

[HIGH COURT OF AUSTRALIA.]

ASSOCIATED NEWSPAPERS LIMITED . APPELLANT;
PLAINTIFF,

AND

BANCKS RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. *Contract—Artist—Supply of drawings—"Us Fellers"—"Ginger Meggs"—Inser-
tion on specified page of weekly newspaper—Undertaking by newspaper company
—Condition—Breach going to root of contract—Rescission of contract by artist.*

1951.

SYDNEY,

April 30;

May 1, 2, 11.

—
Dixon,
Williams,
Webb,
Fullagar
and
Kitto JJ.

B., an artist, by contract, agreed, *inter alia*, for the term of ten years commencing on 27th March 1949, for a substantial weekly salary, to devote the whole of his time and attention to the affairs and business of A., a newspaper company, and to use his best endeavours to promote and foster the same to the best of his skill and ability. B. agreed in the course of his employment to prepare and furnish to A. weekly a full-page drawing of "Us Fellers" or such other subject as might be agreed upon from time to time and A. undertook that each weekly full-page drawing would be presented on the front page of the comic section of a specified weekly newspaper published each Sunday by A. Until 11th February, 1951, A. had complied with its undertaking but on that day and on the two succeeding Sundays, owing to a shortage of newsprint, the comic was printed as an inset in the rotogravure section of the colour magazine, the presentation of B.'s work being on the third page and not on the front page of the comic. On the ground that A. had repeatedly, without his consent and in face of his protest, broken its undertaking, B. gave notice to A. that he was no longer bound by the contract.

Held (1) that A's undertaking was not a mere warranty or non-essential and subsidiary term of the contract, but was a condition or essential term going to its root, the breach of which entitled B. to rescind; (2) that if A's undertaking constituted merely a non-essential term, A.'s conduct was, in the circumstances, such as to amount to a refusal to be bound by the contract.

Mersey Steel & Iron Co. Ltd. v. Naylor, Benzon & Co., (1884) 9 App. Cas. 434, per Lord Selborne L.C., at pp. 438, 439, applied.

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.), affirmed.

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APPEAL from the Supreme Court of New South Wales.

A suit, instituted by an originating summons under the *Equity Act* 1901-1947 (N.S.W.), Sched. 4, r. 8A, was brought in the equitable jurisdiction of the Supreme Court of New South Wales by Associated Newspapers Ltd. for certain immediate injunctions restraining the threatened breach by the defendant, James Charles Bancks, of certain negative stipulations contained in a contract of employment entered into between the plaintiff company and the defendant.

The defence was that the defendant properly and lawfully rescinded the contract, and that therefore the stipulations referred to were no longer binding upon him. The right to rescind was alleged to have arisen from the fact that the plaintiff, on its part, had broken and had threatened to continue the breaches of an essential term of the contract.

Upon the matter coming on for hearing before *Roper* C.J. in Eq., the parties agreed that that hearing should be treated as the final hearing of the suit.

The contract was made on 22nd September 1948, and in it the plaintiff was called "the company" and the defendant was called "the Artist". It provided, so far as material, by cl. 1, for the employment by the company of the artist for a term of ten years, commencing on 27th March 1949; by cl. 2 for the remuneration of the artist, the remuneration being substantial; by cl. 3 that the artist agreed to devote the whole of his time and attention to the company's affairs and business and faithfully to serve the company during his employment and to use his best endeavours to promote and foster the same to the best of his skill and ability; by cl. 4, that the company might at its discretion publish a *Sunbeams Annual* reproducing such drawings by the artist of *Ginger Meggs* and such other characters associated with him as had theretofore appeared in "*Us Fellers*" and as the company thought appropriate, the profits therefrom to be distributed between the company and the artist on the percentage basis set out; by cl. 5, that "the Artist agrees in the course of his employment to prepare and furnish to the company weekly a full-page drawing of '*Us Fellers*' or such other subject as may be agreed upon from time to time and the Company hereby undertakes that each weekly

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full-page drawing will be presented on the front page of the Comic Section of the 'Sunday Sun & Guardian.' And save as provided in clause 9 hereof all such drawings shall be the absolute property of the Company and the Company shall be entitled to re-sell such drawings for newspaper publication in Australia and New Zealand and to retain for its own use and benefit the proceeds of any such re-sale." ; by cl. 6, that " Except as is by the Agreement provided the Artist shall not during his employment hereunder unless with the written consent of the Company carry on directly or indirectly his profession of an Artist either in competition with the Company or otherwise." ; by cl. 10, for the " continuity " of the contract in the event of the death of the artist during the term of the contract ; by cl. 11, that in the event of the artist failing faithfully to perform and observe the provisions of the contract on his part, or being guilty of conduct calculated to prejudice the interests of the company the company should be at liberty forthwith to terminate his employment ; by cl. 12, that the company acknowledged that the copyright in the character " Ginger Meggs " and other characters associated with him in " Us Fellers " was and always had been vested in the artist and that it had no claim to that copyright and (the clause continued) " the Artist hereby undertakes that during the currency of this Agreement he will not transfer or use the said copyright or grant any interest in the same by licence or otherwise to any person, firm or other company without the written consent of the Company." ; by cl. 13, that the expression " the Artist " included his legal personal representatives, and the expression " the Company " included its successors and assigns ; and by cl. 14, that disputes arising between the parties should be settled by arbitration.

The plaintiff was the publisher of the " Sunday Sun and Guardian " newspaper, published weekly, and under the agreement the defendant was to draw material for production in the comic section of that newspaper. Prior to 11th February 1951, that comic section was produced upon letterpress, and the front page, on any interpretation of those words, was occupied in full by the drawings of the defendant. The issue of the newspaper on 11th February showed a change in the method of production of its comic section. The change, which was said to have been forced upon the plaintiff by a shortage of letterpress or newsprint, was that the comic section was then produced by a process of rotogravure on a different type of paper, and it was inserted in the magazine, also produced on similar paper, called " Color ".

The production of the comic section showed a four-page section as folded, the pages being taken up by the reproduction of comic strips or matter. On the first of the pages coming to hand, if the section was abstracted from the magazine, there was a reproduction in black and white, or sepia, of some comic strips. On the second page of the production, as it came to hand from the magazine, there was a reproduction in colour of certain other comic strips, and on the third page, looking at the pages in the way indicated above, there was a reproduction of the work of the defendant—a full page—which was headed “Sunday Sun Comics”. The fourth page was taken up with further material of a somewhat similar nature, reproduced in sepia tone.

Prior to that production the defendant had been informed that the newspaper would be produced substantially in that way, and he had protested that the production of it in that form would be a breach of his contract. He expressed himself as being anxious about the matter and anxious to see what the plaintiff proposed to do. When he did see it it appeared that the production had gone too far to stop it or to make any alteration. Nothing very definite was then arranged between the parties.

The same type of production was continued or repeated on 18th February. There had been, in the meantime, an interview between the defendant and one Lindsay Clinch, the editor of the newspaper, at which again the defendant had protested against the method in which his comic was being presented, and after 18th February he had an interview with Eric Thomson Kennedy, the chief executive officer of the plaintiff company, in which his protests had been repeated.

The same type of production was repeated again on 25th February, and, on 26th February, the defendant wrote a letter to Kennedy which, omitting formal parts, was as follows: “As your company has repeatedly, without my consent and in face of my protest, broken its undertaking contained in clause 5 of my Agreement with it dated 22nd September 1948, I hereby give notice that I am no longer bound by that Agreement.

As you are aware, I have already supplied in pursuance of the Agreement drawings and letter-press covering ‘Ginger Meggs’ for approximately ten issues. I have no objection to your using these in the next ten issues of the ‘Sunday Sun’ pending your making arrangements to replace the page hitherto contributed by me, provided that I am paid the weekly proportion of my salary for every week in which such drawings and letter-press are published by you.”

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Kennedy replied by letter bearing date 1st March 1951, and which, omitting formal parts, was in the following terms:—"In view of our conversation of February 22nd, I was surprised to receive your letter of February 26th, in which you suggest that my Company has repeatedly, without your consent and in face of your protests, broken its undertaking as provided in Clause 5 of our Agreement.

Personally, I am of the opinion that there has been no such breach. The Company's obligations to present Ginger Meggs on the front page of the comic section of the 'Sunday Sun' have been faithfully observed.

I understand, however, that when Mr. Clinch spoke to you on January 24th, he told you that owing to unforeseen difficulties my Company would have to drop the newsprint colour comic section and run the comics as part of the Rotogravure Color Section. Mr. Clinch assures me that he discussed this aspect with you and that you agreed with this proposal. Whilst you did express the view that the manner in which the Ginger Meggs strip appeared in the Color section was not in accordance with your wishes, I hasten to emphasise the fact that you did not raise any objection to its publication in that particular form for the time being.

Consequently, I cannot accept your statement that you are no longer bound by your Agreement. On the contrary, I maintain that the Agreement is still binding in every respect and that you should, in accordance with your past practice, continue to supply your drawings so as to maintain our stock always at least ten weeks ahead of publication.

You will recollect that on Thursday last, February 22nd, you told me you were unhappy because Ginger Meggs was not immediately visible to a reader when he opened the 'Sunday Sun'. I discussed with you the method in which we could vary this, and explained that there were inherent difficulties which would possibly seriously affect our advertising revenues.

I promised you that I would examine the possibilities of making this change as quickly as possible, and I now have pleasure in stating that the change will be made on Sunday next, March 4th, when the comic section will be an envelope of the Color Magazine instead of being inset into it.

In making this alteration, I am doing so not only to satisfy your wishes, but because I agree with you that Ginger Meggs should be more immediately visible to readers.

At the same time, I wish it to be clearly understood that this change has been made as a matter of policy and not of obligation. The Company's obligation is as intimated above to present Ginger Meggs on the front page of the comic section. It is obvious by reference to the title on the page on which Ginger Meggs appears, that this is and always has been the front page of the Comic section.

Presumably your objection is as to the manner in which the comic section has been mechanically folded. That procedure was carefully explained to you and you assented to it for the time being.

May I add that I had thought this matter had been settled by your friendly representations to me and my immediate action to meet your wishes, which were in accordance with my own judgment; further I regret that after all these years of close and friendly association between my Company and yourself, you should have adopted the attitude disclosed in your letter."

Affidavits were filed by Kennedy, Clinch and the defendant and they were all cross-examined.

In his affidavit Kennedy deposed, *inter alia*, that the "Sunday Sun" had produced a comic section for approximately thirty years, and the defendant's comic page had been a part of such comic section for a period of approximately twenty-nine years. That continuous publication in a position of prominence in the "Sunday Sun" comic section had added to the value of the defendant's comic, originally known as "Us Fellers", but for many years more generally known by the public as "Ginger Meggs". It was the kind of sustaining feature which was highly regarded by newspaper publishers as a means of maintaining a steady circulation. Should the defendant's comic be taken from the "Sunday Sun" and published in a rival Sunday newspaper, such rival Sunday newspaper would gain all the advantages and reputation which had accrued to the defendant's comic because of its continuous publication in the "Sunday Sun" over a long period of time. The effect of such transfer from one Sunday newspaper to another would, in Kennedy's opinion, result in the transfer of some readership, both adult and juvenile, from the "Sunday Sun" to such other rival Sunday newspaper.

Clinch deposed, *inter alia*, that owing to a shortage of newsprint, the plaintiff company decided that it would be compelled to drop its letterpress colour comic section printed on newsprint and print the comic section by its rotogravure process in which newsprint was not used. The company decided to print the comic in an

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inset in the rotogravure section of the colour magazine. The presses used for printing that section could only print certain pages of the section in full colour, namely, pages 1, 3, 6, 8, 9, 11, 14 and 16 respectively. To produce the comic as an inset it was necessary, if a front page of the inset in full colour was required, for a reader to reverse-fold the inset as it was taken out of the newspaper. That would make page 9 of the colour magazine page 1 of the comic section when reverse-folded. Page 9 would then be presented to the reader with the front page title "Sunday Sun Comics" so that there could not be any doubt as to that being the front page of the comic section.

During the course of cross-examination the defendant said that on 26th February 1951, a few minutes after he had signed his letter of that date to Kennedy, he signed a contract with Consolidated Press Ltd. to supply his comic to that company in future.

Roper C.J. in *Eq.* said that having regard to the circumstances that there was no promise to the defendant that the matter would be rectified, that what the plaintiff had deliberately done was done with the view that it was entitled to do it; and that negotiations with the defendant would be attempted as a matter of courtesy and not as a matter of right, he thought that the defendant was entitled to assume, and that the court was entitled to assume, that without the rescission the breaches in question would have continued indefinitely and that they did in fact represent a fundamental breach of the clause and a breach of such a nature that it gave rise to the right of rescission. His Honour held that the defendant was entitled to rescind the contract and dismissed the suit with costs.

From that decision the plaintiff appealed to the High Court.

M. F. Hardie K.C. (with him *J. D. Evans* and *J. W. Dicker*), for the appellant. The stipulation in cl. 5 of the contract alleged to have been broken by the plaintiff was not an essential term or condition of the contract. The performance of it did not go to the root and substance of the contract. The judge of first instance, in deciding whether it went to the root of the contract, tested the matter by taking the hypothetical case of the plaintiff having adopted the attitude at the commencement of the contract that it did not propose to comply with the stipulation in question. That is the wrong test. In *Bentsen v. Taylor, Sons & Co.* (No. 2) (1) the test is stated to be "the effect likely to be produced on the foundation of the adventure by any such breach of that portion

of the contract". In determining whether a particular stipulation in a contract goes to the root of it, the question for decision is whether any breach of it would necessarily destroy the substance or foundation of the contract, or substantially deprive the other party of the consideration for the future performance by him of his part of the contract (*Huntoon Co. v. Kolynos (Inc.)* (1), *Luna Park (N.S.W.) Ltd. v. Tramways Advertising Pty. Ltd.* (2)). Even assuming that the judge was correct in holding that that stipulation went to the root of the contract—in the sense in which he used that phrase—he was in error in holding that the breaches were of such a nature and continued for such a period as to entitle the defendant to bring the contract to an end. The breaches must be such that it is apparent the defaulting party intends not to be bound any further by the contract considered as a whole (*Freeth v. Burr* (3); *Bettini v. Gye* (4); *Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon & Co.* (5); *Bentsen v. Taylor, Sons & Co.* (No. 2) (6); *Huntoon & Co. v. Kolynos (Inc.)* (7); *Cornwall v. Henson* (8); *Rhymney Railway Co. v. Brecon and Merthyr Tydvil Junction Railway Co.* (9); *Re Rubel Bronze and Metal Co. Ltd. and Vos* (10); *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.* (11); *Attorney-General v. Australian Iron and Steel Ltd.* (12); *Fullers' Theatres Ltd. v. Musgrove* (13); *Luna Park (N.S.W.) Ltd. v. Tramways Advertising Pty. Ltd.* (14)). The judge of first instance fell into error in applying that test in relation to the specific provision of the contract alone. He should not have inferred from the belief of Kennedy and Clinch that they believed the company was entitled under the contract to do what it was doing; that the company intended to continue to publish the comic in that manner; and that the company was claiming a right to do that and was threatening to continue to act in that way. The decision completely disregarded the undisputed facts as to the conversations which the defendant had with Clinch and Kennedy, particularly the circumstances under which the interview with Kennedy on 22nd February terminated. In addition the

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(1) (1930) 1 Ch. 528, at pp. 557-559, 563.

(2) (1938) 61 C.L.R. 286, at p. 304.

(3) (1874) L.R. 9 C.P. 208, at pp. 213, 214.

(4) (1876) 1 Q.B.D. 183, at pp. 187, 188.

(5) (1884) 9 App. Cas. 434, at pp. 438-441, 443, 444.

(6) (1893) 2 Q.B., at p. 281.

(7) (1930) 1 Ch., at pp. 550, 558, 563.

(8) (1900) 2 Ch. 298, at pp. 303, 304.

(9) (1900) 16 T.L.R. 517; 83 L.T. 111.

(10) (1918) 1 K.B. 315, at p. 322.

(11) (1934) 1 K.B. 148, at pp. 154-158.

(12) (1936) 36 S.R. (N.S.W.) 172, at pp. 178, 180; 53 W.N. 61.

(13) (1923) 31 C.L.R. 524, at pp. 537, 538.

(14) (1938) 61 C.L.R. 286; 38 S.R. (N.S.W.) 632; 55 W.N. 228.

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judge made a completely unjustifiable use on that point of the claim made on behalf of the company in its letter dated 1st March. The defendant supplied comics after the breaches alleged to have been committed by the plaintiff on 11th and 18th February; therefore they were waived (*Bentsen v. Taylor, Sons & Co. (No. 2) (1)*). The supply by the defendant of seven advance copies of the comic, coupled with the second paragraph of his letter dated 26th February, made it impossible for the defendant to terminate the contract until the period of seven weeks covered by those comics had expired. There was not any breach of the agreement as the comic appeared on the title page, which became the front page by reverse-folding. There was not any breach of the stipulation or, if there was, it was of such a minor provision that it could not, on any view of the matter, be treated as a total repudiation by the plaintiff of all its obligations under the contract, including its obligation to employ the defendant, to pay him his substantial salary, to publish the comic in the "Sunday Sun", and to publish it in the comic of that newspaper. The breach relied upon must be one evidencing an intention to repudiate the contract as a whole rather than to repudiate the obligations under one particular stipulation of it. That view receives support from the codification of the authorities in relation to the sale of goods contained in s. 34 (2) of the *Sale of Goods Act 1923* (N.S.W.). In the circumstances an injunction is not suitable. It depends upon the willingness of the plaintiff and performance of the stipulation in cl. 5 (*Warner Brothers Pictures Inc. v. Nelson (2)*). The question of "damage" and "damages" was dealt with in *Marco Productions Ltd. v. Pagola (3)* and *Warner Brothers Pictures Inc. v. Nelson (4)*.

A. R. Taylor K.C. (with him *K. A. Ferguson* K.C. and *A. F. Rath*), for the respondent. The test that the judge of first instance put to himself was: Is the nature of the breach in the circumstances before me such as to entitle the defendant to rescind? The judge did not say—as argued for the appellant—that the defendant could rescind because of three minor breaches of contract. He was entitled to have regard to the plaintiff's conduct, the inferences that might be drawn therefrom, and the whole of the circumstances as disclosed to the court. A consideration of whether or not the breach was deliberate was important. An accidental breach does

(1) (1893) 2 Q.B., at p. 283.

(2) (1937) 1 K.B. 209, at pp. 213,
218.

(3) (1945) 1 K.B. 111.

(4) (1937) 1 K.B. 209.

not give rise to the right to rescind; but in order to determine whether the breach was accidental or not, the court must look at all the circumstances disclosed to it: *cf. Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.* (1). It was further contended on behalf of the appellant that there never was any breach, on the ground that all that was done was "reverse-folding". But the evidence shows that what was done was a new printing job. The evidence shows that it was not really believed by anybody that the comic was any longer on the front page. Looking at the document, the comic certainly does not appear to be on the front page. It is for the parties to determine what are the essential terms of the contract. The change in the form of the newspaper was decided in November or December 1950, without consulting the defendant at all. On 26th January 1951, the defendant did not have any possible choice, for the drawings were required eight weeks in advance. The defendant expected to be shown a proof but on 9th February he only saw the final printing. There could not have been an option. On 26th January 1951, Clinch did not offer to show to the defendant the proof he, Clinch, then had. The offer of the so-called option was dishonest. On 14th February 1951, the defendant visited the plaintiff of his own volition and complained, but all Clinch did was to report the matter to his superior officer. Subsequently, the defendant again visited the plaintiff of his own volition and complained to Kennedy. Kennedy did not say he would do anything; he treated the matter as one for the plaintiff company alone. It was open for the defendant to conclude that he was not being treated with perfect frankness. The inference is inescapable that had it not been for the defendant's letter of rescission the plaintiff would not have restored the comic to the front page. If the defendant had not rescinded, the breach would have continued for an indefinite period of time. The rescinding party can rely on all the circumstances that in fact existed, whether they were known to him at the time of rescinding or not. The true test as to whether the stipulation in cl. 5 goes to the whole of the consideration and therefore is or is not a condition, is to be found in *Tramway Advertising Pty. Ltd. v. Luna Park (N.S.W.) Ltd.* (2) and is: Would the parties have entered into the contract if the stipulation had not been contained in it? See also *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.* (1) and *Salmond and Williams on Contracts*, 2nd ed.

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(1) (1934) 1 K.B., at pp. 153-155.

(2) (1938) 38 S.R. (N.S.W.), at p. 641; 55 W.N. 228; 61 C.L.R., at pp. 302, 303.

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(1945), p. 546. It was contended on behalf of the appellant that as the appellant believed it was performing its contract, then there was not any ground for rescission, even if the appellant's construction of the contract was wrong. But in the *Luna Park Case* (1)—relied upon by the appellant—there was a dispute between the parties as to the true construction; and in fact that case shows that such a belief can be relied upon by the rescinding party as indicating an intention to continue the breach indefinitely. In *Bentsen v. Taylor, Sons & Co. (No. 2)* (2), and other cases relied upon by the appellant, the conditions there in question were of a type to be performed once and for all. The principles enunciated in such cases have no application to the present appeal. In *Rhymney Railway Co. v. Brecon and Merthyr Tydvil Junction Railway Co.* (3) the stipulation there under consideration was purely collateral to the main purpose of the contract. The passage in *Re Rubel Bronze and Metal Co. Ltd. and Vos* (4) merely enumerates the circumstances of that case; it is not an enumeration of all the circumstances that would justify rescission. The circumstances in this case were such as to entitle the defendant to conclude that the form of publication on 11th February 1951 would continue indefinitely. In the normal course it would take eight weeks to effect a change. There was not any evidence that any steps to effect a change were taken or contemplated by the plaintiff before rescission. The defendant's complaints merely drew forth explanations of circumstances which made a change difficult or impossible. The defendant was given to understand that the question of a change would be determined by considerations affecting the plaintiff's business and not by consideration of contractual rights. The three breaches were deliberate, and without regard to the defendant's contract or consent. The new form of publication was clearly intended to be permanent or for an indefinite period of time. It was decided upon because of a difficulty—shortage of newsprint—that was likely to endure. The defendant's complaints were ignored. Clinch simply told the defendant what was going to be done. The plaintiff could have shown the defendant the lay-out in January 1951, but instead only the printed and published form was shown to him. Nothing was done after the defendant's second conversation with Clinch; and when the defendant saw Kennedy the latter explained the difficulties and implied that the matter would be determined by considerations affecting the

(1) (1938) 61 C.L.R. 286; 38 S.R.
(N.S.W.) 632; 55 W.N. 228.

(2) (1893) 2 Q.B. 274.

(3) (1900) 16 T.L.R. 517; 83 L.T.
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(4) (1918) 1 K.B., at pp. 321-323.

plaintiff only. The defendant was not bound to protest, but if he had not done so it is clear that the breach would have continued indefinitely (*Measures Brothers Ltd. v. Measures* (1); *Telegraph Despatch and Intelligence Co. v. McLean* (2)). The inference from Kennedy's letter dated 1st March was that the new form of comic would have been retained for a long time. There was not any assertion in the letter of readiness and willingness to carry out the contract according to its true construction; it states, on the contrary, that the company was acting according to its policy. On the question of waiver, the law is accurately stated in *Chitty on Contracts*, 20th ed. (1947), pp. 384-386.

M. F. Hardie K.C., in reply.

Cur. adv. vult.

The Court delivered the following written judgment :—

This is an appeal by the plaintiff company from a decretal order made by the Supreme Court of New South Wales in its equitable jurisdiction (*Roper* C.J. in Eq.) dismissing its suit with costs. The purpose of the suit is to obtain injunctions enforcing negative covenants in a contract made between the plaintiff and the defendant on 22nd September 1948. The defendant purported to rescind this contract on 26th February 1951, and the question on the threshold of the appeal is whether this rescission was effective, because it is only if it was ineffective that the question of the appropriate relief need be considered. His Honour held that the rescission was effective.

The facts of the case are in a small compass. The contract in suit is a contract by which the defendant agreed for the term of ten years commencing on 27th March 1949 for a substantial weekly salary to devote the whole of his time and attention to the plaintiff's affairs and business and use his best endeavours to promote and foster the same to the best of his skill and ability. By cl. 5 the defendant agreed in the course of his employment to prepare and furnish to the plaintiff weekly a full-page drawing of "Us Fellers" or such other subject as might be agreed upon from time to time and the plaintiff undertook that each weekly full-page drawing would be presented on the front page of the comic section of the "Sunday Sun and Guardian" (a weekly newspaper published each Sunday by the plaintiff). The contract contains a number of clauses relating to the copyright in "Ginger Meggs", the principal

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(1) (1910) 1 Ch. 336, at p. 345; (2) (1873) L.R. 8 Ch. App. 658.
(1910) 2 Ch. 248, at p. 254.

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character in "Us Fellers", which remained in the defendant, to the publication of a Sunbeams annual, and to a licence for the company to use the copyright in the event of the death of the defendant &c., which it is unnecessary to set out in any detail. In his letter of 26th February 1951 the defendant stated that as the company had repeatedly, without his consent and in face of his protest, broken its undertaking contained in cl. 5 of the contract, he thereby gave notice that he was no longer bound by the contract.

Until 11th February 1951 the company had complied with its undertaking contained in the clause. It had printed in colours each week a full-page drawing of "Us Fellers" on the front page of the comic section of the "Sunday Sun and Guardian". The newspaper contained both a colour magazine and a comic section. In the second half of December 1950 or the first half of January 1951, owing to a shortage of newsprint, the company decided that it would be compelled to drop its letterpress comic section printed in newsprint and print the comic section by its rotogravure process, in which newsprint is not used. It decided to print the comic as an inset in the rotogravure section of the colour magazine. The presses used for printing this section only print certain pages of the section in full colour, namely pp. 1, 3, 6, 8, 9, 11, 14 and 16 respectively. To produce the comic as an inset it was necessary, if a front page of the inset in full colour was required, for the reader to reverse-fold the inset as it was taken out of the paper. This would make p. 9 of the colour magazine p. 1 of the comic section when reverse-folded.

In the "Sunday Sun and Guardian" of 11th February 1951 as it was folded the front page of the comic section was p. 7 and so numbered and on this page there was a comic in sepia. The defendant's comic appeared on p. 9, that is, on the third page of the comic section. This page was headed "Sunday Sun Comics" and became the front page of the comic section only if the reader chose to reverse-fold the inset as it was taken out of the newspaper. The same thing happened in the publications of 18th and 25th February 1951. In the publication of 4th March 1951, following the purported rescission, a change was made. The comic section was used as an envelope for the magazine section and the defendant's comic appeared on the front page of the envelope. It was the practice of the defendant to keep the plaintiff supplied in advance with drawings of his comic for ten weekly publications. The plaintiff did not inform the defendant of its intention to produce the comic section by rotogravure process instead of by print until

the magazine and comic sections for eight weekly publications commencing on 11th February had been prepared.

Before the publication of the newspaper on 11th February a conversation took place between Clinch, the editor, and the defendant. A second conversation took place between them on 14th February. A conversation took place between Kennedy, the chief executive officer of the plaintiff, and the defendant on 22nd February. Affidavits were filed by Kennedy, Clinch and the defendant and they were all cross-examined. His Honour accepted the evidence of the defendant where there was any conflict. After the defendant had purported to rescind the contract he received a letter from Kennedy dated 1st March explaining how the comic section would appear in the next publication on 4th March. Kennedy, however, claimed that there had been no breach of the contract. He said that the company's obligations to present Ginger Meggs on the front page of the comic section of the newspaper had always been faithfully observed. With respect to the change to be made on 4th March he said that he wished it to be clearly understood that this change had been made as a matter of policy and not of obligation. "The company's obligation is . . . to present Ginger Meggs on the front page of the comic section. It is obvious by reference to the title on the page on which Ginger Meggs appears, that this is and always has been the front page of the comic section."

Before us, as before his Honour, it was contended that the defendant's work was presented on the front page of the comic section in the issues of the "Sunday Sun and Guardian" of 11th, 18th and 25th February. But it is clear that the presentation was not on the front page but on the third page. In his evidence Clinch admitted that he considered that the presentation was a breach of contract. Clinch was urging the defendant to consent because the company was in a fix and the defendant was objecting. In the end the defendant told Clinch he would see Kennedy and Clinch urged him to do so as it would strengthen his hand. The defendant saw Kennedy on 22nd February and Kennedy said that he would see what he could do about it. At the interview with Clinch on 9th February the defendant said that he did not like the new idea and that he would have a look at it when the newspaper was published on the following Sunday and decide what his attitude would be. If he agreed to the new idea he would want a letter from the company saying that it did not affect his contract to have a front page. At the interview with Clinch on 14th February, after he had seen the publication of 11th February, he said that

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he was dissatisfied. There is no evidence that the defendant at any stage waived any right he had to rescind the contract. The inquiry is whether this right existed on 26th February. If it did it was effectively exercised.

The first question is whether the company's undertaking to present the defendant's drawings on the front page of the comic is a condition or essential term of the contract going to its very root, the breach of which would immediately entitle the defendant at his option to rescind the contract and sue for damages for the loss of the contract, or a mere warranty or non-essential and subsidiary term the breach of which would entitle the defendant to damages. Various tests have been advanced by the courts from time to time to determine what is a condition as opposed to a warranty. In *Bettini v. Gye* (1) *Blackburn J.* (as he then was) said that to determine this question the court must ascertain the intention of the parties to be collected from the instrument and the circumstances legally admissible with reference to which it is to be construed. Later in the same case his Lordship said that in the absence of any express declaration by the parties, as in the present case, "we think that we are to look at the whole contract and applying the rule stated by *Parke B.* to be acknowledged in *Graves v. Legg* (2), see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages" (3). In *Bentsen v. Taylor, Sons & Co. (No. 2)* (4) *Bowen L.J.*, discussing the distinction between a condition and a warranty, points out that in order to decide this question one of the first things you would look to is, to what extent the truth of what is promised would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out. Perhaps the test is better formulated by *C. B. Morison* in his *Principles of Rescission of Contracts* (1916), at p. 86. "You look at the stipulation broken from the point of view of its probable effect or importance as an inducement to enter into the contract." As he says, this form is "expressly supported by such cases at law as *Flight v. Booth* (5), and *Bannerman v. White* (6) and, im-

(1) (1876) 1 Q.B.D., at p. 186.

(2) (1854) 9 Ex. 709, at p. 716 [156 E.R. 304]; 23 L.J. (Ex.) 228.

(3) (1876) 1 Q.B.D., at p. 188.

(4) (1893) 2 Q.B., at pp. 280, 281.

(5) (1834) 1 Bing. (N.C.) 370 [131 E.R. 1160].

(6) (1861) 10 C.B. (N.S.) 844 [142 E.R. 685].

plicity, by such cases as *Hoare v. Rennie* (1) and *Bowes v. Shand* (2). The test was succinctly stated by *Jordan C.J.* in *Tramways Advertising Pty. Ltd. v. Luna Park (N.S.W.) Ltd.* (3). The decision was reversed on appeal (4), but his Honour's statement of the law is not affected. He said (5): "The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor: *Flight v. Booth* (6); *Bettini v. Gye* (7); *Bentsen v. Taylor, Sons & Co.* (No. 2) (8); *Fullers' Theatres Ltd. v. Musgrove* (9); *Bowes v. Chaleyer* (10); *Clifton v. Coffey* (11). If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight."

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At least it is clear that the obligation of the defendant to supply a weekly full-page drawing of "Us Fellers" and the plaintiff's undertaking to present the drawing each week on the front page of the comic section are concurrent and correlative promises. And it would not seem open to doubt that the obligation of the defendant is a condition. He was not an ordinary employee of the plaintiff. He was employed as a comic artist and his true work was to produce this weekly drawing. It was for this production that his substantial weekly salary was principally payable. It was what he was really engaged to do. It would be strange if his obligation was a condition of the contract while the undertaking of the plaintiff was a subsidiary term the breach of which would only sound in damages. The undertaking is really a composite undertaking comprising three ingredients: (1) to present a full-page drawing; (2) to present it weekly; and (3) to present it on the front page of the comic section. It is impossible to attach different values to the defendant's obligation and the plaintiff's undertaking. The plaintiff would not have employed the defendant unless it had been assured that the defendant would perform his promise, and the

(1) (1859) 5 H. & N. 19 [157 E.R. 1083].

(2) (1877) 2 App. Cas. 455.

(3) (1938) 38 S.R. (N.S.W.) 632; 55 W.N. 228.

(4) (1938) 61 C.L.R. 286.

(5) (1938) 38 S.R. (N.S.W.), at pp. 641, 642; 55 W.N. 228.

(6) (1834) 1 Bing. (N.C.), at p. 377 [131 E.R., at pp. 1162, 1163].

(7) (1876) 1 Q.B.D., at p. 188.

(8) (1893) 2 Q.B. 274, at p. 281.

(9) (1923) 31 C.L.R. 524, at pp. 537, 538.

(10) (1923) 32 C.L.R. 159.

(11) (1924) 34 C.L.R. 434, at pp. 438, 440.

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defendant would not have made the promise unless he was assured that his work would be published in a particular manner. Obviously it was of prime importance to the defendant that there should be continuity of publication so that his work should be kept continuously before the public, that his work should be published as a whole and not mutilated, and that it should be published on the most conspicuous page of the comic section. It is like a contract under which an actor is engaged to act in a theatre. It is not sufficient if the employer pays his salary. He must find work for him to do in the sort of part, principal or subsidiary, for which he is employed. In *Herbert Clayton and Jack Waller Ltd. v. Oliver* (1), Viscount *Dunedin* said "I think each contract as it arises must be considered by itself in order to see what are the promises which each party is bound to perform. Considered from that point of view I think that in this case the appellants contracted not only to pay the respondent a salary, but to give him the opportunity of appearing before the public in a part which answered to the stipulated description." In *Tolnay v. Criterion Film Production Ltd.* (2) *Goddard J.* (as he then was) said:—"All persons who have to make a living by attracting the public to their works, be they artists in the sense of painters or be they literary men who write books or who perform in other branches of the arts, such as pianists and musicians, must live by getting known to the public. An unknown author we all know has a great struggle in the same way as an unknown musician or actor has a great struggle. Mr. Williams in this case is already known in this country, and Mr. Tolnay, I think, is not known as an author in this country. One way in which they can expect remuneration and expect employment is by getting their name before the public." A failure to give an actor a proper part is a breach of contract which goes to its root and justifies the actor in treating the contract as rescinded: *White v. Australia & New Zealand Theatres Ltd.* (3).

Reliance was placed by counsel for the appellant on the passage in the speech of Lord *Selborne* L.C., which appears in *Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon & Co.* (4): "I am content to take the rule as stated by Lord *Coleridge* in *Freeth v. Burr* (5), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct

(1) (1930) A.C. 209, at p. 221.

(2) (1936) 2 All E.R. 1625, at pp. 1626, 1627.

(3) (1943) 67 C.L.R. 266.

(4) (1884) 9 App. Cas., at pp. 438, 439.

(5) (1874) L.R. 9 C.P. 208.

is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here." That passage has been cited in many subsequent cases and recently by the House of Lords in *T. D. Bailey, Son & Co. v. Ross T. Smyth & Co. Ltd.* (1). But his Lordship was not there dealing with a breach of a condition. In a contract for the sale of goods to be delivered by instalments the seller, a company, set up the refusal of the buyer to pay *ad diem* for one delivery as discharging it from the contractual obligation to make further deliveries. The refusal was based upon the ground that a petition for the winding up of the company had been presented and that it would be unsafe to make the payment. An argument for the seller that payment for every delivery was a condition precedent to the obligation to make subsequent deliveries was rejected and it was plain that the mere failure by the buyer to pay for the one delivery could not of itself go to the root of the contract. The House of Lords were thus concerned with the circumstances which might make a refusal by one party to perform an executory contract in what otherwise would be a non-essential respect a ground for the other party to the contract treating himself as discharged from further performance. This is apparent from the speech of Lord *Blackburn*. In the present case the undertaking of the plaintiff company that each weekly full-page drawing would be presented on the front page of the comic section formed a condition a substantial failure in the performance of which would enable the defendant to treat the contract as at an end. The plaintiff committed three successive breaches of this condition and thereupon the defendant was certainly entitled to treat the contract as discharged. Such a failure of the plaintiff to perform the condition went to the root of the contract and gave the defendant as the injured party the right immediately to treat the contract as at an end (*Luna Park (N.S.W.) Ltd. v. Tramways Advertising Pty. Ltd.* (2)). He exercised this right by his letter of 26th February.

The defendant had not to prove, as in the case of a breach or breaches of non-essential terms of a contract, that the conduct of the plaintiff was such as to amount to a refusal to be bound by the contract. But when the circumstances are considered they would appear to constitute such conduct. The plaintiff made

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(1) (1940) 56 T.L.R. 825, at p. 831. (2) (1938) 61 C.L.R. 286.

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the original change without consulting the defendant. It maintained that it was entitled to do so despite his protests. On 26th February there had been three publications in breach of the contract and several more were intended. Kennedy's promise to see what he could do was vague, and it was accompanied by an intimation that if anything was done it would be done as a matter of grace and not of right. This evidence all points and points only to a refusal by the plaintiff to perform cl. 5 of the contract and satisfies the test laid down by Lord *Selborne*.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Minter, Simpson & Co.*

Solicitors for the respondent, *Allen, Allen & Hemsley.*

J. B.