods in the carpenters' shop would be required in order to change the possession of the company as bailee into possession as owner. It would be sufficient for the Commonwealth to agree that the company should hold the goods in the capacity of owner and no longer as bailee.

In order to make delivery of the machinery which was in the paint shop, the Commonwealth was bound, but only after payment of the price, to deliver it at the carpenters' shop. Such physical delivery would change the possession of the company from possession as bailee to possession as owner.

The contract plainly contemplates (1) that the first thing to be done is for the company to pay the price; (2) that then, and then only, the Commonwealth must make delivery at the carpenters' shop. These acts are to be performed in the future and there is no difficulty in understanding, or applying to the existing facts, the terms of the contract which relate to them.

But, the plaintiffs contend, delivery had already been made to the company in March 1946 and therefore the provision in the sales advice "net cash before delivery" and the provision as to obtaining delivery at the carpenters' shop had no application to the actual transaction. It is argued that the position was that there was a sale of specific goods for a stated price, that the contract was unconditional, that the property in the goods passed to the plaintiff company when the contract was made, and that the goods were actually delivered to the company. The *Sale of Goods Act* 1895-1943, s. 17, provides:—" (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

Section 18 provides as follows:—" Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—*Rule 1.* Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both be postponed."

It is contended for the plaintiff that these provisions are applicable to the present case and that therefore the property in the

goods passed to the buyer when the contract was made, that is, on 3rd October 1946.

Section 18, however, is introduced by the words "Unless a different intention appears". The parties are at liberty to make their own contract as to the time at which the property in goods is to pass. The *Sale of Goods Act* does not impose any particular contract upon parties to a contract of sale. "There is no rule of law to prevent the parties from making any bargain they please": *Calcutta & Burmah Steam Navigation Co. Ltd. v. De Mattos* (1); and see *Halsbury's Laws of England*, 2nd ed., vol. 29, p. 14. Section 54 of the Act expressly provides that where any right duty or liability would arise under a contract of sale by implication of law it may be negatived or varied by (*inter alia*) express agreement. In the present case the contract included an express term that net cash was to be paid before delivery. This was a condition of the contract, which therefore was not unconditional. The delivery to which reference is made was (1) a delivery under the contract of sale; (2) a delivery which was to take place in the future, after the price had been paid. The meaning of this provision, therefore, is that no delivery was to take place under the contract of sale until net cash had been paid. Nothing was paid at any time and no delivery under the contract took place. The fact that the buyer was in possession as a bailee has no significance in relation to delivery under the subsequent contract of sale. There could be a delivery under that contract only if there was a change in the character of the possession—i.e., from possession as bailee to possession in pursuance of the contract of sale: *Pollock & Wright, Possession in the Common Law* (1888), pp. 57, 74, 75. There was no such change in the character of the company's possession and therefore "net cash before delivery" was completely applicable to the circumstances of the case. The inclusion of this term in the contract shows an intention that the property in the goods was not to pass until they were paid for.

In *McEntire v. Crossley Bros. Ltd.* (2) the House of Lords considered an agreement in writing for the hire of an engine which contained an express provision that upon payment in full the agreement should be at an end and the engine should become the property of the lessee. Lord *Herschell* L.C. said (3):—"Upon an agreement to sell it depends upon the intention of the parties whether the property passes or does not pass. Here the parties have in terms expressed their intention, and said that the property

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(1) (1864) 32 L.J. Q.B. 214, at p. 328. (3) (1895) A.C., at p. 463.
(2) (1895) A.C. 457.

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shall not pass till the full purchase-money is paid. I know of no reason to prevent that being a perfectly lawful agreement."

The Lord Chancellor went on to say that, if other provisions in the contract showed that it was not really the intention of the parties that the property should not pass, the contract would be read as a whole and the intention of the parties would be ascertained accordingly. In the present case there are no terms of the contract which are inconsistent with the property remaining in the vendor until the purchase price was paid, and in my opinion the clear intention of the parties expressed in the provision that net cash should be paid before delivery showed the intention of the parties that the company should not become the owner of the machinery until the price was paid.

It is contended that the Commonwealth, by making a demand for the price in 1946 and 1947 and later, adopted a position which was consistent only with the property having passed, because if the property had not passed the right of the Commonwealth would have been only a right to sue for damages and not a right to sue for the price of the goods. But whether this is the case depends entirely upon the terms of the contract of sale. The price may be made payable at a time before delivery and an action for the price may then be maintained though the property has not passed: see notes to *Pordage v. Cole* (1); *Dunlop v. Grote* (2); *Halsbury's Laws of England*, 2nd ed., vol. 27, p. 151; see also *Benjamin on Sale*, 7th ed. (1931), p. 861: "A seller may well say to a buyer: 'I want the money on such a day, and I will not sell unless you agree to give me the money on that day, whether you are ready or not to accept the goods'; and if these terms be accepted, the seller may recover the whole price of goods although the property remains vested in himself."

In the present case there was an express contract that the price should be payable before the delivery of the goods and the Commonwealth was therefore entitled to demand, and, if it chose to do so, to sue for, the price before any delivery of goods had been made under the contract.

The company was apparently always in financial difficulties, and meetings of its creditors were held in May and August 1947. The Commonwealth was recorded as a creditor by the company. All creditors except the debenture holders were represented as being unsecured. A Commonwealth officer attended each meeting but took no part in the proceedings. It was argued for the respon-

(1) (1669) 1 Wms. Saund. 319 [85 E.R. 449].

(2) (1845) 2 Car. & K. 153 [175 E.R. 64].

dents that the Commonwealth was therefore estopped from denying that the property in the machinery had passed to the company. In my opinion none of the requirements of an estoppel are shown to have existed. No representation was made on behalf of the Commonwealth and neither plaintiff acted upon any such representation.

The appeal should be allowed, the judgment of the Supreme Court set aside, and judgment should be given for the defendants.

WILLIAMS J. This is an appeal in an action tried in the Supreme Court of South Australia by *Paine A.J.*, in which the plaintiffs, the respondents on this appeal, sued the defendants, the appellants on this appeal, whom I shall call the Commonwealth, for the detinue and conversion of certain wood-working machines and equipment and recovered judgment for £4,897 10s. 8d.

The relevant facts can be shortly stated. In March 1946 the plaintiff society was negotiating with the Commonwealth for the purchase of the wood-working machines and equipment in question and for a lease of the carpenter's shop in the ammunition factory at Salisbury, South Australia, where the machines and equipment were situated. On 11th March 1946 the society obtained a lease of this shop and the adjoining paint shop and commenced to carry on a joinery business. The society was allowed to use the wood-working machines and equipment for the purposes of this business pending the conclusion of negotiations for their purchase from the Commonwealth.

The second plaintiff is the trustee of a debenture deed dated 21st February 1946 whereby the society mortgaged its undertaking and all its property present and future, including its uncalled capital, to secure the sum of £3,000 which the debenture holders agreed to advance to the society. On 17th January 1949 this plaintiff entered into possession of the mortgaged property in accordance with the provisions of the deed. On a subsequent date, which does not appear in the evidence, the Commonwealth terminated the lease of the carpenter's shop and the paint shop, as the land was required for an important defence project and entered into possession of the demised premises and thereby acquired possession of the wood-working machinery and equipment.

Although no such claim was made in the pleadings, the learned trial judge was inclined to hold that a contract had been made between the society and the Commonwealth for the purchase of the wood-working machinery and equipment in March 1946. Without going into details, it is sufficient to say that, in my opinion, it is

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clear that no contract was made between the parties until 3rd October 1946. Prior to this date there were negotiations proceeding between the parties for the purchase of the wood-working machinery and equipment and nothing more. In the pleadings the plaintiffs admitted that the wood-working machines and equipment were, prior to 3rd October 1946, the property of the Commonwealth, but claimed that they were sold on that date by the Commonwealth to the society and that the property therein passed on that date from the Commonwealth to the society. The 3rd October 1946 was the date on which the Commonwealth purported to accept the order of the society for the purchase of the wood-working machines and equipment. The acceptance, however, included terms not contained in the order and I am of opinion that it was in law a counter-offer which was accepted by the society by its conduct, particularly by its conduct in stating on 20th March 1947, in reply to a demand for the purchase money made on 20th November 1946, that it would finalise the account as soon as the plywood position was relieved and it could get back to full production. The terms of the contract between the society and the Commonwealth are therefore contained in the document of 3rd October 1946. This provides, *inter alia*, that the purchase price of the wood-working machines and equipment is £3,243 ls. 8d., that the terms of sale are net cash before delivery, that payment is to be made to the Collector of Public Moneys, 142 North Terrace, Adelaide, S.A., and that delivery is obtainable from the carpenter's shop, ammunition factory, Salisbury, S.A.

The society was, as I have said, already in possession of the wood-working machines and equipment and was using them in its business with the consent of the Commonwealth on 3rd October 1946 and it continued in possession of these chattels after that date. But it never paid the purchase money or any part thereof. It was in financial difficulties from the beginning and was forced to call a meeting of its creditors on 19th May 1947. A representative of the Commonwealth attended this meeting, but he made it clear that he had no authority to bind the Commonwealth and that he was only present to observe the proceedings and report to his head office. A financial statement of the society was read to the meeting, which showed the wood-working machines and equipment as part of the assets of the society and the Commonwealth as an unsecured creditor for the unpaid purchase money.

A resolution was passed at the meeting that, subject to the consent of the Commonwealth, the unsecured creditors should postpone payment of their debts for eighteen months, that thence-

forward all purchases by the society should be on the basis of cash on delivery, and that all working expenses of the society should be paid for in cash. On 21st May 1947 the Crown Solicitor wrote to the solicitors for the society referring to the desire of the Commonwealth to terminate the lease of the buildings occupied by the society and to enter into possession thereof on 1st October 1947 as the land was required for an important defence project, and stating that it was not prepared to express its approval of the resolution until it was known what effect the termination of the lease would have on the future plans of the society. Further correspondence on the subject passed between the solicitors, in which the solicitors for the society stated that the society was unwilling to terminate its lease to enable the Commonwealth to take possession on 1st October 1947 unless suitable alternative accommodation was provided, and in which it was stated that the rent which had accrued due since 19th May 1947 would be paid immediately the Commonwealth signified its assent to the proposal. But no assent was ever given.

A second meeting of the creditors of the society was held on 29th August 1947 at which the Commonwealth was again represented, but the representative informed the meeting that no decision had yet been reached as to whether the Commonwealth would consent to the proposals agreed to at the previous meeting for carrying on the business. Nevertheless the creditors present agreed that the society should carry on under the scheme as heretofore. The society carried on business until the trustee for the debenture holders entered into possession of the mortgaged property on 17th January 1949. Considerable losses were made in carrying on the business and as a result the value of the debenture holders' security was considerably depreciated.

The learned trial judge was of opinion that delivery of the wood-working machinery and equipment to the knowledge of both parties had been completely given to the society by the Commonwealth when the society entered into possession of the demised buildings on 11th March 1946 and that the phrase in the document of 3rd October 1946 "net cash before delivery" was entirely inapt to the position existing on that date. He said: "I think it must be taken that all parties concerned knew that delivery had been given and accepted by the society in March 1946". This led him to conclude that the property in the wood-working machines and equipment passed to the society at latest on 3rd October 1946.

I am unable to agree with this conclusion. The contract of sale of the wood-working machinery and equipment was a contract

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for the sale of specific goods. Section 17 (1) of the *Sale of Goods Act* 1895-1943 (S.A.) provides that the property in such goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Section 17 (2) provides that for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. Rule 1 of s. 18 provides that, unless a different intention appears, where there is an unconditional contract for the sale of specific goods, in a deliverable state (as the present goods were), the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. His Honour thought that the conduct of the parties in the present case, particularly the conduct of the Commonwealth in placing the society in physical possession of the wood-working machinery and equipment, in demanding payment of the purchase money in November 1946, and in not claiming that it was more than an unsecured creditor at the meetings of the creditors of the society held on 19th May and 29th August 1947 was consistent, and consistent only, with an intention that the property in the goods should pass to the society when the contract was made.

In my opinion it is impossible to hold that any property in the wood-working machinery and equipment passed to the society in March 1946. Prior to 3rd October 1946 the society was in possession of the chattels as the gratuitous bailee of the Commonwealth pending completion of the negotiations for their purchase. These negotiations ended in a contract between the parties, the terms of which are contained in the document of 3rd October 1946. This document provided that delivery was obtainable from the carpenter's shop. It was submitted for the respondents that this meant physical delivery of the wood-working machinery and equipment. It was therefore contended that the term "net cash before delivery" was quite inapplicable to the circumstances existing when the contract was made. I cannot accept this contention. In my opinion the term "net cash before delivery" imposed a condition that the goods were to be paid for before the property should pass by delivery. The delivery was to be a delivery which would pass the property in the goods and such delivery was to be conditional upon prior payment. Until payment the society was to remain a bailee of the goods and nothing more and the property in the goods was to remain in the Commonwealth: *Barrow v. Coles* (1); *Loeschman v. Williams* (2).

(1) (1811) 3 Camp. 92 [170 E.R. 1316].

(2) (1815) 4 Camp. 181 [171 E.R. 58].

On 3rd October 1946 the society was already in possession of the wood-working machinery and equipment so that, in the event of payment, no further physical delivery would be required, but in order to pass the property it was necessary that the character of the society's possession should change from that of bailee to that of owner. I am unable to agree that the provision that delivery should be obtainable from the carpenter's shop, that is, from the place where the goods, other than the few items removed to the paint shop, were situated on 3rd October 1946, was inapt in the circumstances of the case to apply to a change in the character of the society's possession of the goods from that of bailee to that of owner. It is well established that constructive delivery sufficient to pass the title in chattels may be effected by a change in the character of an uninterrupted custody: *Halsbury's Laws of England*, 2nd ed., vol. 25, p. 214; *Williams on Personal Property*, 18th ed. (1926), p. 74; *Elmore v. Stone* (1); *Marvin v. Wallace* (2); *Dublin City Distillery Co. v. Doherty* (3); *Akron Tyre Co. Pty. Ltd. v. Kittson* (4). The present contract clearly provided that the goods were to be paid for before delivery. It is the duty of the Court to give effect to the intention of the parties to be ascertained from the terms of the contract, and in the circumstances that existed in the present case that intention could only be carried into effect by giving to the word "delivery" a meaning wide enough to include constructive delivery. Section 17 (2) of the *Sale of Goods Act* does no more than give statutory effect to the ordinary principle of construction that the meaning of a contract must be ascertained from its terms read in the light of the surrounding circumstances. The sub-section says that regard shall be had to the conduct of the parties. But the sub-section is not intended to derogate from the established rules of construction of written contracts. The term "net cash before delivery" is clear and unambiguous and in such a case it is a settled rule of construction that the words of a written contract must be construed according to their natural meaning and "cannot be controlled by previous negotiations nor by subsequent declarations or conduct of the parties" (*Halsbury*, 2nd ed., vol. 7, pp. 336, 337). Accordingly the contention of the plaintiffs that the property in the wood-working machinery and equipment passed to the society on 3rd October 1946 and that the Commonwealth was after that date merely an unsecured creditor for the purchase money fails.

There remain for consideration two further contentions advanced by the respondents. (1) That, whatever the true construction of

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(1) (1809) 1 Taunt. 458 [127 E.R. 912].

(2) (1856) 6 El. & Bl. 726 [119 E.R. 1035].

(3) (1914) A.C. 823, at pp. 843 et seq.

(4) (1951) 82 C.L.R. 477.

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the contract might be, the Commonwealth, by demanding payment of the purchase money in November 1946 had elected to proceed on the basis that the property in the wood-working machinery and equipment had been transferred to the society. Unless a different intention appears, the price of goods is not payable unless and until the property therein has passed to the buyer. Until this happens the seller cannot sue for the purchase money. His remedy is to sue for damages for breach of contract. But the parties can make any contract they please with respect to the payment of the price and if they provide that it is to be paid before the property passes, the seller can sue for the price as soon as it becomes payable, for the payment of the price is a condition precedent to the passing of the property. Usually such a contract provides for the payment of the price on a day certain, but in the present case no day of payment is fixed. The purchase money would therefore have to be paid within a reasonable time. If it was not so paid it would become a debt for which the Commonwealth could sue although the property in the wood-working machinery and equipment had not passed to the society. In the letter of 20th November 1946 the Commonwealth said: "It will be appreciated that, as the terms of the sale are 7 days net cash, an early remittance is requested". The contract did not in fact provide for seven days net cash. It only provided for net cash before delivery. But the demand for payment was in no way inconsistent with the Commonwealth retaining the property in the chattels because under the contract the Commonwealth was entitled to retain this property until payment. (2) That the Commonwealth, by its conduct in leaving the wood-working machinery and equipment in the possession of the society and in failing to inform the meetings of creditors that it was not a mere unsecured creditor for the purchase money but claimed to be the owner of the chattels, represented to the creditors, and in particular to the plaintiff Clarke, that the society was the owner of the chattels. But there was nothing unlawful, or even unusual, in the property in the wood-working machinery and equipment remaining in the Commonwealth, although the chattels were in the physical possession of the society. The creditors who were present at the meetings were expressly told that the persons representing the Commonwealth were present merely as observers, and had no authority to bind the Commonwealth. Nothing which they did or omitted to do could amount to a representation by the Commonwealth. The Commonwealth never agreed to the proposals for carrying on the business. It did nothing by which it could be estopped from asserting that it never parted with the property in the wood-working machinery and equipment.

For these reasons I would allow the appeal with costs, set aside the judgment of the Supreme Court, and in lieu thereof give judgment for the defendants with costs.

WEBB J. I agree with the reasons for judgment of the Chief Justice and *Williams J.*, except that I can see nothing in the agreement for sale that enables the Commonwealth to recover the price before delivery. It is true that a vendor and purchaser can make what agreement they like; but here they say nothing about the right to recover the price before delivery. Payment before delivery is provided for, but the question is whether that gives the right to recover the price before delivery.

“Before the Judicature Acts the price of goods sold could be recovered under the common *indebitatus* counts. The count for goods sold and delivered was applicable where the property had passed and the goods had been delivered to the buyer, and the price was payable at the time of action brought. The count for goods bargained and sold was applicable when the property had passed to the buyer and the contract had been completed in all respects except delivery, and the delivery was not a condition precedent to the payment of the price. Now it is sufficient to show facts disclosing either cause of action, but practically the old counts are still used”. *Chalmer's Sale of Goods*, 12th ed. (1893), pp. 137, 138. See also s. 49 (1) of the *Sale of Goods Act* (S.A.).

It will be observed that in the case of each count the price could not have been recovered unless the property had passed. Here, as the Chief Justice and *Williams J.* point out, the property did not pass until delivery. However, s. 49 (2) of the *Sale of Goods Act* provides that if the price is payable on a day certain irrespective of delivery, the seller may maintain an action for the price, although the property in the goods has not passed. But, by the mere provision for payment before delivery, the price did not, in my opinion, become payable on a day certain so as to bring the case within s. 49 (2). “That is not the case of a day being appointed for payment of money and the day happening before the thing which is the consideration for the payment”. See *Stein, Forbes & Co. v. County Tailoring Co.* (1), per *Atkin J.*

The argument that the maxim *id certum est quod certum reddi potest* applied failed, and the argument that payment was not on a day certain unless the day had been fixed by agreement, prevailed in *Muller Maclean & Co. v. Leslie and Anderson* (2). In each case the contract provided for payment against documents. Here it provides for payment before delivery; but that does not make

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(1) (1916) 86 L.J. K.B.D. 448.

(2) (1921) W.N. (Eng.) 235.

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the date of payment certain. Indeed I think this case is *a fortiori*. Further, I am unable to take the view that payment before delivery means payment within a reasonable time. It seems to me that the provision for payment before delivery is intended to do no more than make delivery conditional upon prior payment.

However, the Commonwealth Crown Solicitor demanded payment of the price in his letter of 22nd April 1947 and stated that if it was not paid legal proceedings would be taken for its recovery. As the Commonwealth had no right to recover the price until the property had passed to the society, his letter might be thought to be an acknowledgment that delivery had taken place. In demanding payment of the price the Crown Solicitor did not necessarily take the stand that delivery had been given by the Commonwealth and accepted by the society, but, in intimating that proceedings would be taken to recover the price, I think he did so, as the price could not, in my opinion, have been recovered by action unless there had been delivery, since no day had been named for payment. On the other hand, the society, in acknowledging its liability to pay, as it did in its letter of 28th March 1947, cannot be said to have also taken the stand that constructive delivery had been made: it had undertaken to pay before delivery and the letter may have been nothing more than an acknowledgment of that fact. In these circumstances it would perhaps be going too far to find evidence of constructive delivery in the attitude of the parties as disclosed by this correspondence. It is true that the society now contends that it regarded delivery as having been given and accepted, but that is because it wrongly claims it already had delivery as from 3rd October 1946. There is no evidence, apart possibly from the correspondence referred to, that supports a finding that constructive delivery had taken place after the acceptance of the Commonwealth counter-offer of 3rd October 1946 and, with some hesitation, I think the correspondence does not support a finding of constructive delivery.

I agree that the appeal should be allowed.

Appeal allowed with costs. Judgment of Supreme Court set aside. In lieu thereof judgment for defendants with costs.

Solicitor for the appellants, *K. C. Waugh*, Crown Solicitor for the Commonwealth.

Solicitors for the respondents, *Genders, Wilson & Bray*, Adelaide.

E. F. H.