[HIGH COURT OF AUSTRALIA.]

DUNCOMBE . . . . . APPLICANT-APPELLANT;
PLAINTIFF,

AND

PORTER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 19; *Nov.* 25.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Contract—Construction—Sale—Conditions—Warranties—Action—Demurrer—Interlocutory judgment—Appeal to High Court—Leave—Discretion of Court—Exercise—Judiciary Act 1903-1950 (*No.* 6 *of* 1903—*No.* 80 *of* 1950), *s.* 35 (1) (*a*).

If a party to a contract wishes to exclude the ordinary consequences that would flow in law from the contract he is making, he must do so in clear terms.

Szymonowski & Co. v. *Beck & Co.* (1923) 1 K.B. 457, at p. 466, applied.

In an action by D. for the price of hay bargained and sold and for damages for non-acceptance, the buyer, P., pleaded (*inter alia*) by way of cross-action a breach by D. of the terms of the contract in that he delivered in purported pursuance of the contract, hay which was not in accordance with its terms and which was unmerchantable. To this plea by way of cross-action D. filed a replication setting out the contract. Clause 2 of the contract was in the following words: "The purchaser's agent shall have the right to accept or reject at the stacks but in the event of the buyer's representative not being present when any hay is loaded at the stacks no objection shall be taken by the purchaser to the quality of the hay delivered at rail". The replication further alleged that the hay was loaded by D. at the stacks, and that P.'s representative was not present. P. demurred to this replication.

Held, by *Dixon* C.J., *Webb* and *Fullagar* JJ. (*Kitto* and *Taylor* JJ. dissenting), that the contract ought not to be construed as depriving the buyer of rights to sue in respect of any breach of contract relating to the quality or condition of the hay actually delivered.

The exercise of the discretion of the High Court to grant leave to appeal against an interlocutory judgment, discussed.

Decision of the Supreme Court of New South Wales (Full Court), affirmed.

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APPLICATION for leave to appeal and APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales by Clifford Thomas Duncombe against William Joseph Porter, the plaintiff declared first in the common money counts, alleging in the particulars that he had delivered to the defendant 87 tons 11 cwts. and 1 qr. of lucerne hay at a price of £13 5s. 0d. per ton, which together with exchange (£1 3s. 6d.) and freight (£16 0s. 1d.), made an amount of £1,177 7s. 7d. Credit was given for payment of £677 7s. 7d., leaving the sum of £500 as the amount alleged to be owing.

By the second count in the declaration the plaintiff alleged that it was agreed by and between the plaintiff and the defendant that the plaintiff should sell to the defendant and the defendant should buy from the plaintiff all the lucerne hay contained in five stacks as inspected by the defendant situated at Kingsfield, Aberdeen, derrick pressed, estimated to contain 500 tons for the price of £13 5s. 0d. per ton upon the terms, *inter alia*, that the plaintiff should deliver the hay to the defendant free on rail at Scone or Aberdeen in such quantities and at such times as the defendant might direct and as and when trucks were available and that the defendant should accept the hay from the plaintiff and pay to him the said price in cash on receipt of the railway consignment note in respect of each such delivery. The plaintiff alleged readiness and willingness and fulfilment of conditions precedent on his part, but alleged a refusal on the part of the defendant to accept a large portion of the lucerne hay.

The plaintiff claimed damages in the sum of £1,225.

The defendant pleaded as to the first count never indebted, as to the second count *non assumpsit*, and by a third plea, as to the second count, that the alleged agreement was made upon terms and conditions that the quality of the hay would be as inspected by the defendant and that all rain-damaged hay would be discarded and that the defendant would only be responsible to accept all sound dry hay in good merchantable condition and that the plaintiff would make delivery of the hay as promptly as trucks were available and before any breach of the agreement by the defendant, the plaintiff refused to be bound by the agreement and thereupon the defendant rescinded the contract. By a fourth plea, a plea by way of cross-action, the defendant alleged that it was agreed by and between the plaintiff and the defendant that in consideration that the defendant would buy certain hay from the plaintiff, the plaintiff promised to sell to the defendant certain hay the quality thereof to be as inspected by the defendant and all rain-damaged hay to

be discarded and the defendant would only be responsible to accept all sound dry hay in good merchantable condition and that the plaintiff would deliver the hay as promptly as trucks were available. After alleging the performance of conditions precedent it was further alleged in the plea that the plaintiff delivered to the defendant in purported fulfilment of the agreement a quantity of hay which was not of the quality as inspected by the defendant and all rain-damaged hay was not discarded and it was not sound dry hay in good merchantable condition but was mouldy and unfit for use and that the plaintiff did not make delivery of the balance of the hay as trucks were available whereby that quantity of hay which was mouldy and unfit for use was of no value to the defendant and he lost the benefit of the contract and the profits which he could and would have made on a resale of the whole of the hay and was injured in his business as a produce merchant. The defendant claimed the sum of £1,000 as damages.

The plaintiff joined issue on the defendant's first, second and third pleas. To the plea by way of cross-action the plaintiff filed replications which pleaded that (i) he did not agree as alleged, and (ii) he denied the alleged breaches and did not commit any of them as alleged. For a fourth replication the plaintiff, as to so much of the defendant's fourth plea as depended upon the allegations that the plaintiff delivered to the defendant in purported fulfilment of the agreement a quantity of hay which was not of the quality as inspected by the defendant and all rain-damaged hay was not discarded and it was not sound dry hay in good merchantable condition but was mouldy and unfit for use, said the agreement was as follows (formal parts omitted): "Memorandum of Agreement made this first day of May One thousand nine hundred and fifty-one between Clifford Thomas Duncombe of 'Kingsfield' near Aberdeen Grazier (hereinafter called Vendor) of the one part and William Joseph Porter of 17 Martin Place Sydney Produce Merchant (hereinafter called Purchaser) of the other part Whereas the parties hereto have agreed to the sale of all that Lucerne Hay contained in five (5) stacks as inspected by the Purchaser situated at 'Kingsfield' Aberdeen aforesaid derrick pressed estimated to contain five hundred (500) tons for the price and upon the conditions as follows:

1. Quality to be as inspected and all rain-damaged hay to be discarded and the Purchaser shall only be responsible to accept all sound dry hay in good merchantable condition.

2. The Purchaser's agent shall have the right to accept or reject at the stacks but in the event of the Buyer's representative not

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being present when any hay is loaded at the stacks no objection shall be taken by the Purchaser to the quality of the hay delivered at rail.

3. The price shall be the sum of Thirteen pounds five shillings (£13 5s. 0d.) per ton f.o.r. Scone and or Aberdeen.

4. Payment shall be made as follows : Cash on receipt of Railway Consignment Note.

5. Weights shall be as shown on the sending station Railway Weigh Bridge Tickets and shall be accepted by both parties as being final.

6. Delivery shall be as prompt as trucks are available ".

The signatures of the parties were appended and duly witnessed.

The plaintiff further said that the hay referred to in the plea as " a quantity of hay " was loaded by the plaintiff at the stacks and delivered to the defendant at rail in accordance with the agreement and the defendant's representative was not present when that quantity of hay was so loaded at the stacks and the defendant did not then reject it.

The defendant joined issue on the plaintiff's second and third replications, and demurred to the plaintiff's fourth replication on the grounds, *inter alia*, that (i) it confessed and did not avoid the plea to which it was pleaded ; (ii) that the observance of the terms of cl. 2 of the contract in the manner described in that replication did not in law excuse the breaches of cll. 1 and 6 thereof alleged in the plea ; and (iii) that upon the proper construction and interpretation of the contract the plaintiff contracted to deliver sound dry hay in good merchantable condition.

The Full Court of the Supreme Court (*Street* C.J., *Owen* and *Herron* JJ.) gave judgment for the defendant on the demurrer.

From that decision the plaintiff appealed to the High Court.

Upon the matter coming on to be heard counsel for the appellant conceded that the order of the Supreme Court was an interlocutory order and that leave to appeal therefrom to the High Court was therefore necessary.

The court ordered that the whole case be argued and that the question as to whether leave to appeal should be granted be reserved.

Sir *Garfield Barwick* Q.C. (with him *J. K. Emerton*), for the applicant-appellant. The plaintiff sued on two counts : (i) the common money counts, and (ii) a claim in damages for the failure of the defendant to take delivery of undelivered hay. The demurrer would settle the first count in favour of the plaintiff if the plaintiff's construction were accepted, and it would dispose of so much of

the cross-action as does not depend on delay in delivery. The construction of the contract formed a considerable part of the dispute between the parties. The sale was not by description but was a sale of five specific stacks of hay. The price was determined by charging so much per ton for so much in the stack as was accepted by the purchaser as being in a dry clean condition. The defendant did not obtain any warranty of any kind from the sale. The purchaser was bound to pay for whatever hay he took out of the stacks. No question of the quality of the hay can arise between the parties. In these circumstances there was not any warranty as to quality. Quality is used in the sense of condition. The quality was to be as inspected. The defendant was only entitled to delivery of hay out of the stacks. If none of it was dry and merchantable he had no cause for complaint. The plaintiff's only obligation was to transport the hay to the railhead. The defendant's obligation was to obtain trucks. The Full Court fell into error. There was not any promise to sell sound dry hay in good merchantable condition. The promise by the purchaser was one to pay for so much hay as he accepted out of the stacks. The contract provided machinery for determining the amount to be paid. The price was £13 5s. 0d. per ton placed on rail. The purchaser had a right to reject hay out of a stack which was not dry and merchantable. Otherwise he must pay for such hay as the plaintiff placed on rail. In a practical sense the condition of the hay may change very much between the point of loading and the point of actual delivery. The fact that it was not a sale by description precludes any cause of action founded on the condition of the hay when there has not been any rejection of it under cl. 2. The purpose of cl. 1 was to set the standard by reference to which the right to reject should be exercisable. The contract afforded an extreme opportunity for the purchaser to determine how much of the hay was sound for the purpose of fixing the price.

M. F. Hardie Q.C. (with him *A. Bagot*), for the respondent. Leave to appeal should be refused. The pleading demurred to relates to part only of the defendant's cross-action. No question of principle or of general importance is involved. There is an important question for determination by a jury as to failure to deliver in any event. The Full Court correctly interpreted the contract. The contract was for the sale for such of the hay in the five stacks inspected by the purchaser as was at the date of delivery " sound dry hay in good merchantable condition ". The purchaser contracted to buy so much of that hay as he considered to be in that condition. The seller was under obligations (i) to deliver to the purchaser all

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sound dry hay, and (ii) to discard all rain-damaged hay. If, in the breach of the obligation, he did not discard all rain-damaged hay, and did not deliver it, he was liable to the purchaser in damages. If delivery be at the stacks then the seller must deliver good sound dry hay in merchantable condition. Otherwise there is nothing to prevent the seller from pressing and baling hay and placing it on his lorries many days before proceeding to the railhead. The phrase "no obligation" in cl. 2 must be construed in the light of the context. It is not an apt phrase to bring about the result contended for by the seller. He was the person who had to discard rain-damaged hay. "Condition" refers to "dry" or "damp" condition. Clause 2 cannot be set up as an effective answer to the cross-action. The seller's obligation was to discard *all* rain-damaged hay and not some only of such hay. The purchaser's only responsibility was to accept hay which had not been so discarded by the seller.

[DIXON C.J. referred to *Szymonowski & Co.* v. *Beck & Co.* (1).]

The principles applied in that case are very similar to the principles applied by the Full Court in this case. The language of cl. 2 is not adequate to cut down the obligation on the part of the seller to discard rain-damaged hay. If cl. 2 were not there the purchaser would have had a right to inspect at the point of delivery, or, perhaps, later, and if not up to standard could have rejected the hay, in which event the seller would have had to bear the expense of loading or carting to railhead and transporting it away. Clause 2 was inserted to bring forward to an earlier date the time for examination and rejection. If not examined and rejected at that point of time then there was not to be any further right of rejection. But the clause does not exclude or negative the purchaser's right to claim damages for breach. The effect of the seller's argument is that he was to be left at liberty to work a fraud on the purchaser so long as he could do it while the purchaser was engaged upon other matters.

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

Nov. 25.

The following written judgments were delivered :—

DIXON C.J. This is an application for leave to appeal from an interlocutory judgment of the Supreme Court of New South Wales pronounced upon demurrer. The defendant demurred to a replication by the plaintiff to a plea of the defendant by way of cross-action. The plaintiff is described as a grazier of Kingsfield, near

(1) (1923) 1 K.B. 457, at p. 466; affirmed (1924) A.C. 43.

Aberdeen, New South Wales, and his action was in part to recover the price of hay sold and delivered or bargained and sold and in part to recover damages for non-acceptance of the balance of the hay which the defendant, who is described as a produce merchant of Martin Place, Sydney, had agreed to buy.

The plaintiff declared first in the common money counts. The particulars thereunder alleged that 87 tons 11 cwts. and 1 qr. of lucerne hay had been delivered by the plaintiff to the defendant at a price of £13 5s. 0d. per ton, which, together with exchange and freight, made an amount of £1,177 7s. 7d. Credit was given for payment of £677 7s. 7d., leaving an amount alleged to be owing of £500.

The second count in the declaration alleged an agreement by the plaintiff to sell to the defendant and by the defendant to buy from the plaintiff all that lucerne hay contained in five stacks as inspected by the defendant situated at Kingsfield, derrick pressed, estimated to contain 500 tons for the price of £13 5s. 0d. per ton. The count, after stating certain terms of the alleged agreement for sale and making the usual allegations of readiness and willingness and fulfilment of conditions precedent, alleged a refusal on the part of the defendant to accept portion of the hay and claimed £1,225 damages. To this declaration the defendant pleaded as to the first count never indebted, as to the second count *non assumpsit* and a special plea setting out terms and conditions of the bargain, a refusal by the plaintiff to be bound by the agreement and rescission by the defendant. The defendant's fourth plea was the plea by way of cross-action which leads to the demurrer. By this plea the defendant alleged that the plaintiff promised to sell certain hay, the quality whereof was to be as inspected by the defendant and all rain-damaged hay to be discarded. The plea proceeded to allege that the plaintiff's promise was that the defendant would only be responsible to accept all sound, dry hay in good merchantable condition and that the plaintiff would deliver the said hay as promptly as trucks were available. After alleging the performance of conditions precedent, the plea alleged that in purported fulfilment of the agreement the plaintiff delivered to the defendant a quantity of hay which was not of the quality as inspected by the defendant and that all rain-damaged hay was not discarded and that it was not dry hay in good merchantable condition but was mouldy and unfit for use. The plea further alleged that the plaintiff did not make delivery of the balance of the hay as trucks were available. The plea concluded that thereby that quantity of hay which was mouldy and unfit for use was of no value to the defendant and that

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the defendant lost the benefit of the contract and the profits which he could and would have made on the resale of the whole of the said hay and was injured in his business as a produce merchant and claimed the sum of £1,000 as damages.

To this plea by way of cross-action the plaintiff filed replications which first pleaded that he did not agree as alleged, and, secondly, that he did not commit the breaches alleged. The last of the plaintiff's replications to the plea by way of cross-action took up the allegations in the plea that the plaintiff delivered to the defendant in purported fulfilment of the agreement a quantity of hay which was not of a quality as inspected by the defendant and that all rain-damaged hay was not discarded and that it was not sound dry hay in good merchantable condition but was mouldy and unfit for use. To those allegations the plaintiff pleaded specially. It is to this replication that the defendant demurs. The demurrer therefore affects only so much of the cross-action as relates to what may be called the breach of warranties as to the hay actually delivered. It does not directly affect so much of the cross-action as relates to the allegation that the plaintiff did not make delivery of the balance of the hay as trucks were available and that the defendant lost the benefit of the contract. In other words, it does not relate to so much of the cross-action as seeks general damages for loss of profits on the undelivered quantity of hay. Needless to say it does not directly affect the causes of action on which the plaintiff sued. What the plaintiff's replication to the defendant's cross-action did was first to set out fully the memorandum of agreement in writing constituting the contract. The memorandum of agreement which is set out states the agreement of the parties in the form of a recital. It recites that " whereas " the parties thereto have agreed to the sale of all that lucerne hay contained in the five stacks as inspected by the purchaser situated at Kingsfield, Aberdeen, derrick pressed, estimated to contain 500 tons at a price and upon certain conditions. It then sets them out. The condition contained in the first clause is expressed thus :—" Quality to be as inspected and all rain-damaged hay to be discarded and the purchaser shall only be responsible to accept all sound dry hay in good merchantable condition ". The second clause is as follows :—" The purchaser's agent shall have the right to accept or reject at the stacks but in the event of the buyer's representative not being present when any hay is loaded at the stacks no objection shall be taken by the purchaser to the quality of the hay delivered at rail ". Clause 3 provides that the price of £13 5s. 0d. per ton shall be f.o.r. Scone and/or Aberdeen. Clauses 4 and 5 deal with

the price, payment and weights. Clause 6 says that delivery shall be as prompt as possible as trucks are available.

After setting out this document the replication proceeds to allege that the hay referred to in the defendant's plea of cross-action as a quantity of hay was loaded by the plaintiff at the stacks and delivered to the defendant at rail in accordance with the said agreement and the defendant's representative was not present when the said quantity of hay was so loaded at the said stacks as aforesaid and the defendant did not then reject the same. It is to this replication that the defendant has demurred. The question raised by the demurrer is therefore whether on the terms of the contract the buyer is entitled to recover damages in respect of hay delivered on the ground that it was not of the quality as inspected or that all rain-damaged hay was not discarded or that it was not sound dry hay in good merchantable condition but was mouldy and unfit for use.

The plaintiff's contention is that upon a proper construction of the whole contract cl. 2 produces the result that in respect of the quality or condition of the hay delivered the buyer has no remedy unless at the stacks before the hay is sent to the railway trucks he objects to the same and rejects it or at all events if neither he nor his representative attend at the stacks. The Supreme Court of New South Wales were of opinion that this was not the proper interpretation of the contract and that the clause did not deprive the buyer of his remedy in damages if the hay delivered failed to comply with the requirements of the contract.

As in effect has already been said, the decision of the demurrer does not dispose of the whole action. Moreover if the interpretation contended for by the plaintiff had been adopted by the Supreme Court that interpretation would not necessarily have disposed of the defendant's cross-action. It would not necessarily have disposed of more of it than related to the eighty-seven tons of hay actually delivered. Even, therefore, if this Court were of opinion that prima facie the decision of the Supreme Court was not correct, it is by no means clear that in the exercise of our discretion we ought to give leave to appeal from the interlocutory judgment on demurrer. There is a good deal to be said for allowing the case to go to trial before an appeal is admitted to this Court.

There is a further consideration against exercising our discretion in favour of granting leave to appeal, namely, that there seems to be a question of fact which may affect the construction of the document. The memorandum of agreement as set out in the replication reads as if the five stacks of hay consisted of derrick

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pressed bales when inspected and when sold. On behalf of the defendant, however, it was stated orally at the Bar that this was not so and that in fact the stacks when inspected were simply stacks of lucerne hay. This may affect the application of the words " all rain-damaged hay to be discarded " and it, indeed, may affect the operation of the words " quality to be as inspected ". For if the stacks did not consist at the time of the contract of derrick pressed bales but of loose hay, it would, as it seems to me, be quite impossible to accept the plaintiff's contention that the words " all rain-damaged hay to be discarded " have no promissory force. Their natural meaning is that in baling the hay the seller must discard what was rain-damaged. It would increase the difficulty of giving to the words " quality to be as inspected " any other meaning than that of a condition or warranty.

But for my part I do not think that the decision of the Supreme Court was prima facie wrong ; on the contrary, I agree in it. The document is not easy to construe but on the whole I think that the provision relating to acceptance or rejection ought not to be construed as depriving the buyer of rights to sue in respect of any breach of contract relating to the quality or condition of the hay actually delivered, and I think that upon the proper construction of the whole contract there is a condition that the hay shall be as inspected, derrick pressed, and sound dry hay in a good merchantable condition, with rain-damaged hay discarded.

It was suggested that the Supreme Court had begun by treating the contract as a sale by description in which was accordingly implied a condition that the hay should be of good merchantable quality and that, having begun in that manner, the court had rejected any limitation on the right to recover damages for breach of the condition so implied in a sale by description when the condition is turned into a warranty by delivery of the goods on the ground that very clear language is necessary to effect such a result. I read the reasons given in the Supreme Court as meaning that the condition that the hay should be in good merchantable condition is found on the face of the contract, but I am by no means prepared to say that this is not a contract for the sale of goods by description within the meaning of s. 19 (2) of the *Sale of Goods Act* 1923-1937 (N.S.W.). It is true that the sale is one of ascertained goods, but the provision is not limited to unascertained goods. A buyer may buy specific or ascertained goods by description within the meaning of the provision. That is shown by *Varley* v. *Whipp* (1) ; *Wren*

(1) (1900) 1 Q.B. 513.

v. *Holt* (1); by a New Zealand case, *Boys* v. *Rice* (2); a Victorian case, *H. Beecham & Co. Pty. Ltd.* v. *Francis Howard & Co. Pty. Ltd.* (3); and the case in this Court of *David Jones Ltd.* v. *Willis* (4); and by *Morelli* v. *Fitch* (5); and *Grant* v. *Australian Knitting Mills Ltd.* (6). If the buyer of goods which he has identified or selected relies in doing so upon their correspondence to a description, then they may be regarded as bought by description, notwithstanding that the goods are ascertained or specific. In the present case the goods are described as lucerne hay and, if they in fact were already derrick pressed, as derrick pressed. The defects complained of apparently do not seem to be such as ought to have been revealed by examination. But, however this may be, there is a clear promise that the quality of the hay will be as inspected and that all rain-damaged hay will be discarded. The words "the purchaser shall only be responsible to accept all sound dry hay in good merchantable condition" literally mean that he is bound to accept hay in that condition and no other hay. But plainly the reason for this is that hay which does not comply with the requirement is hay which the purchaser has not bargained to accept and pay for, and that, I think, notwithstanding the fact that the contract is initially expressed as a sale of ascertained goods, is the same as saying that the purchaser has not bargained to buy it. The natural meaning to attribute to the words "quality to be as inspected and all rain-damaged hay to be discarded" is that the seller so undertakes and I so interpret them. In this view it is of small importance whether the hay was sold by description so that prima facie a condition would be implied that the goods were or would be of merchantable quality. The suggestion that the purpose of the words was only to fix the quantity so that the price might be calculated and that the defendant bought the five stacks independently of their condition does not seem to accord with any probable intention of the parties. The strongest support which the plaintiff's contention finds in the document is the use of the words "no objection" in cl. 2. No doubt there is a good deal to be said for the view that a buyer who seeks to recover compensation for the defective condition of goods actually delivered to him which he has accepted literally does object to the quality of the goods when he makes his claim. But there are several considerations which make it right in my opinion to treat the logical susceptibility of the word "object" to this meaning as insufficient to justify a

(1) (1903) 1 K.B. 610.
(2) (1908) 27 N.Z.L.R. 1038.
(3) (1921) V.L.R. 428.
(4) (1934) 52 C.L.R. 110.
(5) (1928) 2 K.B. 636.
(6) (1936) A.C. 85, at p. 100; 54 C.L.R. 49, at p. 61.

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construction depriving the buyer of his right to claim damages after the delivery of the goods. First and foremost is the general rule which is expressed by *Scrutton* L.J. in *Szymonowski & Co.* v. *Beck & Co.* (1). *Scrutton* L.J. (2) describes it as a principle repeatedly acted upon that if a party wishes to exclude the ordinary consequences that would flow in law from the contract that he is making he must do so in clear terms. His Lordship had before him a clause providing that goods delivered should be deemed to be in all respects in accordance with the contract, and the buyer should be bound to accept and pay for the same accordingly unless the sellers within fourteen days after the goods arrive at the destination receive from the buyers notice of any matter or thing by reason whereof they allege that the goods were not in accordance with the contract. Of this clause *Scrutton* L.J. said that he had to consider whether it was clear that if the goods are not in accordance with the contract a claim for damages is excluded unless the notice of the defect is given within a specified time. His Lordship said that the clause was obscurely drawn and asked the rhetorical question whether having regard to the fact that it mentioned one particular consequence, and bearing in mind the principle he had stated, could he say that the sellers had used language which to the mind of an ordinary commercial man clearly excludes the buyer's right to claim damages as well as their right of rejection. The provision which his Lordship interprets was unlike the present contract but the principle invoked appears to me to be applicable.

In the next place, the terms of cl. 2 itself are in themselves inadequate for the plaintiff's purpose. The earlier part of the clause is concerned with the point at which the right of acceptance or rejection is exercisable. The critical words which follow appear to be directed to the consequence of the absence of the buyer's representative at that point rather than to the consequence of acceptance of the goods. It may be supposed that the parties considered it unlikely that enough trucks would be available at one time to enable the plaintiff to despatch and load the whole 500 tons of hay as one operation. As there might be successive occasions meaning a number of deliveries it was likely that the buyer's representative would be absent when some instalments were despatched from the stacks to be placed in trucks. At all events there is no express provision that the failure of the buyer's representative, when attending, to reject at the stacks shall have any particular consequence and it could only be by implication

(1) (1923) 1 K.B. 457; affirmed (1924) A.C. 43.

(2) (1923) 1 K.B., at p. 466.

that the words " no objection shall be taken " could be considered to exclude the right to claim damages in the case of the buyer's representative, though attending at the stacks, failing to reject bales of hay which when opened up showed that all damaged hay had not been discarded or that the quality was not as inspected or that it was not dry hay in good merchantable condition.

In the third place, the words " no objection " are particularly appropriate to objecting to what is tendered for delivery and might naturally be used for that purpose without any thought of their being applied to a subsequent complaint concerning the condition of hay when opened up.

On the whole I think the proper construction of the agreement considered in all its parts is that it does not exclude the buyer's right to claim damages in respect of hay delivered on the ground of its condition or quality. I am also of opinion that the contract does contain conditions or warranties that the quality shall be as inspected, that all rain-damaged hay shall have been discarded and that the hay shall be sound dry hay in good merchantable condition.

For these reasons the application for leave to appeal should be refused with costs.

WEBB J. I would refuse leave to appeal for the reasons given by the Chief Justice.

It must be borne in mind that the sale was of five stacks of hay, derrick pressed, in bales, and not of loose hay. The condition of the hay would not be ascertainable until the bales were opened. That would not be until after loading and delivery to the purchaser. Hence the need for the warranty, which then should not readily be negatived.

FULLAGAR J. In this case a notice of appeal was served and filed on the assumption that an appeal to this Court lay as of right. It was, however, conceded by counsel for the appellant that the order of the Supreme Court was an interlocutory order, and that leave to appeal was therefore necessary. Reasons of considerable weight suggest themselves for refusing leave as a matter of discretion. The order in question is very far from disposing of either the action or the cross-action, and it would be open to challenge on an appeal as of right from final judgment in the proceedings. In the course of argument, however, the question of the correctness of the construction placed by the Supreme Court on the relevant contract was fully canvassed, and the argument has left me convinced that

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the view taken by their Honours was correct. I am accordingly of opinion that on that ground leave to appeal should be refused.

The contract in question is a contract in writing, dated 1st May 1951, for the sale of certain hay by the plaintiff to the defendant. The question, which arose in the Supreme Court on a demurrer, is whether the terms of the contract, in an event which is alleged, and must, of course, be assumed to have happened, preclude the buyer from maintaining an action for damages in respect of the quality of certain hay delivered under the contract. Because the question arose on demurrer, the document must be interpreted in the absence of evidence, but this does not mean that the matter is to be considered simply *in vacuo*. There are one or two matters which either are the subject of obvious inference from the terms of the document itself or were stated and accepted by counsel in argument, and these it will be convenient to state at the outset. In the first place the hay, which was of a quantity estimated at about 500 tons, was contained in five stacks situate on a property known as Kingsfield, near Aberdeen in New South Wales. In the second place, the stacks had been inspected by the buyer before the making of the contract, but the inspection could not, of course, disclose the quality or condition of what was in the interior of the stacks. In the third place, the hay was not simply bought "in the stack". What was contemplated, as the contract itself shows, is that the seller should take the hay from the stacks, and deliver it in bales at the railway station at either Scone or Aberdeen—presumably at seller's option, though subject to the requirement that delivery should be "as prompt as trucks are available". The seller's obligation to deliver was to be discharged by delivery at the railway station, and the agreed price was a price per ton free on rails Scone or Aberdeen.

The contract consists of a recital and six numbered "conditions". What purports to be a recital, however, expresses the main obligation intended to be created, and it is clear that it must be given contractual force. The parts of the document which are material for present purposes are this "recital" and cll. 1 and 2 of the numbered "conditions". It will be convenient to consider these in order, though it is on cl. 2 as I view the matter, that the only question in the case arises.

What is "recited" is that the parties have "agreed to the sale of all that lucerne hay contained in five (5) stacks as inspected by the purchaser situated at 'Kingsfield' Aberdeen aforesaid derrick pressed estimated to contain five hundred (500) tons for the price and upon the conditions as follows".

If what followed had contained nothing but provisions as to price and time and mode of delivery, more than one interesting question might, in certain events, have arisen, but such questions it is unnecessary to discuss. Two things seem reasonably clear. On the one hand, if the contract had contained no more than is supposed above, it would seem clear that the case would have been one of a well-recognized class in which there is a sale of specific goods which is also a sale by description. So, whatever might have been the position at common law, there would have been, by virtue of s. 18 of the *Sale of Goods Act* 1923-1937 (N.S.W.), an implied condition that the goods should correspond with the description. The condition, so far as non-correspondence would not be disclosed by inspection, would not be excluded by the fact that the goods had been inspected: *Josling* v. *Kingsford* (1). If, for example, the hidden interior of the five stacks had consisted not of lucerne hay but of oaten straw, delivery of the oaten straw, duly pressed, at Scone or Aberdeen would not have constituted a performance of the contract. On the other hand, it would seem equally clear that there would have been no condition or warranty as to merchantable quality. It is not, of course, impossible that such a condition should be implied in such a contract, but the implication could not be made except under s. 19 (2) of the *Sale of Goods Act* 1923-1937, and the matters required thereby to found the implication are not pleaded here.

Questions will often arise as to whether a particular word or expression in a particular contract is part of a description of goods, and a buyer who is not in a position to rely on s. 19 (2) of the *Sale of Goods Act* may claim that a word or expression, which is indicative of quality, is part of a description of the goods such as to bring the case within s. 18. But a condition or warranty as to correspondence with description is an entirely different thing from a condition or warranty as to quality. In the present case that part of the contract which has so far been considered identifies and describes the goods, but (so far at least as this appeal is concerned) it cannot be regarded as either saying or implying anything as to quality. The matter of quality is dealt with by cl. 1 of the conditions which follow. Clause 1 is in the following terms:— "Quality to be as inspected and all rain-damaged hay to be discarded and the purchaser shall only be responsible to accept all sound dry hay in good merchantable condition".

Clause 1 is not an example of elegant drafting, but the effect of it, if it stood alone, would, as it seems to me, be perfectly clear.

(1) (1863) 13 C.B. (N.S.) 447, at p. 457 [143 E.R. 177, at p. 181].

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The seller promises that the quality of all the hay shall be the quality disclosed by inspection of the stacks. He further promises that, if, when the stacks are opened up, any rain-damaged hay is disclosed, he will discard that rain-damaged hay, i.e., he will not tender it for delivery. From the remainder of the clause there may be implied a further promise by the seller that all the hay delivered will be sound and dry and in good merchantable condition. Actually, however, this last part of the clause appears to add nothing to the obligations of the seller, because, if any of the hay delivered were not sound and dry and in good merchantable condition, it may be taken as clear that its quality would not be "as inspected". The real purpose of the last part of the clause is thus seen, I think, to be to make it quite clear that the seller's obligation as to quality is a condition and not a mere warranty. If there is a breach by the seller of his undertakings, and if he does deliver hay not of the quality promised, the buyer may reject any such hay. There is, of course, nothing to compel the buyer to reject any such hay. He may accept it, if he thinks fit, and, if he does, he may sue the seller for damages for breach of the promises contained in the first part of the clause.

So far the position seems clear enough. But cl. 1 is qualified by cl. 2, and cl. 2 does, I think, raise a fairly arguable point. Before coming to cl. 2, however, it will be well to consider a little further what the position would have been if cl. 1 had stood unqualified. The position would, I think, have been quite clear. It would have been governed by ss. 37, 38 and 39 of the *Sale of Goods Act* 1923-1937. The buyer would not be deemed to have accepted any goods unless and until he had had a reasonable opportunity of examining them. He would be deemed to have accepted them when he intimated to the seller that he had accepted them, when he did any act in relation to them inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retained the goods without intimating to the seller that he rejected them. If he lawfully rejected them, he would not be bound to return them to the seller. Difficulties might conceivably have arisen in applying these principles to particular events which might have occurred, but the principles which would have been applicable seem plain enough.

Clause 2 is in the following terms:—"The purchaser's agent shall have the right to accept or reject at the stacks but in the event of the buyer's representative not being present when any hay is loaded at the stacks no objection shall be taken by the purchaser to the quality of the hay delivered at rail". The reference to acceptance or rejection "at the stacks", read with the rest

of the clause, clearly contemplates the presence of a representative of the buyer at Kingsfield at the time when the stacks are being opened up and the hay is being loaded for conveyance to rail. The question suggests itself whether it is not necessary to imply a promise on the part of the seller, or at least a condition precedent to the operation of the latter part of the clause, that the seller will give reasonable notice to the buyer of the time or times when he intends to take hay from the stacks, so that the buyer may, if he wishes, arrange for his representative to go to Kingsfield to inspect the hay. This question, however, does not arise on the present appeal. I think we must approach the case on the assumption that it is to be answered in favour of the seller.

There is no doubt that cl. 2 is intended to restrict, and does restrict, the buyer's right to reject goods for non-compliance with the requirements of cl. 1. The question is whether it goes further and means that, if the buyer does not send his agent to inspect " at the stacks ", he is precluded not only from rejecting goods for non-compliance with cl. 1 but also from maintaining an action for damages in respect of goods which are delivered on rails but do not comply with cl. 1. The question is, of course, a pure question of construction. There are, in my opinion, several reasons why it should be answered in the negative.

To construe the latter part of cl. 2 in the wider sense would be, I think, to violate a well-established general rule of the construction of all instruments. Rights which exist at common law or by statute are not to be regarded as denied by words of dubious import. Before any such denial is accepted, it must appear with reasonable clarity from the language used that the denial is intended. It does not seem to me to be possible to maintain that the latter part of cl. 2 explicitly or unequivocally denies a right to claim damages for breach of cl. 1. I think, indeed, on the whole, that the words actually used, while entirely apt to exclude a right to reject for breach of condition as to quality, are less appropriate to express an intention to exclude a claim for damages in respect of goods delivered and accepted. The words are " no objection shall be taken to the quality of the hay delivered ". It may be conceded that the word " objection " is a word of wide and somewhat vague import, but it does, I think, convey a definite notion of refusal or unwillingness to accept the thing objected to. If a buyer refuses to accept goods on the ground of defective quality, he does in the real and literal sense " take objection " to their quality. If he accepts them but later (perhaps long after he has resold them)

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claims to be compensated for their defective quality, it is not an actual misuse of language to say that he is objecting to their quality, but it is only, I think, in a loose and colloquial sense that he can be said to be so doing. It would, to my mind, be more accurate to say that he has waived his right to object to the quality of the goods and is pursuing another remedy. The matter may perhaps be put in another way by saying that to refuse to accept the goods really is to give effect to an objection to their quality, whereas to sue for damages is not.

Such considerations may be thought to be somewhat refined, but such cases as this must often turn on a nice estimation of a denotation or a connotation. In my opinion, however, when regard is had to the context of the critical words, the present case is removed from the realm of serious doubt. For those words occur in what is clearly intended to be a qualification of the buyer's right to reject for breach of a condition as to quality. Clause 1 says what the quality is to be, and expressly gives to the buyer a right to reject for defective quality. Then follows cl. 2, the whole purpose of which is obviously to qualify that right of rejection. The words on which the seller relies follow immediately on an express reference to the buyer's " right to accept or reject ". The whole concern of cl. 2 is this " right to accept or reject ", and there is no justification, in my opinion, for regarding them as having any reference to anything other than this " right to accept or reject ".

The primary purpose of cl. 2 is to confine the right of rejection to the place of the stacks and the time of loading. The " right to accept or reject " is not, of course, an arbitrary right. It is impossible to suppose that the buyer's agent is authorized by cl. 2 to reject hay which complies with the condition : if that were so, the buyer could reduce the contract to a nullity by instructing his agent to reject *all* the hay. The " right to accept or reject " is the right given by cl. 1. The buyer's agent, if he is present at the time and place of loading, may, of course, accept hay which is of defective quality, and, if he does, his acceptance will (one would think) bind the buyer, though it will not affect the buyer's right of action for damages. But the agent is not entitled to reject hay which is *not* of defective quality, and, if he does, the seller will have *his* right of action for damages. So far the position seems entirely clear, but it remained to deal with the event of the buyer's agent not being present at the time and place of loading. The latter part of cl. 2 deals with that event, and says that, if that event occurs, the right of rejection for defective quality is lost. But it does not say more. On this view cll. 1 and 2 make a coherent and sensible

whole. If the wider meaning is given to the latter part of cl. 2, we get a position which, if not irrational, is at least very remarkable. If the buyer sends his agent along, and the agent accepts hay which is of defective quality (he might, of course, be instructed to accept all the hay, whatever its quality), the buyer will have his action for damages. But, if, relying on the seller's integrity, he does not send his agent along, he will have no action for damages although the great bulk of the hay delivered is rotten and worthless.

Leave to appeal should, in my opinion, be refused.

KITTO J. By the order which the appellant seeks to challenge in this case, the Full Court of the Supreme Court of New South Wales gave judgment for the defendant on a demurrer to a replication in an action pending in that court. The plaintiff instituted an appeal against the order without having obtained the leave which s. 35 (1) (*a*) of the *Judiciary Act* 1903-1950 makes necessary in the case of an interlocutory judgment. Upon the appeal coming on to be heard his counsel applied for leave, and we directed that the substance of the matter as well as the application for leave should be argued, the parties agreeing that in the event of leave being granted the appeal would be treated as instituted in pursuance of the leave and decided without further argument.

The action in which the demurrer arose was an action for an unpaid balance of the price of certain lucerne hay sold by the plaintiff to the defendant, and, alternatively, for damages for the defendant's non-acceptance of a portion of the hay sold. The defendant's pleas included a plea of cross-action claiming damages for breaches of certain promises alleged to have been made by the plaintiff to the defendant in consideration of the purchase of the hay. The breaches assigned were four in number, the first three being that the plaintiff delivered to the defendant in purported fulfilment of the sale agreement a quantity of hay which was not of the quality as inspected by the defendant; that all rain-damaged hay was not discarded; and that it (*scil.* the hay delivered) was not sound dry hay in good merchantable condition but was mouldy and unfit for use.

The plaintiff addressed his fourth replication to so much of this plea as depended upon these three allegations of breach. The replication set out the agreement in full, the material portions of it being as follows:—

"Whereas the parties hereto have agreed to the sale of all that Lucerne Hay contained in five (5) stacks as inspected by the Purchaser situated at 'Kingsfield' Aberdeen aforesaid derrick

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pressed estimated to contain five hundred (500) tons for the price and upon the conditions as follows :

1. Quality to be as inspected and all rain-damaged hay to be discarded and the Purchaser shall only be responsible to accept all sound dry hay in good merchantable condition.

2. The Purchaser's agent shall have the right to accept or reject at the stacks but in the event of the Buyer's representative not being present when any hay is loaded at the stacks no objection shall be taken by the Purchaser to the quality of the hay delivered at rail.

3. The price shall be the sum of Thirteen pounds five shillings (£13 5s. 0d.) per ton f.o.r. Scone and or Aberdeen.

4. Payment shall be made as follows :—Cash on receipt of Railway Consignment Note.

5. Weights shall be as shown on the sending Station Railway Weigh Bridge Tickets and shall be accepted by both parties as final.

6. Delivery shall be as prompt as trucks are available ".

The replication went on to allege that the hay referred to in the plea as " a quantity of hay " was loaded by the plaintiff at the stacks and delivered to the defendant at rail in accordance with the agreement, that the defendant's representative was not present when the said quantity of hay was so loaded at the stacks, and that the defendant did not then reject the same.

It was to this replication that the defendant demurred. The learned judges in the Supreme Court placed upon the agreement the construction which the defendant had attributed to it ; that is to say, they read cl. 1 as containing a promise by the vendor that the hay sold, when delivered at rail, would be of the quality it had possessed when the purchaser inspected it and would be not rain-damaged, but sound dry hay in good merchantable condition. In addition, the learned Chief Justice appears to have considered that an obligation to a like effect arose under the common law unless it was clearly excluded by the contract. Their Honours proceeded to hold that cl. 2, while it limited the purchaser's right to reject hay which was not of the quality thus required, did not affect his right to recover damages in respect of hay which, though not rejected at the stacks, was nevertheless found on delivery at rail to be below the stipulated quality. On this construction of the agreement the replication did not disclose a good defence to the cross-action, and for that reason the demurrer was upheld.

In my opinion there is no ground for implying any warranty of quality into the agreement. As I read it, it is not an agreement for the sale of goods by a description referring to quality, nor is

the case one of a buyer making known to the seller the particular purpose for which goods are required so as to show that the buyer relies upon the seller's skill or judgment, the goods being of a description which it is in the course of the seller's business to supply. The agreement relates to goods which the purchaser has inspected, and obviously has inspected for quality. The question of quality is not left to be governed by implication from the terms of the agreement or by any presumptions supplied by the law. It is made the subject of specific provision which is contained in cll. 1 and 2 read together; and the sole question appears to me to be whether that provision is to be construed as promissory or as merely restrictive of the subject matter of the intended sale.

It is true that the agreement commences by describing the intended sale as a sale of all the hay contained in the five stacks inspected by the purchaser, and that the first five words of cl. 1 " quality to be as inspected ", are quite apt for the expression of a promise. But the rest of the clause appears to me to show that it is not intended as a promissory provision at all. It describes a state of affairs to exist at a future time. This, of course, is to be expected since the hay is to be delivered at rail at times dependent upon the availability of trucks; the price is agreed at a rate per ton to be conclusively determined by railway weighbridge tickets; and payment of the price is to be made on receipt of the railway consignment notes. Clearly enough, the title is to pass on delivery at rail. But what hay is it intended that the purchaser shall acquire and become liable to pay for on delivery at rail? Not, I should have thought, the whole of the hay in the five stacks, regardless of any failure to conform to the quality existing at the time of the purchaser's inspection; for the effect of the second provision of cl. 1 is to exclude from the hay to be delivered at rail any of the hay in the stacks which may be damaged by rain, and the effect of the third provision of that clause is to relieve the purchaser from any obligation to take any hay which is not sound, dry and in good merchantable condition. These two provisions thus operate as qualifications upon the initial description of the sale as comprising all the hay in the five stacks, and they show that the purchaser is not buying all the hay in the stacks in reliance upon its being of a stipulated quality so that defects of quality shall give rise to a right to recover damages, but is interested only to buy hay which is of the quality that he wants. In this context the first of the three provisions of cl. 1 appears simply as an explanatory introduction to a clause the function of which is to exclude from the sale so much of the hay in the stacks as may be found, when the

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time for delivery arrives, to be no longer of the quality which alone the purchaser is content to accept, because it is rain-damaged or for some other reason not sound, dry and in good merchantable condition. Clause 1 thus protects the purchaser in regard to quality, and cl. 2 modifies the extent of that protection in order to save the vendor the expense and trouble of loading hay and carting it to the rail, only to have it then rejected for defects of quality. Clause 2 shows that the only defects of quality which are to exclude hay from the sale are such as exist at the time of loading for cartage to the rail. Its meaning appears to me to be that the purchaser is precluded from refusing on the ground of defective quality to accept as sold to him under the agreement any hay which his agent fails to reject at the stacks at the time of loading, the agent being present and accepting it either expressly or by not rejecting it, or being absent when he might have been present.

On this construction of cll. 1 and 2, there is nothing in the agreement which expresses or imports any promise as to quality, the agreement being simply one for the sale of all the lucerne hay in the five stacks inspected by the purchaser which at the time of loading does not fall short of the quality described in cl. 1 or to the quality of which the purchaser is not precluded from objecting by the provisions of cl. 2. Unless this is the meaning of the agreement I cannot see why cl. 2 is in the document at all.

If the agreement be construed in this sense, the replication demurred to affords a good defence to that portion of the cross-action to which it is pleaded. In my opinion the case is one for leave to appeal, for I can see no advantage and much potential disadvantage to the parties in allowing the action to go to trial on the footing of a construction of the agreement which may ultimately not be upheld. For the reasons I have stated, I am of opinion that the appeal should be allowed, the judgment for the defendant on the demurrer should be discharged, and judgment should be entered for the plaintiff on the demurrer.

TAYLOR J. The problem in this case is whether cl. 1 of the agreement between the parties, set out in the plaintiff's fourth replication, constituted a warranty as to the quality and condition of the contract goods. The defendant, who was the buyer, contended that it did whilst the plaintiff maintained that it did not. The argument advanced on behalf of the latter asserted that the agreement was for the sale of specific goods, namely, " all that Lucerne Hay as inspected by the Purchaser situated at ' Kingsfield ' . . . derrick pressed estimated to contain five hundred tons ", and that the

provisions of cll. 1 and 2 of the contract merely provided that the defendant should be entitled, before delivery, to exclude from the sale " rain-damaged " hay and hay which was not " sound dry hay in good merchantable condition ".

Some support for the plaintiff's contention is to be found in the reasons of the Court of Appeal in *Eldon (Lord)* v. *Hedley Bros.* (1) where a contract for the sale of " two stacks of old land hay standing " at the seller's farm, " delivery of same to be taken when convenient, and only good marketable hay, clear of mould, to be delivered in a dry condition " (2), was held to be an agreement for the sale of specific goods, that is, the two specified stacks of hay. But this decision was based, largely, upon a consideration of evidence of extrinsic facts which the members of the Court of Appeal thought to be material. The problem in the present case, however, arises on demurrer and the Court is without the assistance which might possibly be derived from a consideration of the circumstances in which the agreement was entered into. Accordingly if it were thought that a consideration of those circumstances might be of assistance in determining the rights of the parties leave to appeal should be refused. But I do not think this would be so.

The problem, as I see it, cannot be resolved merely by determining whether the agreement was for the sale of specific goods or for the sale of goods by description for there can be no question that a seller may give a warranty as to the quality, or as to the condition, of specific goods. No doubt the determination of that question may assist in a proper understanding of the meaning of cll. 1 and 2 but it cannot, of itself, resolve the real problem in favour of either one party or the other.

In *Szymonowski & Co.* v. *Beck & Co.* (3) the Court of Appeal was concerned with a contractual clause which provided that " The goods delivered shall be deemed to be in all respects in accordance with the contract, and the buyers shall be bound to accept and pay for the same accordingly, unless the sellers shall within fourteen days after arrival of the goods at their destination receive from the buyers notice . . . of any matter or thing whereof they may allege that the goods are not in accordance with the contract " (4). This clause was contained in an agreement for the sale of goods by description and, I think it not unimportant to observe, it related to the giving of notice within a specified time after delivery to the buyer or on his account. It was therefore a provision relating to the acceptance of the contract goods and might have been understood

(1) (1935) 2 K.B. 1.
(2) (1935) 2 K.B., at p. 17.
(3) (1923) 1 K.B. 457.
(4) (1923) 1 K.B., at p. 463.

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to fix, as between the parties, a reasonable time within which the buyer might have rejected them. The question with which the Court of Appeal was concerned was whether the clause had a wider operation and precluded, in the absence of an appropriate notice within fourteen days, not only rejection of the goods but also an action for damages for breach of warranty. It was held that the clause did not so operate and that the only intention of the parties declared thereby was that, if appropriate notice was not given, the buyer should be taken to have lost his right of rejection and be bound to pay for the goods. The clause did not go further, as it might have done, and exclude liability for breach of the warranty which the agreement clearly contained.

The present case does not, I think, fall into the same category for the provisions of cl. 2 do not relate to acceptance or rejection after delivery. Nor, on the other hand, do they provide that the contractual goods shall be taken with all "defects" (cf. *Shepherd* v. *Kain* (1)) or "without allowance for any defect or error" (cf. *Taylor* v. *Bullen* (2)). The obligation of the defendant under this contract was to pay on railway weights for such hay as was delivered and the primary purpose of cll. 1 and 2 appears to me to have been to exclude from deliveries to the defendant such portions of the five stacks of hay as he might properly "reject". But whilst cl. 2 conferred upon the defendant the right to reject hay at the stacks, it is completely silent as to the basis upon which this right is exercisable. Obviously the basis upon which it is exercisable is that the standards prescribed by cl. 1 have been departed from so that he may reject hay which is not of the "quality as inspected", which is "rain-damaged" or not "sound dry hay in good merchantable condition". If it were not for the presence in the agreement of cll. 1 and 2 the defendant would, subject to any implications pursuant to the *Sale of Goods Act*, have been bound to take and pay for the whole of the five stacks of hay, and no action for breach of warranty would have accrued to him. Is the plaintiff's position, then, any weaker because he has, in effect, agreed to give to the defendant the right to make a further examination of the hay, as it is being loaded, and to exclude from deliveries under the agreement hay which does not conform to the specified standards? I think not. The plaintiff has in my opinion done no more than sell to the defendant five stacks of hay and agreed to give to him the right to exclude as and when it is being loaded, and before delivery, such hay as does not conform to the standards specified in cl. 1.

(1) (1821) 5 B. & A. 240 [106 E.R. 1180].

(2) (1850) 5 Ex. 779 [155 E.R. 341].

But on this view the plaintiff did not warrant the quality or condition of any hay "accepted" or not "rejected" by the defendant. If the defendant did not exercise his right to reject he is, I think, bound to pay for hay delivered from the five stacks. And, even if the clause had not contained the provision that "in the event of the buyer's representative not being present when any hay is loaded at the stacks no objection shall be taken by the purchaser to the quality of the hay delivered at rail" the defendant would have been in no better position. For if he was given the right, upon specified grounds, to exclude hay from deliveries under the agreement and did not choose to exercise it his primary liability under the agreement remained. The words which I have quoted were, I think, merely intended to make it clear that this result was intended and that no warranty of quality or condition was intended in respect of hay delivered pursuant to the agreement. For the same reason I am of the opinion that there is no room for the implication in the contract of any warranty of quality or condition.

In the circumstances I am of the opinion that leave to appeal should be granted and the appeal allowed.

Leave to appeal refused with costs.

Solictors for the applicant-appellant, *K. D. Manion & Co.*
Solicitors for the respondent, *Lobban, McNally & Harney.*

J. B.