[HIGH COURT OF AUSTRALIA.]

PETER TURNBULL AND COMPANY PROPRIETARY LIMITED . . . . Plaintiff, } Appellant;

AND

MUNDUS TRADING COMPANY (AUSTRALASIA) PROPRIETARY LIMITED Defendant, } Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1953, Sydney, *Nov.* 12, 13;

1954, Melbourne, *June* 1.

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

Sale of Goods—F.o.b. contract—Breach—Sale of oats—Loading on ship within prescribed time—Ship and shipping date to be nominated by buyer—Resale of oats by buyer—Ship nominated not ready to load in prescribed time—Seller's inability to carry out contract—Oats purchased by buyer at increased cost—Damages.

By a written agreement made on 22nd November 1950, the plaintiff agreed to buy and the defendant to sell a quantity of oats at 7s. 4d. per bushel f.o.b. Sydney to be loaded on a ship or ships nominated by the plaintiff during January or February 1951; the plaintiff was to give fourteen days' notice of ships and shipping dates. On 8th January 1951, the plaintiff mentioned 14th February as the approximate shipping date and later in the month mentioned the *Afric* as the ship but at no time did the plaintiff give to the defendant an appropriate shipping notice as required by the agreement. On 15th January the plaintiff entered into a contract with a third party to sell it the same quantity of oats at 8s. 8d. per bushel f.o.b. Sydney, for shipment "Feb./First half of March", intending to deliver against the contract the oats which it had contracted to buy from the defendant. At the end of January the defendant told the plaintiff that it could not supply the oats f.o.b. Sydney but claimed that it would be able to deliver them f.o.b. Melbourne if the plaintiff could persuade the ship to accept them at that port. The plaintiff's efforts were unsuccessful and it informed the defendant by letter that the oats would have to be loaded in Sydney. The defendant replied that it had no oats and could not carry out its contract. Early in March the plaintiff bought the oats against its contract with the third party at the then price of 10s. 4d. per bushel first informing the defendant of its

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intention to do so and giving it the opportunity of buying them itself. The defendant refused the plaintiff's suggestion. The *Afric* did not arrive in Sydney until March 1951. In an action by the plaintiff against the defendant for breach of contract a verdict was found for the plaintiff for £2,100, being the difference between 7s. 4d. per bushel at which the defendant had agreed to sell and the 10s. 4d. per bushel which the plaintiff had to pay to fulfil its resale contract.

Held, by *Dixon* C.J., *Webb* and *Kitto* JJ. (*Taylor* J. dissenting), that the plaintiff was entitled to succeed on the ground that, in so far as there was a non-fulfilment of the condition requiring the nomination of a February ship and the giving of fourteen days' notice of the ship and shipping date, the defendant dispensed the plaintiff from such fulfilment.

Decision of the Supreme Court of New South Wales (Full Court): *Peter Turnbull & Co. Pty. Ltd.* v. *Mundus Trading Co. (Australasia) Ltd.* (1953) 70 W.N. (N.S.W.) 184, reversed and verdict and judgment of *Kinsella* J. restored.

APPEAL from the Supreme Court of New South Wales.

Peter Turnbull & Co. Pty. Ltd. brought an action in the Supreme Court of New South Wales claiming from the defendant, Mundus Trading Co. (Australasia) Pty. Ltd., the sum of £2,100 as damages for the non-performance by the defendant of an agreement whereby the defendant agreed with the plaintiff that the plaintiff would purchase from the defendant two hundred and fifty tons of oats at the price of seven shillings and fourpence (7s. 4d.) per bushel f.o.b. Sydney to the knowledge of the defendant for the purpose of resale. The plaintiff further alleged that it was a term and condition of the agreement that the oats were to be loaded by the defendant on a ship or ships nominated by the plaintiff during the months of January and February 1951, but the defendant had failed to deliver any of the oats and the plaintiff had been compelled to purchase the same quantity of oats elsewhere at the price of ten shillings and fourpence (10s. 4d.) per bushel thereby losing the benefit of that agreement and the profits expected to be made under the agreement.

The action was tried as a commercial cause without a jury, the issues for trial being, *inter alia*: (a) whether there was a contract made between the plaintiff and the defendant whereby the defendant agreed to sell and the plaintiff agreed to buy two hundred and fifty tons of oats at the price of 7s. 4d. per bushel f.o.b. Sydney; (b) did the defendant commit a breach of this contract in that it failed to deliver the oats the subject of the contract to the plaintiff; and (c) if the defendant did so fail to what damage is the defendant entitled.

The trial judge found that the plaintiff was not in default on 28th February 1951 when the defendant stated it would not load the oats in Sydney and that the plaintiff was entitled to accept the repudiation of the contract by the defendant, and to maintain the action for the breach. A verdict was given for the plaintiff in the sum of £2,100.

An appeal by the defendant was upheld by the Full Court of the Supreme Court (*Street* C.J., *Owen* and *Clancy* JJ.) the verdict for the plaintiff set aside and in its place a verdict was entered for the defendant (*Peter Turnbull & Co. Pty. Ltd.* v. *Mundus Trading Co. (Australasia) Pty. Ltd.* (1)).

From that decision the plaintiff appealed to the High Court.

Further material facts appear in the judgments hereunder.

R. L. Taylor Q.C. (with him *I. F. Sheppard*), for the appellant. On 31st January 1951 the respondent stated it was unable to supply the oats in Sydney but was able to supply them in Melbourne. Both parties knew that the ship *Afric* would be loaded in Sydney before it would be loaded in Melbourne. Under the terms of the contract the appellant could have nominated any other ship to load in Sydney in February 1951, when it found that the *Afric* would not be in Sydney for loading before March 1951, and it, the appellant, had until 15th February 1951 to exercise its right to nominate. The appellant was entitled to maintain this action for a breach of the original contract. It was not obliged to prove or establish that it had nominated a ship in Sydney ready to load in February 1951 because it had refrained from doing that at the express request of the respondent. The respondent cannot now set up the non-fulfilment of that condition (*Ogle* v. *Earl Vane* (2); on appeal (3); *Charles Rickards Ltd.* v. *Oppenhaim* (4)). The doctrine in the last-mentioned case should be accepted as applicable to this case. The parties treated the contract as being on foot after the date of performance, and each party is estopped. The matter of waiver is completely left out of the question and the principles enunciated in *Oppenhaim's Case* (5) have not been taken into account. The appellant was not obliged to prove fulfilment of the conditions, the respondent having said that it could not and would not supply the oats: see *Ripley* v. *McClure* (6) and *British & Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (7). The respondent is estopped from asserting that the ship did not arrive in time for

(1) (1953) 70 W.N. (N.S.W.) 184.
(2) (1867) 2 Q.B. 275, at pp. 281, 284.
(3) (1868) 3 Q.B. 272, at p. 279.
(4) (1950) 1 K.B. 616, at pp. 622, 623.
(5) (1950) 1 K.B., at pp. 622, 623.
(6) (1849) 4 Ex. 345 [154 E.R. 1245].
(7) (1923) A.C. 48, at pp. 63, 64.

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a February loading. The original stipulation in the contract which required the appellant to provide a ship to load the oats in Sydney in February had ceased to be a condition of the contract and both parties treated it as a warranty. A correct statement of the position appears in *Tramways Advertising Pty. Ltd.* v. *Luna Park (N.S.W.) Ltd.* (1); on appeal *Luna Park (N.S.W.) Ltd.* v. *Tramways Advertising Pty. Ltd.* (2). Alternatively, the original contract was altered by a parol agreement to provide that the ship was to be the *Afric* and the respondent would load the oats on the *Afric* either at Melbourne or Sydney and that this agreement in writing was sufficient to comply with the statute.

N. H. Bowen Q.C. (with him *T. O. Ziems*), for the respondent. The respondent relies on the judgment given by the court below. The time limit applies to loading and not to nomination. The shipping date must be the date on which the appellant required the respondent to load the oats on the ship. The expression " 14 days' notice " means " not less than 14 days' notice ". Physical capacity did not matter. In this case 14 days' notice was not in fact given. So far as notice was given at all a warning notice was given that there would have been an approximate shipping date on 14th February. The appellant's declaration shows that it is suing on an agreement between it and the respondent. It is admitted that no proper notice as required by the contract was given at any time. There never was any dispute that a contract had been made. It was the responsibility of the buyer to secure the accommodation and to notify the seller as to the shipping date. It was never in a position to give a proper notice of shipping in Sydney. The only evidence as to shipping available was as to Melbourne. This is not a case of waiver or forbearance but of variation. Here positive variation would be needed and it would have to be contractual (*Phillips* v. *Ellinson Bros. Pty. Ltd.* (3)). For the purpose of determining whether a contract to vary a contract is within the *Statute of Frauds* or the *Sale of Goods Act* (1923-1953) (N.S.W.), the second contract is regarded as creating a single new contract consisting of so many terms of the old contract as still apply together with the new. If the whole of the new contract is not in writing it will be unenforceable but in those circumstances the original contract will not be rescinded and may still be enforceable (*Morris* v. *Baron & Co.* (4); *British & Beningtons Ltd.* v. *North Western Cachar Tea*

(1) (1938) 38 S.R. (N.S.W.) 632, at pp. 643, 644; 55 W.N. 229.
(2) (1938) 61 C.L.R. 286.
(3) (1941) 65 C.L.R. 221, at pp. 243, 244.
(4) (1918) A.C. 1, at pp. 31, 39.

Co. Ltd. (1); *Dowling* v. *Rae* (2) and cf. *Phillips* v. *Ellinson Bros. Pty. Ltd.* (3)). If the time for the performance of a condition has passed and there has been a breach, such breach may be waived and the condition is then reduced to the level of a warranty, the contract remaining on foot. Performance in the varied form must then be accepted but if the condition waived relates to the time of performance and no fixed time is substituted the party who waived the condition may give a notice allowing a reasonable time after which he will be entitled to terminate the contract (*Bentsen* v. *Taylor, Sons & Co.* (4); *Panoutsos* v. *Raymond Hadley Corporation of New York* (5); *Hartley* v. *Hymans* (6) and *Charles Rickards Ltd.* v. *Oppenhaim* (7)). If the time for performance of a condition has not arrived and the promisor is in a position to perform the condition but performance is excused or waived by the promisee, then the promisor may sue upon the original contract notwithstanding that the time for the performance of the condition has expired without its having been performed (*Hickman* v. *Haynes* (8); *Levey & Co.* v. *Goldberg* (9)). If a promisor is never in a position to perform a condition in a contract within the time provided by the contract he is not entitled to sue on the original contract relying on excuse or waiver of the performance of the condition as required by the contract (*Plevins* v. *Downing* (10); *Besseler Waechter Glover & Co.* v. *South Derwent Coal Co. Ltd.* (11); cf. *British & Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (12)). "Readiness and willingness" implies not only disposition but also capacity to perform the contract (*De Medina* v. *Norman* (13); *British & Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (14); *Plevins* v. *Downing* (15)). Whatever reason was given at the time the respondent can rely on every actual breach which appears (*Shepherd* v. *Felt & Textiles of Australia Ltd.* (16)). The appellant was never ready and willing to perform a new contract. The contract must be in writing. The repudiation was accepted and it does not rest with the respondent either to affirm or deny.

R. L. Taylor Q.C., in reply. The delivery clause provided that the oats should be loaded on to the ship. Grammatically construed that means loaded on to any ship the buyer has nominated during

(1) (1923) A.C., at pp. 62, 63.
(2) (1927) 39 C.L.R. 363, at pp. 370, 371.
(3) (1941) 65 C.L.R., at pp. 243, 244.
(4) (1893) 2 Q.B. 274, at p. 283.
(5) (1917) 2. K.B. 473.
(6) (1920) 3 K.B. 475.
(7) (1950) 1 K.B. 616.
(8) (1875) L.R. 10 C.P. 598.
(9) (1922) 1 K.B. 688.
(10) (1876) 1 C.P.D. 220, at pp. 225, 226.
(11) (1938) 1 K.B. 408, at pp. 416, 417.
(12) (1923) A.C. 48.
(13) (1842) 9 M. & W. 820, at p. 827 [152 E.R. 347, at p. 350.]
(14) (1923) A.C., at p. 63.
(15) (1876) 1 C.P.D., at pp. 225, 226.
(16) (1931) 45 C.L.R. 359, at pp. 371, 377, 378.

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those two months. It is not possible or practical to give the precise date on which the ship could take the oats. The buyer is to give fourteen days' notice, and the seller is to have fourteen days' notice or more. The seller had in fact fourteen days' notice in which to load the oats (*George Hudson Ltd.* v. *Australian Timber Workers' Union* (1); *Adams* v. *Chas. S. Watson Pty. Ltd.* (2); *Turner* v. *York Motors Pty. Ltd.* (3)). It being a prime question of construction of the document it is open to the respondent to contend for that construction. The terms of the contract did not require that a written notice should be given. An informal notice would be sufficient compliance with those terms: see *Williams* on *Contracts*, 2nd ed. (1945), p. 495. The matter of the fulfilment of conditions was dealt with in *Morrell* v. *Studd & Millington* (4); *Wackerbarth* v. *Masson* (5); *Maine Spinning Co.* v. *Sutcliffe & Co.* (6). The appellant was never in a position to give fourteen days' notice. In any event the respondent waived the condition that the appellant had to give it fourteen days' notice of a February ship. Reference was not made before the trial judge to any suggested lack of writing. The appellant would be entitled on these issues to make a case on a contract consisting of the original contract with a variation to load on the *Afric* in March if such a contract were in writing. There was an oral variation and evidence in writing. For mode of performance see *Plevins* v. *Downing* (7).

Cur. adv. vult.

June 1.

The following written judgments were delivered:—

DIXON C.J. The question for decision upon this appeal is whether, under the terms of a contract for the sale and purchase of oats f.o.b. Sydney, the buyer is disentitled to recover from the seller for non-delivery of the oats because the buyer failed in the fulfilment of conditions precedent. At the trial of the action as a commercial cause before *Kinsella* J. without a jury, the buyer, who is the plaintiff in the action and the appellant in this Court, succeeded and recovered £2,100 damages, but the decision in the buyer's favour was reversed in the Full Court by *Street* C.J., *Owen* and *Clancy* JJ. The contract was dated 22nd November 1950. The defendant agreed to sell and the plaintiff to buy a quantity of about 250 tons of oats at a price of 7s. 4d. a bushel free on board Sydney. The contract is expressed as subject to conditions, the most material of which is as

(1) (1923) 32 C.L.R. 413.
(2) (1938) 60 C.L.R. 545, at pp. 547, 548.
(3) (1951) 85 C.L.R. 55.
(4) (1913) 2 Ch. 648, at p. 660.
(5) (1812) 3 Camp. 270 [170 E.R. 1378].
(6) (1917) 34 T.L.R. 154.
(7) (1876) 1 C.P.D. 220.

follows :—" Delivery. To be loaded on ship or ships nominated by Buyer during the months of January and February 1951. Buyers to give seller fourteen days notice of ship(s) and shipping date(s) ". No doubt the first part of this condition means that the oats must be loaded on ship or ships during the months of January and February 1951 and that the ship or ships must be nominated by the buyers. In other words the clause does not mean that it is enough that the nomination of a ship should be made during January and February, although the ship does not become available for loading until later. There is a general condition providing that the contract is subject to strikes, fires, lockouts, breakdown of machinery, *force majeure*, and other contingencies beyond buyers' and sellers' control.

The transaction was conducted on behalf of the plaintiff company by Mr. P. W. Turnbull and on behalf of the defendant company by Mr. N. H. White, who was at that time its grain manager. At the final stages the managing director of the defendant company, Mr. F. E. W. West, also took a part.

At some time early in January Turnbull tentatively booked space in the ship *Afric* for the consignment of oats and on 8th January 1951 he wrote to the defendant, marking the letter for Mr. White's attention. He wrote : " We indicate to you at this stage an approximate shipping date of February 14th. This will give you ample time to assemble the parcel during the next few weeks. We shall be glad to have your confirmation that these oats will be ready by say the second week in February, and upon receipt of your advices we should be in a position to give you shipping marks."

On 15th January 1951 Turnbull in his turn contracted to sell the oats f.o.b. Sydney to another buyer. Of course both sales were by description but the quantity and description were the same and commercially the plaintiff relied upon the sale to it for the fulfilment of the sale by it. Between that date and the end of January Turnbull by word of mouth informed White definitely that the *Afric* was the ship. It is to be inferred that the tentative booking had been made absolute by the buyers from the plaintiff or possibly by Louis Dreyfus & Co., to whom those buyers at some stage sold the oats. During the last week in January Turnbull told White that his company had resold the oats. On 31st January White informed Turnbull by telephone that the defendant company could not supply the oats from Sydney because it had not got them, but said that probably it could supply them from Melbourne. The ship *Afric* was to call at Melbourne after sailing from Sydney. Turnbull said that he would do his best with his buyers to persuade them to

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take the oats from Melbourne but he could not guarantee it. He could not give a decision then. In a letter of the same day referring to the plaintiff's letter of 8th January and to the conversation, White wrote, "We wish to advise that we are, at the moment, unable to supply this quantity in Sydney to meet your shipping date of about the 14th February. However we can supply this contract on a F.O.B. Melbourne basis and we would be pleased to hear from you in this regard." Turnbull informed his buyers and they, or Louis Dreyfus & Co. made an endeavour to arrange for the shipment of the consignment in Melbourne. In his evidence Turnbull said that from the telephone conversation with White on 31st January until Friday 23rd February his buyers and himself jointly were trying to get the oats shipped from Melbourne at White's request: "During that period there was a state of flux and none of us knew where the goods would be shipped." On 8th or 9th February Turnbull had again specified the ship as the *Afric*. He had informed White probably on the same date that the date of shipment had been put forward to "around the beginning of March". He said too that time was running out and that White would have to try to get the oats together quickly. On 23rd February he knew as he said definitely by writing that they had failed and he telephoned West accordingly. Earlier in the week, probably on Monday 19th February, he had heard orally and had telephoned to the defendant, speaking presumably to White. On that occasion he had told White that up to date they had been unsuccessful in getting the oats loaded from Melbourne and that it seemed unlikely that they would succeed. White asked him to do his best. On Monday 26th February, White telephoned to Turnbull and said that he was upset that the latter could not arrange to have the oats loaded in Melbourne. Turnbull explained that the shipping company had some technical reason for not allowing it; he thought it was to trim the ship, and he said: "It is over to you now", to which White answered that the defendant had in its organization a man of long experience in the shipping business who would be able to fix it. Turnbull urged him to "go his hardest". On Wednesday 28th February, White telephoned again. He said that he was sorry that they had not been successful in getting the shipping company to alter the position, they would not agree to loading the 250 tons of oats on the *Afric* from Melbourne, "so the defendant would not be loading the oats from Melbourne." Turnbull replied: "Well you will have to load them in Sydney. We have to honour our contract. We sold the oats, the buyers have booked the space and we have to deliver the oats.

Now we know that we cannot load from Melbourne, we will have to load from Sydney." White said in response to this: "I am sorry; we have not got the oats here. You cannot get blood out of a stone." Turnbull said something about buying against him and terminated the conversation. At that date the market price of oats was 10s. 4d. a bushel or more. On 1st March 1951 Turnbull telephoned to the defendant company's office. Both West and White were out but he told the former's brother of the availability for purchase from sellers named Mackaness & Avery at 10s. 4d. of 250 tons of oats lying in store in Sydney and said that if the defendant company was not prepared to purchase the parcel the plaintiff company would do so. This information Turnbull confirmed by letter on the same day. The letter concluded: "We were to have given an answer this afternoon to the owner of the oats in store, but in view of the absence from your office of both Mr. White and Mr. West, Senior, we are arranging that the answer will be deferred until tomorrow morning." On the following day White telephoned to Turnbull and said that the defendant would not buy the oats from Mackaness & Avery and would not agree to the plaintiff buying them against the defendant. Turnbull asked him if he could supply the oats from any source and White replied that he could not. Turnbull then said that he either had no sense of responsibility or he was a crook. The plaintiff company then bought the parcel of oats from Mackaness & Avery. The sale was oral and was not reduced to writing until 7th March 1951, when it was expressed in a formal contract. Later on 2nd March, that is to say after the plaintiff's oral purchase on that day of the oats from Mackaness & Avery, West telephoned to Turnbull and suggested that they should meet. Turnbull told West that White had simply told him that the defendant did not have the oats, was not going to deliver them, and would not allow the plaintiff to buy Mackaness & Avery's oats against the defendant. He said that the plaintiff had to fulfil its contract and so had bought the oats. However he made an appointment to discuss the matter with West.

It appears to me that by buying the oats of Mackaness & Avery against the defendant's contract and by informing the defendant of the fact, Turnbull on behalf of the plaintiff fixed or crystallized the rights under the contract, whatever they may be, of the respective parties. The plaintiff treated the refusal or failure of the defendant to deliver the oats as a breach going to the root of the contract and intimated an intention on the part of the plaintiff to regard the contract as at an end. *Kinsella* J. found that the contract came to an end on 2nd March 1951 before the interview that had been

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arranged. Nothing was agreed or done at this interview or subsequently which, as it seems to me, could affect the matter.

West had a long discussion of the whole difficulty with Turnbull and with one Nicholls, a co-director of the plaintiff company who attended with the latter. West said that the defendant company had oats at Albury which he would bring to Sydney, but when Turnbull offered to take them at Albury he said that the sale was f.o.b. and he would not deliver except to the ship. According to a subsequent letter West told Turnbull on 2nd March that because of a strike they knew they had sufficient time to ship and consequently they did purchase oats ready to ship on the *Afric*. In earlier letters, one dated 7th March and another dated 12th March, the defendant company represented itself as having sought shipping instructions and as making every endeavour to ship by the *Afric* oats held by it although, in the absence of 14 days' notice of shipment, not being bound to do so. But *Kinsella* J. found that all this was untrue. His Honour said: "I do not believe that the defendant's officers made any attempt to get in touch with Mr. Turnbull. I am satisfied that the defendant did not have oats available in Sydney and that Mr. West did not have any intention of bringing oats to Sydney for shipment on s.s. *Afric*." Indeed the learned judge described the letter of 7th March as "a dishonest pretence that the defendant was ready and willing to deliver the oats on s.s. *Afric* in Sydney, written in the knowledge that the plaintiff would have to reject the offer because the shipping space was already being filled with the oats from Mackaness & Avery Pty. Ltd. The letter was designed merely to evoke a refusal of the offer contained in it on which the defendant hoped to rely." The facts as I have stated them are the result of the testimony of Turnbull whom *Kinsella* J. accepted as a truthful and reliable witness. There is no very clear evidence as to the precise time when the ship *Afric* was, in the event, ready to load but it seems likely that she began loading on or about 12th March and finished on 19th. She is said to have berthed in Melbourne about 22nd March 1951.

The defendant's case rests upon the failure of the plaintiff to name a ship available for loading in February and to give fourteen days' notice of the ship and of the shipping date. No question seems to have been raised as to the effect of the clause that makes the contract subject to contingencies beyond the buyer's and seller's control.

It was stated, though not distinctly proved, that the *Afric* was a ship due to load in Sydney in February; it would appear to have

been so from the reference, already quoted, to her being put forward to the beginning of March. The cause for her being delayed is not proved, though again there is a reference to a strike in the statement as to there being sufficient time because of the strike. Perhaps it was assumed that upon the proper construction of the clause it operated only to discharge the whole contract on the occurrence of a contingency within its application or at most to relieve one or other of the contracting parties of a liability for damages for breach. But this is not necessarily its only effect. In *Ringstad* v. *Gollin & Co. Pty. Ltd.* (1), a decision upon a contract for the purchase of goods c.i.f. Sydney shipped between certain dates from continental ports, a further operation was given to a clause which said: "The above sale is subject to strikes, floods, war, accidents, fire, failure of manufacturers to deliver, non-receipt, non-delivery or mistakes in cables, and/or other contingencies causing delay or non-shipment." The construction given to the clause was expressed by *Isaacs* J. as follows: "The expression 'the above sale is subject to strikes', &c., means in my view that the 'sale', that is, the contract of sale as set forth up to that point, is to be performed just as already stated, unless certain events supervene, but, if any of those events occur, then to the extent that they necessitate departure from the previous stipulations those previous stipulations are to be modified" (2). If the corresponding clause in the present contract were similarly interpreted then, assuming that the *Afric* was a February ship delayed until March by circumstances outside the plaintiff's control, it might follow that a departure from the condition as to notice of the ship and even of the shipping date was necessitated, a departure sufficient to cover what the plaintiff actually did up to 2nd March 1951.

But however this may be, I think that the plaintiff is entitled to succeed on the ground that, in so far as there was a non-fulfilment of the condition requiring the nomination of a February ship and the giving of fourteen days' notice of the ship and shipping date, the defendant dispensed the plaintiff from such fulfilment.

In the Supreme Court the plaintiff failed because the case was treated as one in which the contract had been kept open by the plaintiff notwithstanding the defendant's intimation of its inability to perform it, with the consequence that the plaintiff was bound to fulfil the conditions on its part to be fulfilled. But this is not a case confined to a simple anticipatory refusal to perform or declaration of inability to perform on the part of one party followed by an

(1) (1924) 35 C.L.R. 303. (2) (1924) 35 C.L.R., at p. 314.

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election by the other not to treat the contract as discharged by breach. The course taken by the defendant involved something more than that and the additional element brings into application other principles of law. The defendant persisted up to 2nd March that it could perform the contract only in one way, namely by substituting a shipment by the same vessel in Melbourne for that in Sydney contracted for. By seeking the plaintiff's help in an attempt to effect this substitution and at the same time persisting that it could not perform the contract according to its terms the defendant clearly intimated to the plaintiff that it was useless to pursue the conditions of the contract applicable to shipment in Sydney and that the plaintiff need not do so. The fact that under the rules of law governing anticipatory breach of contract, the plaintiff might have elected to treat the defendant's intimation as a discharge by breach may be disregarded. The plaintiff did not do so and that left the contract on foot. But it left it on foot subject to a continued intimation that only by a substituted performance could the defendant carry it out, an intimation involving an attempt by all parties to effect the substitution. When it appeared that the loading of the *Afric* would be late and begin after the end of February the defendant did not disaffirm the whole contract but continued to press for the substitution of Melbourne as the place of shipment by that vessel. There was still time for the plaintiff to name another ship for Sydney and give fourteen days' notice of shipment. For that was on or before 8th February and twenty days remained. It is likely, no doubt, that the plaintiff could not have secured space in another vessel sailing to or by the same ports as the *Afric*. But the contract would have been satisfied by any ship sailing from Sydney and, having regard to the rise in the price of oats, the plaintiff might, notwithstanding high freights and handling charges, have preferred to name a ship sailing to a port in Australia in order not to absolve the defendant from the contract by failing to fulfil formally a condition precedent. It appears to me that the defendant adopted an attitude clearly importing that the plaintiff need take no such course. It was involved in the persistent refusal to find oats in Sydney and the effort to effect the substitution of Melbourne as the place of shipment in the *Afric*.

Now long before the doctrine of anticipatory breach of contract was developed it was always the law that, if a contracting party prevented the fulfilment by the opposite party to the contract of a condition precedent therein expressed or implied, it was equal to performance thereof: *Hotham* v. *East India Co.* (1). But a plaintiff may be dispensed from performing a condition by the defendant

(1) (1787) 1 T.R. 638 [99 E.R. 1295].

expressly or impliedly intimating that it is useless for him to perform it and requesting him not to do so. If the plaintiff acts upon the intimation it is just as effectual as actual prevention. *Jones* v. *Barkley* (1), is a case decided more than half a century before it was found possible to sue as for an anticipatory breach of contract. As will be seen from Lord *Mansfield's* judgment it went upon the principle which in my opinion controls the decision of this appeal. Lord *Mansfield* said: "One needs only state what the agreement, tender, and discharge, were, as set forth in the declaration. It charges, that the plaintiffs offered to assign, and to execute and deliver a general release, and tendered a draft of an assignment and release, and offered to execute and deliver such assignment, but the defendant absolutely discharged them from executing the same, or any assignment and release whatsoever. The defendant pleads, that the plaintiff did not actually execute an assignment and release; and the question is, whether there was a sufficient performance. Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act" (2). Thus too, *Ripley* v. *M'Clure* (3), which might at a later date have been decided as a case of anticipatory breach, was placed by *Parke* B. upon the same ground. Lord *Campbell* C.J., in *Cort* v. *The Ambergate &c. Railway Co.* (4) gave an account of *Ripley* v. *M'Clure* (3) which brought the point out clearly: "There being an executory contract, whereby the plaintiff agreed to sell and the defendant to buy, on arrival, certain goods, to be delivered at Belfast at a certain price, payable on delivery, it was held that a refusal by the defendant before the arrival of the cargo to perform the contract was not of itself necessarily a breach of it, but that such refusal, unretracted down to and inclusive of the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal and a waiver of the condition precedent of delivery, so as to render the defendant liable for the breach of contract" (5). At the end of a very clear judgment stating fully the reasons that led the Supreme Court to decide against the plaintiff, *Owen* J. said, "The short answer to the plaintiff's claim is, in my opinion, that, through circumstances outside its control, it was not able, ready and willing to perform the contract on its part, and the defendant cannot be made liable

(1) (1781) 2 Dougl. 684 [99 E.R. 434].
(2) (1781) 2 Dougl., at p. 694 [99 E.R., at pp. 439, 440].
(3) (1849) 4 Ex. 345 [154 E.R. 1245].
(4) (1851) 17 Q.B. 127 [117 E.R. 1229].
(5) (1851) 17 Q.B., at p. 148 [117 E.R. 1229].

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in damages for failing to deliver f.o.b. Sydney when the ship nominated by the plaintiff was not ready to load there during the period set by the contract for delivery. While I regret that in the circumstances of this case the defendant must succeed, the fact that its conduct was undoubtedly dishonest cannot justify a departure from the ordinary rules of law relating to f.o.b. contracts governed by the *Sale of Goods Act*" (1). The reason why my conclusion differs from his Honour's is that I think that the defendant unmistakably intimated to the plaintiff that it was useless to take the steps requisite if the defendant was to deliver f.o.b. Sydney because the defendant could not do so and so impliedly intimated to the plaintiff, when time still allowed the plaintiff to find another February ship and to give fourteen days' notice of the ship and of the shipping date or dates, that the plaintiff need not do so. It may be remarked that, if as *Owen* J. says, it was through circumstances outside the plaintiff's control that it was not able, ready and willing to do these things, a question must arise as to the operation of the clause making the contract subject to contingencies outside the buyers' and sellers' control. Supposing that, when named, the *Afric* was a ship due to load in February, the plaintiff on that footing might well find in the clause an excuse for the lateness of the ship. But my conclusion does not depend upon the clause excepting contingencies beyond the control of a party. I think that the plaintiff should succeed because the plaintiff was excused from literal compliance with the clause requiring a February ship and fourteen days' notice thereof and was so excused at and from a time when the plaintiff could still have fulfilled it. What excused the plaintiff was the defendant's persistently maintaining that it could not ship the goods from Sydney as distinguished from Melbourne.

It is perhaps desirable to state what I think the position would be if, contrary to the view I have expressed, it were the fact that the defendant did not dispense the plaintiff from strict compliance with the obligation of the clause while it was still possible for the plaintiff to name instead of the *Afric* another ship which would load in Sydney in February and to give fourteen days' notice. On that assumption I think that the defendant should be held after that time had passed to have sufficiently manifested an intention to accept the *Afric* notwithstanding its lateness as the ship to be loaded, whether in Melbourne or Sydney. Having so accepted the *Afric*, the defendant could not treat the plaintiff's failure to name

(1) (1953) 70 W.N. (N.S.W.) 184, at p. 186.

some other ship, which in fact did load in February, as a ground for refusal to deliver the oats.

In my opinion the appeal should be allowed and the judgment of *Kinsella* J. restored.

WEBB J. I have had the advantage of perusing the reasons for judgment of the Chief Justice and of *Taylor* J. As I did so I must confess that my opinion fluctuated.

As the Chief Justice points out, the respondent took up the position, while it was still possible for the appellant to nominate a ship and shipping date in terms of the contract, that it was useless for the appellant so to do if the respondent was to deliver the oats f.o.b. Sydney; and at no time did the respondent depart from that position. In those circumstances it became unnecessary at that stage for the appellant to make the nomination before it could recover damages; and I am not prepared to hold that because of the delay in investigating the respondent's offer of oats in Melbourne, a delay for which the respondent was responsible, the appellant's position altered to its prejudice, while the respondent continued to maintain the position that it could not deliver the oats f.o.b. Sydney. In face of this attitude of the respondent it is not in my opinion proper to find that there was an election by the appellant not to act on the repudiation by the respondent, but to continue the contract in operation, simply because of the decision of the appellant to investigate the offer of oats in Melbourne and the delay that the investigation entailed. There was in fact no election by the appellant to sue for non-performance when the day arrived, i.e. fourteen days after the nomination of the ship and shipping date (*Wilkinson* v. *Verity* (1)). If there had been no offer by the respondent of oats in Melbourne and still the appellant for no particular reason did not see fit to issue the writ at an earlier date than it did, then in the absence of any election the lapse of time would not have added to the amount of proof it was required to give in order to succeed in its action. If on the last day that the appellant could have nominated a ship and shipping date in terms of the contract the respondent had informed the appellant that it could not deliver the oats f.o.b. Sydney and the appellant had not on that day acted on this repudiation but had deferred action until the next day when it would have been too late to make a due nomination I do not think that this brief delay would necessarily have deprived the appellant of the benefit of the contract. And I see no difference in principle between a delay for one day and a

(1) (1871) L.R. 6 C.P. 206, at p. 210.

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delay for many days, not being an unreasonable delay, although for no particular reason. But a delay for no particular reason would not I think have left the appellant in a better position than a delay to investigate an offer by the respondent for its own advantage, more particularly an offer that was not genuine, or at all events that proved abortive through no fault of the appellant.

I would allow the appeal and restore the judgment of *Kinsella* J.

KITTO J. I agree with the Chief Justice in thinking that the principle which is decisive of this case is that which is illustrated by Lord *Campbell's* statement in *Cort* v. *Ambergate &c. Railway Co.* (1), of the decision in *Ripley* v. *M'Clure* (2). His Honour has set out the passage and I need not do so again. The principle, which applies whenever the promise of one party, A, is subject to a condition to be fulfilled by the other party, B, may, I think, be stated as follows. If, although B is ready and willing to perform the contract in all respects on his part, A absolutely refuses to carry out the contract, and persists in the refusal until a time arrives at which performance of his promise would have been due if the condition had been fulfilled by B, A is liable to B in damages for breach of his promise although the condition remains unfulfilled.

The doctrine of anticipatory breach is, of course, applicable as soon as A has communicated to B his refusal to carry out the contract. Under that doctrine B is put to his election. He may, if he chooses, treat the contract as brought to an end in consequence of A's default, and recover damages from A for loss of the benefit of the contract. Alternatively, he may treat the contract as continuing on foot, in which case it will remain in force for the benefit of both parties, just as it would if the refusal had never been declared. If A persists in his refusal, B may at any time while the refusal continues elect to treat the contract as at an end and sue for damages; but unless and until he does so the contract remains on foot, and A may withdraw his refusal and require B to perform the contract on his part, subject only to giving B reasonable notice of his change of intention: *Panoutsos* v. *Raymond Hadley Corporation of New York* (3); *Cohen & Co.* v. *Ockerby & Co. Ltd.* (4), or he may take advantage of any supervening circumstances of such a character as to discharge the contract: *Avery* v. *Bowden* (5). But suppose that A's refusal is never retracted; that B does not elect while the period specified by the contract for performance is

(1) (1851) 17 Q.B. 127, at p. 148 [117 E.R. 1229, at p. 1237].
(2) (1849) 4 Ex. 345 [154 E.R. 1245].
(3) (1917) 2 K.B. 473.
(4) (1917) 24 C.L.R. 288, at p. 298.
(5) (1856) 6 E. & B. 953 [119 E.R. 1119].

unexpired to treat the contract as determined by reason of the refusal; and that no event occurs during that period to discharge the contract. I am supposing, of course, a case like the present where in all the circumstances the refusal necessarily conveys to B that he need not trouble to fulfil a condition to which A's obligations under the contract are subject, because even if he does A will still not perform his obligations. Is it true in such a case to say that A's continued refusal must not be allowed any significance in an action by B against A, in which B seeks damages for not getting what he bargained for and A seeks to defend himself by relying upon the condition which he has all along shown that he was not concerned to have fulfilled? What does it matter for the purposes of that action that the refusal was not treated as ending the contract and as founding an action for anticipatory breach? The damages claimed are not for loss of the contract by premature termination, but for loss of the benefit which performance of the contract in accordance with its terms by both parties would by now have produced to B but for the fault of A. It is a cause of action which the facts I have assumed make out, unless the non-fulfilment of the condition is an answer to it; and as to that the inescapable fact is that A's refusal was a continuing intimation that the condition need not be observed, and it did not become any the less an intimation to that effect because B chose not to determine the contract before its time. The intimation having continued until the time came when A would certainly have been in default if the condition had been fulfilled, the law, as I understand it, treats A's obligation as absolute, and holds B entitled to damages for not having got what A promised he should have in the event of the condition being fulfilled.

It will be observed that when it is said that A's obligation is to be regarded as absolute because he has dispensed with fulfilment of the condition to which it was originally subject, it is not meant that the contract is to be treated as if the condition had been deleted from it. If that were the meaning of the principle it would not assist B in a case like the present, where the contract is in such terms that fulfilment of the condition is required, not only in order to entitle B to insist on performance of A's obligation, but in order to make definite what it is that A is bound to do. Here, for example, the respondent's obligation to deliver the oats was conditional upon the appellant's nominating a ship willing to receive them at Sydney at some time during the months of January and February. But the substance of the obligation was to deliver the oats at Sydney on board a duly nominated ship; and nothing short of an agreed

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variation of the contract could oblige the respondent to do anything different: *Maine Spinning Co.* v. *Sutcliffe & Co.* (1). Consequently, if the condition of nominating a February ship were dispensed with in the sense of being treated as struck out of the contract, the respondent could not be said to have made default in delivery, for so long as no ship had been in fact nominated in accordance with the contract there was no delivery which he was obliged to make.

What is meant, however, by saying that fulfilment of the condition has been dispensed with is that A's conditional obligation is to be treated, for the purposes of an action for non-performance, as if it had been made absolute by a fulfilment of the condition. This is made clear in the second part of the case of *Laird* v. *Pim* (2). The declaration in that case averred a promise by the defendants to pay the plaintiff an agreed price for certain land " as soon as the conveyance thereof should be completed ". It then alleged (stating it shortly) that the plaintiff was always ready and willing to make a good title and to execute a conveyance, and actually offered to execute a conveyance, and would have tendered it to the defendants but that the defendants discharged the plaintiff from so doing, yet the defendants did not regard their promise and would not pay the purchase money; and damages were claimed for the non-payment. On demurrer, the declaration was held good. Counsel for the defendant argued that actual completion of the conveyance was necessary before payment could be due, and on that ground he sought to distinguish cases such as *Jones* v. *Barkley* (3). The case therefore raised the precise question whether damages for non-performance of a promise can be recovered where the plaintiff has not in fact done something which the contract prescribes, not only as a condition to be fulfilled by the plaintiff before he is to be entitled to performance of the defendant's obligation, but in order to fix an element in the obligation itself—in that case the time when the purchase price should be payable. Lord *Abinger* C.B. said that the case made was substantially the same as if it had been averred that the defendants had refused to execute a conveyance actually tendered to them; and the effect of the judgment of *Parke* B. is that, the defendants having discharged the plaintiff from doing what he had to do, he was substantially in the same position as if he had done it, not indeed for the purpose of recovering the whole purchase money, but for the purpose of recovering damages for the non-payment thereof. The point of the distinction thus drawn is

(1) (1918) 86 L.J. (K.B.) 382; 34 T.L.R. 154.

(2) (1841) 7 M. & W. 474 [151 E.R. 852].

(3) (1781) 2 Dougl. 684 [99 E.R. 474].

that what the defendants did by dispensing with the tender of a conveyance was not to make the price payable independently of such a tender—for that would have been to alter the contract—but to entitle the plaintiff to treat their refusal to complete the purchase as a refusal after tender of a conveyance, for the purpose only of recovering such damages as the plaintiff had sustained by not getting the price in exchange for a conveyance: cf. *Colley* v. *Overseas Exporters* (1).

I need not go over the facts of the present case; they have been examined in the judgment of the Chief Justice, with whose interpretation of them I agree. The respondent made it quite clear to the appellant throughout the month of February that it would be useless to nominate a ship accepting February loading at Sydney, because the oats would not be loaded on any such ship even if it were nominated. In the Full Court of the Supreme Court the view was taken that the appellant could not recover in his action for non-delivery, because the appellant, never having had a February ship available at Sydney to take the oats, cannot say that it was always ready and willing to perform the contract on its part. It is true that the appellant had to show, in order to succeed in the action, that it was ready and willing to perform its obligations under the contract. A judgment in point is the judgment of *Isaacs* J. in *Cohen & Co.* v. *Ockerby & Co. Ltd.* (2). After referring to the principle laid down in *Jones* v. *Barkley* (3); *Ripley* v. *M'Clure* (4) and *Cort* v. *Ambergate &c. Railway Co.* (5), the learned judge, citing *Byrne* v. *Van Tienhoven* (6), said that although a party who has been absolved from doing an act by the refusal of the other party to carry out the contract "may defend an action against him, by merely showing he was so absolved, yet, if he sues the other party whose refusal he relies on, he must show he was ready and willing to perform his part, had he not been absolved from actual performance" (7). See also per *McArthur* J. in *Y. P. Barley Producers Ltd.* v. *E. C. Robertson Pty. Ltd.* (8). And of course readiness and willingness imports ability to perform: *De Medina* v. *Norman* (9). But it seems to me that there was ample prima facie evidence that the appellant was and never ceased to be ready and willing to nominate a February ship. It is true that when the *Afric*, which the appellant in fact nominated as a February ship,

(1) (1921) 3 K.B. 302.
(2) (1917) 24 C.L.R., at pp. 297-298.
(3) (1781) 2 Dougl. 684 [99 E.R. 434].
(4) (1849) 4 Ex. 345 [154 E.R. 1245].
(5) (1851) 17 Q.B. 127 [117 E.R. 1229].
(6) (1880) 5 C.P.D. 344.
(7) (1917) 24 C.L.R., at p. 298.
(8) (1927) V.L.R. 194, at p. 205.
(9) (1842) 9 M. & W. 820, at p. 827 [152 E.R. 347, at p. 350].

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proved to be unable to make Sydney until March neither party troubled to find out whether there was another February ship which could be nominated in its place. But the evidence did not show or suggest that such a ship could not have been found, and it was because of the attitude which the respondent took that it never became material for the appellant to put the matter to the test. There being clear evidence of a general disposition, and indeed an anxiety, on the part of the appellant to get the contract performed, and there being no reason on the evidence to infer that the necessary shipping would not have been available in the port of Sydney, the prima facie inference in the circumstances of this case is, I should think, that there was nothing to prevent the appellant from nominating a February ship, or to account for its omission to do so, except the respondent's implied intimation that it would be a waste of time to take any such step. The respondent made no attempt to displace such an inference.

It seems to me that the most practical way of considering this case, and one for which authority is to be found in *Pontifex* v. *Wilkinson* (1) is this: while acknowledging that there are two questions, first whether the appellant was ready and willing to do all that the contract required it to do, and secondly, whether the respondent discharged the appellant from doing what remained for it to do, yet to say that the two questions amount, in reality, to no more than one, viz. whether the non-completion of the contract proceeded from the wrongful act and conduct of the appellant in not nominating a February ship and giving due notice of its shipping date, or of the respondent in refusing to deliver the oats at Sydney. To this question the only possible answer is: from the wrongful conduct of the respondent. Which, of course, is only a compendious way of saying that the respondent maintained throughout February its refusal to load the oats at Sydney, and when the end of that month arrived the appellant, having always been ready and willing to perform its part under the contract, was in a position to say that the respondent would certainly have been then in default in making delivery under the contract if the acts which the respondent's conduct had absolved the appellant from doing had been done. The appellant is therefore entitled to complain that by the respondent's default it has lost the benefit it would have derived from delivery of the oats in accordance with the contract, and it is accordingly entitled to recover damages for the non-delivery.

I agree that the appeal should be allowed, and that the verdict and judgment for the plaintiff should be restored.

(1) (1845) 1. C.B. 75, at pp. 90, 91 [135 E.R. 464, at p. 470].

TAYLOR J. This is an appeal from an order of the Full Court of New South Wales setting aside a judgment for the sum of £2,100 entered by the learned trial judge in a commercial cause in which the appellant sued the respondent for damages for failure to deliver a quantity of oats in accordance with a contract made between them. The contract was in writing and was made on 22nd November 1950. In substance it evidenced a sale of about 250 tons of "good sound heavy feed" oats at a price of 7s. 4d. per bushel of 40 lbs., free on board, Sydney. Provision as to delivery was made in the following terms: "To be loaded on ship or ships nominated by Buyer during the months of January and February 1951. Buyers to give seller fourteen days notice of ship(s) and shipping date(s)."

It is common ground that none of the contractual oats were delivered but it is material to consider the circumstances in which the parties found themselves during the delivery period prescribed by the contract. On 8th January 1951, the appellant wrote to the respondent indicating "an approximate shipping date of February 14th". This, it was said, would give the respondent "ample time to assemble the parcel during the next few weeks". The letter further added that the appellant would be glad to have confirmation from the respondent that the oats would be ready by the second week in February and intimated that upon receipt of the respondent's advices the appellant would be in a position to furnish shipping marks. At the time of writing this letter the vessel in the contemplation of the appellant was the *Afric* which was then in the course of a voyage to Sydney via Melbourne. But, although later in January and in February, the name of this vessel was mentioned in the course of conversation between representatives of the parties no appropriate notice in respect of that ship was given by the appellant. No further written communication passed between the parties until 31st January 1951. It was on that date that the respondent informed the appellant by telephone that it could not deliver in Sydney as contemplated by the contract since it did not have oats available there but they could, it was said, be supplied for shipment in Melbourne. Mr. Turnbull of the appellant company informed the respondent that he would try to persuade the buyers, to whom the appellant had resold in anticipation of delivery, to accept delivery in Melbourne The respondent requested Mr. Turnbull to do his best to obtain their consent and there the conversation ended. The conversation was confirmed by the letter of that date. This letter, written on behalf of the respondent, advised the appellant that the former, "at the moment", was

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unable to supply feed oats in Sydney to meet the approximate shipping date of 14th February. Thereafter the appellant endeavoured to make arrangements to meet the respondent's request but a little more than a week after this conversation Mr. Turnbull informed Mr. White, a representative of the respondent, that, although he was still endeavouring to obtain shipping space on the *Afric* in Melbourne, he had so far been unable to do so. He added that time was running out and that he, Mr. White, would have " to move to get the oats together quickly ". Later during the same month, about 19th or 20th February, Mr. Turnbull again spoke to Mr. White and told him that it was unlikely that the *Afric* would accept the oats in Melbourne and that the vessel would load in Sydney at the end of February or early in March. On Friday 23rd February, Mr. Turnbull informed an officer of the respondent company that his efforts to secure space for shipment in Melbourne had failed and that he could do nothing further about it. On the following Monday Mr. White expressed his disappointment that the oats could not be accepted on board in Melbourne and said that his company would make independent efforts to arrange for shipment there. This conversation was confirmed by a letter written by the appellant on 26th February: " Further to your letter of January 31 and our 'phone discussion of this morning, we confirm that the position briefly is that our buyers in Sydney have informed us that despite constant representations they have failed to persuade the ' Afric ' Agents to accept the 250 tons of oats from Melbourne. We now await the result of your own approach to the Shipping Company and trust your efforts will be more successful. As given you by 'phone, the marks are LDC over Durban, and the vessel is due to load here in about one week from to-day ". Two days later Mr. White informed Mr. Turnbull that he had not been successful in obtaining space in Melbourne whereupon Mr. Turnbull said that the respondent would have to load in Sydney. To this Mr. White replied that he was sorry, indicating that they did not have oats for shipment there, and added that it was impossible to get blood out of a stone. On the following day the appellant wrote to the respondent in the following terms: " We confirm our various telephone conversations, and in particular yours of yesterday informing us that it is not possible for you to supply the 250 tons of feed oats f.o.b. Sydney for shipment on the 'Afric ' due to load some time this week. You also advised us that you had made representations to the Agents of the 'Afric ' regarding the possibility of loading the oats from Melbourne, but you made it clear to us that the 'Afric ' Agents would not accede to your request. We

now confirm our telephone conversation of this afternoon with your Mr. West Junior, (neither your Mr. White nor your Mr. West Senior was available), during which we pointed out that there are 250 tons of feed oats available in store Sydney, and the owner is prepared to place these f.o.b. for shipment on the 'Afric', the price being 10/4d. per bushel f.o.b. It would be an easy matter to verify that this price is well in line with to-day's market quotations and we recommend that these oats be purchased forthwith, thereby fulfilling Contract No. 1004 entered into between us on November 22 last year. If you are not prepared to purchase the oats available at 10/4d. per bushel f.o.b. we want you to know that we ourselves would be prepared to make the purchase and debit you with the difference in the cost to us as against your selling price to us under the contract abovementioned, this difference being 3/-. per bushel. We remind you that on January 8 we wrote to you indicating an approximate shipping date of February 14, and in our letter we stated 'this will give you ample time to assemble the parcel during the next few weeks'. Early in February we informed you that the date of shipment had been put forward to around the beginning of March, and we gave you the name of the vessel. In view of the circumstances, we feel that you have had ample time to assemble this parcel, particularly in view of the fact that the contract was entered into on November 22. We were to have given an answer this afternoon to the owner of the oats in store, but in view of the absence from your office of both Mr. White and Mr. West Senior, we are arranging that the answer will be deferred until to-morrow morning". On the next day, 2nd March, Mr. White again telephoned Mr. Turnbull and said that the respondent would not concur in the appellant purchasing against it in the manner suggested and added, further, that it would not make the purchase itself. Thereafter the appellant purchased from Mackaness & Avery Pty. Ltd. the 250 tons of oats which were on offer and subsequently they were shipped on board the *Afric* which, apparently, arrived in Sydney about 12th March. Further discussions took place after this event and the respondent at one stage asserted that it had oats available at Albury. Mr. Turnbull was apparently doubtful of the truth of this assertion but said that on the assumption that they were available his company would be prepared to take them at Albury at the contract price less cartage and railage. This offer was rejected and the discussion did not lead to any further arrangement being made.

It can be said that the effect of the evidence was to establish the following matters: (1) that in January 1951 the respondent

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intimated to the appellant that it was unable to deliver oats in accordance with the terms of the contract; (2) that the appellant did not thereupon rescind the contract but, whilst keeping it on foot, assented to the respondent's suggestion that an endeavour should be made to secure space for shipment in Melbourne, and that, if such space could be secured, delivery free on board in Melbourne should be accepted in lieu of delivery free on board in Sydney; (3) that both parties joined in making endeavours, though without success to secure shipping space in Melbourne; (4) that at no time was an appropriate notice for shipment in Sydney during January or February given by the appellant to the respondent; (5) that the *Afric*, though not duly nominated was the ship in the contemplation of the appellant but this ship did not arrive in Sydney until after the end of February; (6) that at the end of February, when it was certain that shipping space could not be obtained in Melbourne, the appellant insisted on delivery in Sydney; (7) that thereupon the respondent again declared its inability to deliver and within a day or two the appellant purported to rescind the contract and buy against the respondent.

It should perhaps be added that if negotiations for shipment in Melbourne had not intervened it is possible that an appropriate notice for a February ship would have been given by the appellant. But it is, of course, equally possible that the appellant would have given notice for the *Afric* or for some other ship which, in the light of later events, could not be classified as a February ship. What would have occurred in the absence of such negotiations is, however, a matter of speculation and there is no evidence as to whether the plaintiff could have secured space on a February ship either before or after it was known that the *Afric* would be delayed.

It is in these circumstances that the appellant claims that it is entitled to damages for non-delivery. But since the matter was tried as a commercial cause and the issues were stated in a general form there is no precise allegation of the breach which the appellant alleges; the relevant issue was, simply, whether the respondent committed a breach of the contract in failing to deliver to the appellant the oats, the subject of the contract. This being so, it is important at the outset to determine what particular aspect of the respondent's conduct can be said to amount to failure to discharge its obligation to deliver oats in accordance with the contract. But before doing so it is of importance to observe that in the normal course of the operation of the contract no obligation to deliver oats could arise until after the giving by the appellant of the requisite fourteen days' notice. Accordingly, independently of the collateral

facts in the case, the obligation of the respondent to deliver the contract goods never became enforceable. This does not, of course, mean that the respondent could not, in any circumstances, be in breach, for if at some time before it was too late for the appellant to give the necessary notice the former had announced to the appellant its inability to perform the contract or its intention to refuse to do so, the latter might have accepted this as a repudiation and thereupon gone into the market and bought against the respondent. The fact that a shipping notice had not been given would in those circumstances have been of no consequence, nor, indeed would it, in those circumstances, be material that subsequent events showed that if the repudiation had not been accepted and the contract allowed to remain on foot the appellant never would have been able to give an effective notice (*Avery* v. *Bowden* (1)).

With these considerations in mind it is possible broadly to formulate the submissions made by the appellant on this appeal. First of all it was said that the appellant forebore at the request of the respondent to give a delivery notice and so to require delivery pursuant to the contract. Alternatively, it was contended that the obligation to give such a notice was waived or that the respondent was, in the circumstances, estopped from asserting that no such notice was given. Finally there was some suggestion made that the continued declaration by the respondent of its inability to deliver in Sydney entitled the appellant at the end of February to treat the contract as at an end and to sue for damages for non-delivery.

It is convenient, first of all, to deal with this last suggestion for, in its ultimate analysis, the answer to the question thereby raised really constitutes a complete answer to all of the appellant's arguments.

As appears from what has already been said there was evidence of conduct on the part of the respondent which might well have amounted to repudiation of the contract on 31st January 1951, but this is not the breach relied upon by the appellant for, notwithstanding the repudiation the evidence shows quite clearly that the appellant did not exercise its right to rescind, but, on the contrary, it elected to keep the contract on foot. After the end of January, therefore, the contract was still on foot and, notwithstanding the attempts, to which both the appellant and the respondent were party, to obtain shipping space in Melbourne the contract was the full measure of the rights and obligations of both parties. A question, therefore, which immediately arises for consideration is

(1) (1855) 5 El. & Bl. 714 [119 E.R. 647].

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the construction of the delivery clause in the contract. Did it, upon its true construction, require that loading should take place during the months of January and February 1951, or does it mean that the appellant was entitled at any time during those months to give fourteen days' notice of a "ship and shipping dates"? And if the latter was the true meaning of the clause was the respondent bound to load within a period of fourteen days after notice or within a reasonable period thereafter? I have little doubt that the provision called for loading to take place not later than the end of February and, consequently, that it required the appellant to give notice at some earlier stage and certainly not later than 14th February. The language of the clause may be said to be somewhat ambiguous, but in a document of this description there can be no real doubt as to the meaning of the clause. The object of the clause was to stipulate for loading during specified months upon a ship or ships nominated by the buyer. This is, I think, the meaning which should be given to it and I should add that this construction was assented to by both parties both at the trial and on the appeal to the Full Court of the Supreme Court, and the contrary view was advanced for the first time on this appeal. This being so, it is apparent that the attempts to obtain shipping space in Melbourne continued until after it was too late for the appellant to give fourteen days' notice of a February ship.

In these circumstances, and quite apart from any other question which may arise in the case, the appellant never became entitled to a delivery under the contract. As I have already said it may well have been open to the appellant on or within a reasonable time after 31st January 1951 to have rescinded the contract but it did not do so. On the contrary it elected to keep it on foot and to insist upon its performance by the respondent. The nature of the option presented to the appellant at that time is well defined but in view of the arguments addressed to the Court it may not be out of place to refer to some of the relevant authorities. *Avery* v. *Bowden* (1) is clear authority for the proposition that where one party continues to insist upon performance of a contract after the other contracting party has refused and continued to refuse performance it is too late for the former to complain where before the time for performance has expired the contract ceases to bind the parties. The application of this principle determined the rights of the parties in that case where the plaintiff failed to rescind the contract before it was otherwise discharged. The relevant principle is stated by *Cockburn* C.J. in *Frost* v. *Knight* (2) where he said:

(1) (1855) 5 El. & Bl. 714 [119 E.R. 647].

(2) (1872) L.R. 7 Ex. 111.

" The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster* v. *De la Tour* (1) and *The Danube and Black Sea Railway Co. Ltd.* v. *Xenos* (2) on the one hand, and *Avery* v. *Bowden* (3); *Reid* v. *Hoskins* (4) and *Barrick* v. *Buba* (5) on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it " (6). (See also per Lord *Esher* M.R. in *Johnstone* v. *Milling* (7).) The same principle is expounded by Viscount *Simon* L.C. in *Heyman* v. *Darwins Ltd.* (8) where his Lordship said: " The first head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party ' repudiates ' it. That is not so. ' I have never been able to understand,' said *Scrutton* L.J. in *Golding* v. *London & Edinburgh Insurance Co.* (9) ' what effect the repudiation of one party has unless the other party accepts the repudiation '. If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance: a classic example of this is to be found in *Avery* v. *Bowden* (10). Alternatively, the other party may rescind the contract, or (as it is some-

(1) (1853) 2 E. & B. 678; 22 L.J. (Q.B.) 455 [118 E.R. 922].
(2) (1863) 13 C.B. (N.S.) 825; 31 L.J. (C.P.) 284 [143 E.R. 325].
(3) (1885) 5 El. & B. 714; 26 L.J. (Q.B.) 3 [119 E.R. 647].
(4) (1856) 6 E. & B. 953; 26 L.J. (Q.B.) 5 [119 E.R. 1119].
(5) (1857) 2 C.B. (N.S.) 563; 26 L.J. (C.P.) 280 [140 E.R. 536].
(6) (1872) L.R. 7 Ex., at p. 112.
(7) (1886) 16 Q.B.D. 460, at pp. 466, 467.
(8) (1942) A.C. 356.
(9) (1932) 43 Ll. L. Rep. 487, at p. 488.
(10) (1855) 5 El. & Bl. 714 [119 E.R. 647].

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times expressed) 'accept the repudiation,' by so acting as to make plain that in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages. 'Rescission (except by mutual consent or by a competent court)' said Lord *Sumner* in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (1) 'is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option'. But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other" (2).

The contract under consideration in *Avery* v. *Bowden* (3) was discharged by the outbreak of war between England and Russia, but it is clear that the same principle is applicable where, there having been no rescission, the party who otherwise would have been liable in damages is, before the time for performance has expired, discharged or relieved from performance by the provisions of the contract itself. This result necessarily flows from the circumstance that failure to rescind leaves the contract on foot and thereafter the obligations of the party whose conduct afforded to the other the opportunity of rescinding must be measured according to the contract. The above passages make it clear to my mind that the future rights of the latter must also be determined according to his election; he may retain the benefit *and risk* of the contract or he may rescind and recover damages. But that he may not have both is, I should think, clear beyond doubt. Nor, having elected to keep the contract on foot, may he, after having failed to fulfil a condition precedent to his right to performance on the part of the other party, rescind upon a refusal, then continued, to perform the contract for, *ex hypothesi*, whatever ground is assigned for such a continued refusal the other party is not then under any obligation to perform the contract.

But nevertheless it is contended on behalf of the appellant that the giving of the requisite notice was, in effect, omitted at the request of the respondent. In one sense it may be suggested that this omission was the result of the course which the respondent proposed to the appellant. But the course which it proposed, and that to which it was agreeable, was not the performance of the existing contract subject to waiver of the provisions of the clause

(1) (1926) A.C. 497, at p. 509.
(2) (1942) A.C., at p. 361.
(3) (1855) 5 El. & Bl. 714 [119 E.R. 647].

relating to the giving of a shipping notice, but acceptance by the appellant of an entirely different form of performance in discharge of the contract. To my mind there cannot be inferred from evidence of the negotiations relating to this proposal that the respondent indicated its agreement to waive the provisions as to the giving of a shipping notice in the carrying out of the contract in its original form, or that it was prepared to perform its obligations thereunder in the absence of such a notice. Indeed it is difficult to see how the respondent could in the absence of a shipping notice have made any effective delivery at all under the contract.

Alternatively, the appellant maintained that the omission to give a proper notice constituted in the circumstances a forbearance on the part of the appellant, at the request of the respondent, to require delivery within the time specified in the contract and that the result of this was to leave the appellant in a position to insist upon delivery of the quantity of oats specified in the contract within a reasonable time after the end of February, or within fourteen days after the giving by the appellant, within a reasonable time after the end of that month, of a notice nominating an appropriate ship. The appellant sought to support this proposition in a number of ways and relied upon a passage in the reasons of *Denning* L.J. in *Charles Rickards Ltd.* v. *Oppenhaim* (1) where, speaking of a condition in a contract which prescribed a limit of time for the completion of work to be performed, his Lordship said : " If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it " (2). It is convenient to refer to this passage immediately for counsel for the appellant endeavoured to base his various contentions successively on principles relating to forbearance, waiver and estoppel. The provisions of the *Sale of Goods Act* 1923-1953 (N.S.W.), however, made it difficult for him to rely upon any contention that the parties had agreed to vary their original contract so that, whatever the position was in *Charles Rickards Ltd.* v. *Oppenhaim* (1), it is necessary in this case to identify precisely the principle upon which relief—if it should be

(1) (1950) 1 K.B. 616. (2) (1950) 1 K.B., at p. 623.

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afforded at all—should be afforded. In order to achieve this it is essential to ascertain the exact nature of the rights and obligations created by the contract. In the first place, it should be said, there was no obligation on the respondent to deliver until after the receipt of an effective notice from the appellant and it is clear that a notice would not be effective unless given on or before 14th February 1951. But the fact is that no such notice was given and, therefore, no obligation to deliver before the end of February ever arose. The appellant, however, claims that this is a simple case of forbearance on the part of the appellant to insist upon delivery in accordance with the provisions of the contract; forbearance at the request of the respondent is said to have been constituted by the deliberate omission on the part of the appellant to give an appropriate notice. In these circumstances it is contended that the case resembles such cases as *Ogle* v. *Earl Vane* (1) and *Hickman* v. *Haynes* (2). But there is a clear distinction between those cases and the present case. The contract under consideration in the first of those cases imposed upon the defendant an unconditional obligation to deliver within specified times, and failure to make delivery accordingly constituted a breach on the part of the defendant. No doubt the plaintiff in that case might have rescinded the contract upon such a breach but forbore to do so and kept it on foot for some months, and upon a further failure on the part of the defendant to make delivery, was obviously entitled to allege a breach constituted by failure to comply with the terms of the contract. The circumstances in *Hickman* v. *Haynes* (2) were somewhat similar. In that case the action was for non-acceptance within a specified time. The plaintiff had at the request of the defendant forborne to deliver within the specified time, but nevertheless was clearly entitled to allege his readiness and willingness to do so and to maintain his action for the defendant's refusal to accept within that time, even though he allowed the contract to remain on foot for some time after the specified period. It is not unimportant, however, in considering these decisions to bear in mind that in the former case the plaintiff sued for breaches constituted by a failure to deliver within the times fixed by the contract and that in the latter case the action was founded on a breach constituted by failure to accept within the stipulated times. No doubt it was this circumstance in each case which induced the particular line of reasoning disclosed in the cases, but I think there is little doubt that the plaintiff in the first case might well have been entitled to recover upon an allegation that the defendant,

(1) (1868) 3 Q.B. 272.

(2) (1875) L.R. 10 C.P. 598.

after waiver by the plaintiff of the original breach, had failed to deliver within a reasonable time. Similarly, the plaintiff in the latter case might have alleged a failure to accept within a reasonable time after waiver of the earlier breach. There is—if it is needed—ample authority for the proposition that a breach on the part of one of two contracting parties does not of itself discharge the contract (see *Heyman* v. *Darwins Ltd.*, per Viscount *Simon* L.C. (1); per Lord *Macmillan* (2); per Lord *Wright* (3) and per Lord *Porter* (4), and I do not see any ground to support the suggestion that a contract, in which time for performance is of the essence, comes to an end when performance does not take place within the specified time. Indeed there is abundant authority for the proposition that the injured party may keep the contract on foot and insist on performance within a reasonable time. This proposition is, I should think, of the very essence of the decision in *Tyers* v. *Rosedale & Ferryhill Iron Co.* (5) which was decided in the same year as *Hickman* v. *Haynes* (6) and, indeed, might well have afforded a basis for the assessment of damages made in *Ogle* v. *Earl Vane* (7) not as upon failure to deliver within the specified time but, after waiver of that breach, as upon a failure to deliver within a reasonable time.

The present case, however, is, on at least two grounds, fundamentally different from those cases. In the first place the obligation of the respondent to deliver before the end of February 1951 did not pass beyond the conditional stage. No appropriate notice having been given it did not become obliged to deliver or load any oats before the end of that month and its omission to do so did not constitute a breach of the contract. The word "omission" is, of course, inappropriate, for in the absence of an effective notice, there was nothing the respondent could have done towards delivery but I use it for want of a better word. This being so, what is it which the appellant claims to have forborne or waived? It cannot be said that the respondent's breach was waived for there was none and it cannot be said, in any effective sense, that it postponed the time for delivery at the request of the respondent because no time for delivery was ever fixed pursuant to the contract. It could, of course, be said that the parties agreed to vary the provision of the contract as to the time for delivery but this contention could not, in the absence of writing, avail the appellant. In the second place the provision of the contract in this case as to loading was not

(1) (1942) A.C., at pp. 361, 362.
(2) (1942) A.C., at pp. 371, 372.
(3) (1942) A.C., at p. 378.
(4) (1942) A.C., at pp. 395, 400.
(5) (1875) L.R. 10 Ex. 195.
(6) (1875) L.R. 10 C.P. 598.
(7) (1868) 3 Q.B. 272.

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merely a provision as to time of performance. It was, in effect, part of the description of the contract goods. As Lord *Cairns* said in *Bowes* v. *Shand* (1): "If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of *Madras* rice to be put on board at *Madras* during the particular months" (2). Lord *Blackburn* expressed precisely the same view. He said: "The first question which arises is, what was it that, according to that contract, the Plaintiffs were to supply, and that the Defendants were bound to take under that contract. It was argued, or tried to be argued, on one point, that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the subject-matter of the contract went, its being shipped at another and a different time being (it was said) only a breach of a stipulation which could be compensated for in damages. But I think that that is quite untenable. I think, to adopt an illustration which was used a long time ago by Lord *Abinger*, and which always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. As he said, if you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at *Madras* or the coast of *Madras*. Equally good rice might have been shipped a little to the north or a little to the south of the coast of *Madras*. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship, and before the Defendants can be compelled to take anything in fulfilment of that contract it must be shewn not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound

(1) (1877) 2 App. Cas. 455.

(2) (1877) 2 App. Cas., at p. 469.

to take it " (1). The objection in *Bowes* v. *Shand* (2) was not that the seller had failed to ship the goods before the expiration of a specified time; the bulk of the goods which were to be shipped " during the months of March and/or April " were in fact shipped on the specified vessel late in the month of February. Again in *Lubrano* v. *Gollin & Co.* (3), where reference was made to *Bowes* v. *Shand* (2), *Ferguson* J. observed: " Under the contract the plaintiff was obliged to ship in April, May, and/or June. It was contemplated that the war or other unavoidable causes might occasion such a delay that it would be impossible to make the shipment in time, and so the plaintiff would not be able to carry out his contract. I think the clear meaning of the clause in question is that in such case the plaintiff was not to be responsible, that and no more. If the parties had intended that he should be at liberty to send, and the defendants be under an obligation to accept goods by a later shipment, they could have said so. *The time of shipment is part of the description of the goods, and there is nothing in the contract to indicate that the defendants were in any circumstances to be required to accept goods which they had not ordered* " (4). (The italics are mine.) These observations were made in the course of disposing of demurrers and further reference was made to *Bowes* v. *Shand* in a later appeal in the same case (5). There *Cullen* C.J. said: " The contract now in question provides under the heading 'Shipment'—'April, May, June, direct steamers from Italy.' In proceedings on demurrer in this case reported in (3) and (6) the words I have just read were closely considered, and they were referred to, especially in the judgment of *Ferguson* J., as words of description, so much so that the actual thing which was the subject of the contract of sale was goods of the kind specified as shipped from Italy in the months of April, May and/or June. The High Court in approving the judgment so delivered found no fault with that way of describing the nature of the contract " (7). Thereafter the learned Chief Justice referred to the observations made in *Bowes* v. *Shand* (2) on this point. *Pring* and *Wade* JJ. agreed with the reasons of the Chief Justice, the former adding: " What was set up on behalf of the plaintiff was an agreement that the defendants should accept goods different from those which he had purchased. If that were so, of course there was a clear variation of the contract, and there being no writing evidencing it, the plaintiff is not entitled to recover " (8).

(1) (1877) 2 App. Cas., at pp. 480, 481.
(2) (1877) 2 App. Cas. 455.
(3) (1919) 19 S.R. (N.S.W.) 214; 36 W.N. 81.
(4) (1919) 19 S.R. (N.S.W.), at p. 225; 36 W.N. 81.
(5) (1921) 21 S.R. (N.S.W.) 300; 38 W.N. 80.
(6) (1919) 27 C.L.R. 113.
(7) (1921) 21 S.R. (N.S.W.), at p. 304; 38 W.N. 80.
(8) (1921) 21 S.R. (N.S.W.), at p. 306; 38 W.N. 80.

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Quite obviously the provision of the contract in this case as to loading was not intended to prescribe the *latest* time at which the oats might be delivered. It was not a provision which could be said to be inserted for the benefit of one party rather than the other since it is quite clear that the purchaser did not assume any obligation to buy oats except oats to be loaded in the months of January and February 1951, and the seller did not undertake any obligation to sell oats except oats to be loaded during those months. This being so, the stipulation as to the time of loading must, in effect, constitute part of the description of the goods. How then can the appellants say that it extended or postponed the time for delivery ? To say so implies that, unilaterally, it extended or altered the respondent's obligations under the written contract. No doubt the appellant might have accepted some substituted mode of performance in discharge of the respondent's contractual obligations but its claim cannot, in the absence of writing, be based upon an allegation that the parties *agreed* upon some new and different mode of performance (*Noble* v. *Ward* (1) ; *Stead* v. *Dawber* (2) and *Hickman* v. *Haynes* (3)). These considerations lead me inevitably to the conclusion that even if it can be said that the appellant *forbore* to give notice under the contract because of the negotiations for shipment in Melbourne which took place, that fact does not assist its case in any way.

Nor can it successfully contend that its case is advanced by asserting that its obligation to give an effective notice was *waived* by the respondent. Assuming for the moment that it can be said that the appellant's obligation to give proper shipping instructions could be and was without writing effectively waived before 14th February, what was then the position of the parties ? What was then the nature of the respondent's obligation ? It was either an obligation to load on the *Afric* whenever that vessel, having arrived in Sydney, was available for loading there, or it was an obligation to load on some other unascertained vessel either during February or at some other time. But it is clear that the respondent was not bound by the contract to accept performance in any such way and that, even if it can be said that the obligation of the appellant to give notice was waived, the fact that it was not given left the respondent in the position that it was not bound to deliver. Indeed in the absence of a notice it would be quite impossible for the respondent to make any effective delivery. It is, I think, equally clear that no new and different obligation as to delivery could have

(1) (1867) L.R. 1 Ex. 117 [2 Ex. 135].

(2) (1839) 10 Bl. & E. 57 [113 E.R. 22].

(3) (1875) L.R. 10 C.P. 598.

been imposed upon it except by an agreement evidenced by writing. It was suggested during the course of argument that such an agreement was made and that it was sufficiently evidenced by writing. But I agree with the view formed below that the dealings between the parties concerning delivery were not contractual in their nature and I am satisfied that even if they were there is no sufficient written evidence of any new contract.

The remaining ground upon which the counsel for the appellant put his case was that the respondent was estopped from alleging that the appellant failed to give an appropriate notice under the delivery clause of the contract. In my opinion there is no basis for holding that any estoppel ever arose, and, indeed, I do not see how any estoppel could operate to assist the appellant's case. What is it that any such estoppel could preclude the respondent from asserting? Would it preclude it from asserting that the appellant failed to give a fourteen days' notice specifying the *Afric* or that it failed to give a fourteen days' notice for some other vessel loading in February? If it is the former it would achieve nothing for the *Afric* was not available for loading during February and if the latter, the result which would be produced would be quite artificial. It would be quite impossible in the absence of some notice or some new agreement for the respondent to make any effective delivery at all and indeed if it had loaded the specified quantity of oats on any unspecified vessel the appellant would not have been bound to accept that as performance of the contract. To afford relief to the appellant on some such principle of estoppel would mean therefore, that whatever the respondent did after the estoppel arose it would be in breach, for in the absence of an effective notice or any agreement having the effect of varying the original contract there was no way in which it could effectively discharge its obligation to deliver.

In the circumstances I am of the opinion that the appellant was not entitled to succeed in its action and that the appeal should be dismissed.

Appeal allowed with costs. Order of the Full Court of the Supreme Court discharged. In lieu thereof order that the appeal from the verdict and judgment thereon of Kinsella J. to the said Full Court be dismissed with costs. Restore verdict and judgment of Kinsella J.

Solicitors for the appellant, *Parish, Patience & McIntyre.*
Solicitors for the respondent, *S. T. Hodge & Co.*

J. B.