[HIGH COURT OF AUSTRALIA.]

TALLERMAN AND COMPANY PROPRIETARY LIMITED . . . . . } APPELLANT;
PLAINTIFF,

AND

NATHAN'S MERCHANDISE (VICTORIA) PROPRIETARY LIMITED . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1956, SYDNEY, *Aug.* 7, 8;

1957, MELBOURNE, *Feb.* 18.

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

Contract—Original agreement—Subsequent agreement—Same parties—Same subject matter—Earlier contract—Abrogation—Particular provisions—Particular term—"Rescission"—"Variation"—Effect—Performance in manner not originally approved—"Without prejudice"—"Accord"—"Satisfaction"—Completion of contract—Where made—When made—Contract made outside State—Jurisdiction of State court—Implied rescission—Parties—Intention.

It appeared that the plaintiff and the defendant entered into written contracts for the sale of goods and that those contracts were made in Victoria. Some of the goods were delivered and accepted but the defendant sent back a shipment comprising the greater part. There was evidence of a parol agreement with respect to terms of delivery and the defendant relied on this in sending the goods back. In subsequent correspondence between the parties the defendant in a letter headed "without prejudice" made a fresh proposal about conditions for delivery of the balance of the goods. The plaintiff rejected the proposal and suggested alternatives; the defendant replied rejecting the alternatives and added that it was not prepared to vary its former proposal. After a lapse of two months the plaintiff in a letter posted in New South Wales to the defendant in Victoria also headed "without prejudice" wrote that it accepted the proposal. A month later the defendant wrote in terms which made plain that it was not prepared to carry out the terms suggested in its former proposal. A writ was issued out of the Supreme Court of New South Wales, indorsed with a declaration containing counts to recover the price of the goods, or alternatively to recover damages for breach of contract. The defendant entered a conditional appearance and a summons

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was issued by which the defendant sought to have the writ set aside on the ground that the Supreme Court of New South Wales had no jurisdiction in the matter. By consent the summons was dismissed and it was understood and agreed by counsel for both parties that the contract alleged in the indorsement on the writ was a contract alleged to have been made in Sydney and to be found in the correspondence. Amendments were made in the indorsement for the purpose of making it conform with this understanding. The trial judge gave judgment for the plaintiff for the full purchase price, apparently on the first count. The Full Court of New South Wales allowed the appeal and ordered judgment to be entered for the defendant. On appeal,

Held: by *Dixon* C.J. and *Fullagar* J. that the correspondence brought about not a new contract nor even a varied contract but a mere accord executory;

by *Williams* and *Kitto* JJ. that the offer and acceptance in the correspondence constituted a new contract made in Sydney as sued on by the plaintiff;

by *Taylor* J. that the correspondence brought about either an accord executory or a variation of the original contracts in which case the plaintiff had not made out the contract on which he sued.

Held, therefore, by *Dixon* C.J., *Fullagar* and *Taylor* JJ. (*Williams* and *Kitto* JJ. dissenting) that the appeal should be otherwise dismissed but that since the merits of the real dispute had not been investigated because of the restricted basis on which the case was dealt with there should be judgment of non-suit.

Per Dixon C.J. and *Fullagar* J.: (1) the rule is that a contract is not completed until acceptance of an offer is actually communicated to the offeror, and a finding that a contract is completed by the posting of a letter of acceptance cannot be justified unless it is to be inferred that the offeror contemplated and intended that his offer might be accepted by the doing of that act; this rule is itself only a particular application of the more general rule that a contract is to be regarded as made at the place where that act or thing was done or said which finally created the contractual obligation;

(2) where a contract is concluded in one place and subsequently varied by agreement in another there is only one contract and it must be regarded as made at the place where it was originally concluded; for the variation affects the content of the obligation but not the obligation itself.

Per Williams J.: an existing contract that is varied as to one of its terms by a subsequent contract must be in law a new contract.

Per Kitto and *Taylor* JJ.: whether an agreement dealing with subsisting rights and obligations of the same parties under an earlier contract effects a variation or a discharge of that contract is a question depending upon the intention of the parties as appearing from the new agreement; but where it merely varies the existing contractual rights and obligations it cannot be held to have discharged the antecedent contract and put another in its place.

The effect of a subsequent agreement on an existing contract generally, discussed.

Luke v. *Mayoh* (1921) 29 C.L.R. 435, and *Ex parte Walker; Re Caldwell's Wines Pty. Ltd.* (1931) 31 S.R. (N.S.W.) 494; 48 W.N. 189, considered.

The jurisdiction of the Supreme Court of New South Wales *qua* contracts made outside New South Wales, referred to and discussed.

The distinction drawn between "rescission" and "variation" in *Morris* v. *Baron & Co.* (1918) A.C. 1, and *British and Beningtons Ltd.* v. *North Eastern Cachar Tea Co. Ltd.* (1923) A.C. 481, discussed.

Decision of the Supreme Court of New South Wales (Full Court): *Nathan's Merchandise (Vic.) Pty. Ltd.* v. *Tallerman & Co. Pty. Ltd.* (1957) S.R. (N.S.W.) 416; 73 W.N. 300, subject to a variation by entering a judgment of non-suit in lieu of judgment for the defendant, affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales the plaintiff, Tallerman & Co. Pty. Ltd. sought to recover from the defendant, Nathan's Merchandise (Vic.) Pty. Ltd. the sum of £8,800 being the price of 1,600,000 bullets which it was alleged it had agreed to sell to the defendant.

The trial judge, sitting without a jury, gave judgment in favour of the plaintiff but upon an appeal thereto the Full Court of the Supreme Court (*Roper* C.J. in Eq., *Ferguson* and *Manning* JJ.) allowed the appeal and ordered that judgment be entered for the defendant: *Nathan's Merchandise (Vic.) Pty. Ltd.* v. *Tallerman & Co. Pty. Ltd.* (1).

From that decision the plaintiff appealed to the High Court.

Further facts are stated in the judgments hereunder.

K. W. Asprey Q.C. (with him *A. F. Mason*), for the appellant. Under the arrangements said by the respondent to exist the appellant could not deliver the bullets unless the respondent asked for them. If that be so, then there was no binding contract and the only contract made in respect of these goods is in the March-June 1952 correspondence and this was the only contract dealt with by the trial judge. It was a contract of compromise. The appellant joins issue with the suggestion that even though it be an agreement by way of compromise it cannot be sued on because it is a contract made by way of variation. There was no proof of any contract to vary. No question of variation arises unless there is first of all proved to be a prior binding contract.

(1) (1957) S.R. (N.S.W.) 416; 73 W.N. 300.

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[FULLAGAR J. referred to *Luke* v. *Mayoh* (1).]

The respondent's contention was that if that decision be correct then although the only contract in existence was in Melbourne it could have been sued upon in the Supreme Court of New South Wales. The contract sued upon was the contract arising out of the correspondence. It had nothing to do with the orders. Any variation at all of that contract involves the rescission of the first contract and the entering into of a fresh contract. *Morris* v. *Baron & Co.* (2); *British and Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (3) deal with a totally different subject matter. When the new contract was made with the respondent by the posting in Sydney of the letter of acceptance dated 4th June 1952, such new contract between the parties was made in Sydney and this entitled the appellant to sue in the Supreme Court of New South Wales. The new contract was of a type which has been called a variation, that is, a contract to vary a previous contract or contracts. Under the general law every contractual variation of a prior contract operates to rescind the prior or varied contract. This is a rule of general application, subject only to the operation of special rules of evidence which come into play in certain cases, e.g. by the operation of the *Sale of Goods Act* 1923, or the *Statute of Frauds*: *Goss* v. *Lord Nugent* (4); *Sanderson* v. *Graves* (5). The contract made in Sydney was the only contract in existence. It was not proved in evidence that there was any other prior contract made in Melbourne in this case. Assuming, however, when the March-April-June 1952 contract was made, the Melbourne contract, if one there was, went by the board and the only contract remaining in existence was the one made in Sydney. The case for the appellant may be put in one of three ways: (i) there was no proof of any contract with reference to the bullets, prior to the 1952 correspondence, hence such correspondence constituted the first contract between the parties; (ii) assuming there was in existence a binding contract with reference to these bullets prior to the 1952 correspondence, the contract constituted by that correspondence operated to extinguish the prior contract; (iii) the 1952 correspondence amounted to an agreement by way of compromise and the mutual intention of the parties was to extinguish the previous contractual arrangements between them when they made the contract of compromise. A statement of the law as a general legal proposition applicable to the law of contract,

(1) (1921) 29 C.L.R. 435.
(2) (1918) A.C. 1.
(3) (1923) A.C. 48.
(4) (1833) 5 B. & Ad. 58, at pp. 65, 66 [110 E.R. 713, at p. 716].
(5) (1875) L.R. 10 Exch. 234, at pp. 236, 237.

is to be found in *Sanderson* v. *Graves* (1). The effect of *Noble* v. *Ward* (2) is that there can be a verbal agreement to rescind a prior written agreement. No question of the *Sale of Goods Act* comes into this matter, therefore it must be dealt with under the general law. If the verbal evidence is construed as effecting a rescission, force is given to it. It was said in *British and Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (3) that it was very difficult to know what was decided in *Morris* v. *Baron & Co.* (4). In the last-mentioned case there was not complete unanimity as to the effect of the transactions in that case: see (5). The distinction is only drawn between rescission and variation for the purposes of the *Statute of Frauds*. All that the cases on the statute were dealing with was a test of admissibility. According to the appellant's theory of the contract, it was a contract which had been discharged by performance, but according to the respondent's theory of the contract it was a contract which was entirely executory and depended upon the respondent making requests and no performance has been made at all. Those were merely rival claims; each one surrendered the claims in the compromise. The words "without prejudice to its legal rights" in the letter mean, in that context, that it was simply indicating by that phraseology that if this offer were refused, the statement of that offer was not to be used in any legal sense to weaken the position of the respondent. The words "without prejudice" in the letter of acceptance cannot affect its validity as an acceptance. A contract can be rescinded not only by express agreement but by any agreement which is inconsistent with something going to the root of the previous contract evidencing an intention by the parties that they intended to rescind the prior agreement. An important change was made with regard to the terms of delivery. The important changes were matters going to the root of the contract and showed that the parties intended to make a new contract. An agreement arrived at by way of compromise, as this was, is a strong indication that the parties were intending to displace the previous contract about which there had been disputes and to substitute a new contract for it. The appellant has an action for damages, or, alternatively, it is entitled, under the agreement, to the price. "The balance of this order for bullets" must be read in this contract as meaning the 160 cases of bullets that were then lying at Young's Store. The appellant is not bound to the price. The fact that the

(1) (1875) L.R. 10 Exch., at p. 236.
(2) (1867) L.R. 2 Exch. 135, at p. 137.
(3) (1923) A.C. 48.
(4) (1918) A.C. 1.
(5) (1918) A.C., at pp. 15, 17.

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respondent did bona fide believe that it had this right and gave it up is considerable evidence of the fact that it was intending to make a new contract.

[WILLIAMS J. referred to *Levey & Co.* v. *Goldberg* (1).]

In order to establish the contract arising from the correspondence regard may be had to the whole history of the matter.

[KITTO J. referred to *Sanderson* v. *Graves* (2).]

The trial judge's judgment was really for damages. It was not contended otherwise.

Sir *Garfield Barwick* Q.C. (with him *M. F. Loxton* Q.C. and *B. B. Riley*), for the respondent. The significance of the endorsement on the writ as amended was that the appellant undertook to prove that in lieu of a number of contracts, each for one million bullets, with the undelivered balances outstanding, there was one contract for 1,600,000 bullets for delivery not later than 30th September 1952. The scheme of the *Service and Execution of Process Act* 1901-1953 (Cth.) is that one may be served outside the jurisdiction, and if the subsequent events under the statute take place it may be the judgment becomes a complete judgment *inter partes*. At the point of time at which the *Common Law Procedure Act* 1899, as amended, strikes, namely, at the time of the writ, the appropriate procedure is to move to set it aside : see *Supreme Court Rules*, r. 518 ; *Betts, Louat and Hammond's Supreme Court Practice*, 3rd ed. (1939), p. 373.

[DIXON C.J. referred to *Ex parte Walker*; *Re Caldwell's Wines Ltd.* (3).]

If the appellant seeks to make out an independent contract, one which is self-contained as to its source of obligation, then the appellant will not prove that by showing that it merely varied some other one or more of three contracts. The appellant is not tied, in an evidentiary sense, merely to the letters, but it must find the entire contract in the letters, expressly or by reference. A new contract could be made incorporating therein the terms of the old contract. The word "new" is ambiguous. It is ambiguously used in *Goss* v. *Lord Nugent* (4) and *Sanderson* v. *Graves* (2). The appellant has agreed that its declaration must be construed as meaning in each of the two, or three, material counts, that the obligation which it seeks to enforce arose out of a series of promises made in Sydney. The formation of that contract in itself is the

(1) (1922) 1 K.B. 688, at p. 690.
(2) (1875) L.R. 10 Exch. 234.
(3) (1931) 31 S.R. (N.S.W.) 494 ; 48 W.N. 189.
(4) (1833) 5 B. & Ad. 58 [110 E.R. 713].

source of the obligation. Independently of the question whether he had antecedent contracts, the obligation which is the subject of litigation must not be composed partly of an obligation under the first contract and partly an obligation under the second contract. As to what exactly was the proposal which it is said matured into a contract to take 1,600,000 bullets, involves a review of the correspondence, that is letter dated 18th March 1952 and the critical letter dated 21st March 1952. It is plain that the Melbourne house was refusing to recognise the right of the Sydney house to deliver the goods. There was not any legal significance in that. A fair paraphrase of what was being expressed was: " We stand on the existing legal relationship as we have nominated it, but we are prepared to exercise our rights under that existing arrangement to the extent to accelerate the delivery. Our right at the moment is to give it as and when we please up to a reasonable time and we are telling you that we will undertake to exercise our pleasure before 30th September ". That was insusceptible of acceptance unless the other party agreed with that view. Unless that view was accepted there could not be any acceptance of that proposal. The acceptance of that would necessarily involve an acceptance of the existence of the agreement and of those rights. The expression " without prejudice to its legal right " used in the letter is not of the same significance as the endorsement " without prejudice " to endeavour to keep a matter out of evidence. It is an insistance that the legal rights are not being altered, except to the indicated extent: see *Ogle* v. *Vane* (*Earl*) (1); *Levey & Co.* v. *Goldberg* (2) and *Plevins* v. *Downing* (3). The letter of 21st March 1952 does not offer to abandon the existing arrangements and make a fresh and independent arrangement of any kind. It plainly intends to maintain the existing legal relationship either plus a forbearance, or plus a variation, according as one gives force or not to the words " without prejudice to its legal rights " in the context. Subsequently that offer was rejected. The branding of the letters " without prejudice " is not a matter of habit; it is a matter of particular choice. The renewal on 3rd April and the acceptance on 4th June were done quite deliberately at that point of time with a falling market. The words " without prejudice " on the letter dated 4th June 1952 cannot be ignored. They are deliberate and emphasise that the offer was by way of forbearance, or they indicate that it was not accepted contractually, which may amount to the same thing. That letter was not an acceptance in terms, because the

(1) (1867) L.R. 2 Q.B. 275.
(2) (1922) 1 K.B. 688.
(3) (1876) L.R. 1 C.P.D. 220, at p. 225.

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offer was to give delivery instructions as under the existing contract. The purported acceptance was that the appellant accepted the respondent's offer to the effect that the delivery of the balance of this order for bullets would be accepted, delivery to be not later than 30th September. There was some discrepancy between what was offered and what was said to be accepted in that what was offered was the giving of delivery instructions under the existing contract whereas what was affected to be accepted was delivery of the balance of this order to be accepted not later than a certain date. The letter dated 21st March 1952 assumes that the appellant is already under an obligation to sell and that the respondent is under an obligation to buy some bullets. The letter was no more than the offer of forbearance; it offered to depart from the contract in respect of the time of delivery and no more. The correspondence does not withdraw at any stage the assertion of the respondent that the August order had not matured into a contract and that there were only 600,000 bullets outstanding. There could not be any consideration for the so-called promise. The counterpart of the forbearance in case of the respondent on its point of view is an accord executory so far as the appellant is concerned. It would be right to look at it as an accord executory and if it is only an accord satisfactory it cannot itself be the subject of action: see *Scott* v. *English*(1); *McDermott* v. *Black* (2) and *British Russian Gazette & Trade Outlook Ltd. and Talbot* v. *Associated Newspapers Ltd.* (3). The appellant is driven to the situation that it establishes, if it establishes anything, no more than an agreement to sell and deliver on its part. It does not establish a bargain and sale, and it is left with its sole remedy as to damages for non-acceptance of delivery. There is no evidence as to value therefore there could not be a verdict beyond a nominal amount. A non-suit is for the plaintiff's benefit. The court on appeal cannot give it to the plaintiff as a discretion; it could only be entered for a defendant at the behest of the defendant if there was no evidence to support the claim at all. There must be a mutual intention to rescind the old arrangements and supplant them, and, as a sort of corollary to that, a mere variation would not do, because it did not work a mutual rescission. In *Morris* v. *Baron & Co.* (4) the House of Lords took principles from the general law to apply unto the situation. The principle from the general law was that there was a difference between variation and rescission in the relevant respect (*Morris* v. *Baron & Co.* (5); *British and*

(1) (1947) V.L.R. 445, at p. 453.
(2) (1940) 63 C.L.R. 161, at p. 183.
(3) (1933) 2 K.B. 616.
(4) (1918) A.C. 1.
(5) (1918) A.C., at pp. 20, 25, 26, 28.

Beningtons Ltd. v. *North Western Cachar Tea Co. Ltd.* (1) and *Royal Exchange Assurance* v. *Hope* (2)). The significance of that last-cited decision is that the distinction between rescission and variation is not only appropriate in the case of *Statute of Frauds*. Even in the case of forbearance there is agreement though one may not have contract (*Besseler Waechter Glover & Co.* v. *South Derwent Coal Co. Ltd.* (3)). As to whether or not the judgment would work an estoppel against the appellant in Victoria the respondent has no desire to attempt to circumvent the appellant by means of the verdict.

K. W. Asprey Q.C., in reply. If the Court is disposed to dismiss the appeal then in view of the assent given on behalf of the respondent, there should be attached to such dismissal, a qualification to make it clear that there should be no estoppel and that such a qualification is attached by the consent of the respondent to the appeal.

Cur. adv. vult.

Feb. 18, 1957.

The following written judgments were delivered:—

DIXON C.J. AND FULLAGAR J. The appellant was plaintiff and the respondent was defendant in an action in the Supreme Court of New South Wales which was tried by *Clancy* J. *Clancy* J. gave judgment in favour of the plaintiff. The defendant appealed to the Full Court of New South Wales, which allowed the appeal and ordered that judgment be entered for the defendant. From that judgment the plaintiff appeals to this Court. The action arose out of two alleged contracts for the sale by the plaintiff to the defendant of a large quantity of Hungarian .22 long rifle bullets. These contracts were made in Victoria, and unfortunately, as will be seen, the Supreme Court of New South Wales, by reason of real or supposed limitations on its jurisdiction, was called upon to deal with the case on a conventional and restricted basis. The plaintiff placed itself in the position of suing not upon those contracts but upon a contract supposed to have been made much later in New South Wales. The result is, as it seems to us, that the merits of the real dispute between the parties have never been investigated.

The plaintiff is a company incorporated and carrying on business in New South Wales. It is registered as a company in Victoria, where it also carries on business. The defendant is a company incorporated in Victoria. So far as appears, it does not carry on

(1) (1923) A.C. 48, at p. 68.
(2) (1928) 1 Ch. 179, at p. 191.
(3) (1938) 1 K.B. 408, at p. 417.

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business outside Victoria. The two relevant original contracts, which are alleged, were made by communications between the defendant company and the Melbourne office of the plaintiff, which was managed by a Mr. Bell. The first was made on 14th May 1951, and the second on 2nd August 1951. It would seem that in each case an order was given orally in the first place. In each case the plaintiff acknowledged the order by a letter which said: "We thank you for your valued order covering .22 long Hungarian rifle bullets and have pleasure in enclosing herewith our contracts in duplicate. Please sign and return the original copy . . . and retain the duplicate for your own records." The enclosed "contract" in each case consisted of the plaintiff's printed form of order with the particulars typewritten therein. The first is headed "Order No. M58" and the second "Order No. M73". Each is for 1,000,000 bullets at 110/- per thousand. Each contains the following terms: "Prices quoted are ex store. D.I.S. Subject to acceptance. Payment net seven days or cash on delivery at seller's option. Date of delivery about earliest". The letters D.I.S. mean "delivery into store". The curious expression "delivery about earliest" is partly explained by the fact that the words "delivery about" are part of the printed form, the word "earliest" being typewritten in. Probably the words should be interpreted as providing for delivery as soon as possible. We do not know what significance, if any, is to be attached to the words "subject to acceptance". The defendant has at no stage relied upon them. In each case the order was signed on behalf of the defendant by Mr. Baird, who was in charge of the defendant's merchandise department in Melbourne, and was then returned to the plaintiff's Melbourne office.

So far the position seems plain enough. We have two contracts in writing each for the sale of 1,000,000 bullets. Each contract was clearly made in Melbourne, delivery is to be made in Melbourne, and it was doubtless also contemplated that payment should be made in Melbourne.

No delivery was made under either contract until 12th February 1952, when the plaintiff consigned by rail from Sydney to the defendant in Melbourne 1,800,000 bullets. Freight was prepaid. The invoice identified the bullets as delivered in pursuance of Orders M58 and M73 and also of another order (No. M53) which had been given on 20th April 1951. It is possible to infer from a notation on Order No. M53 (which was put in evidence) that 200,000 of the bullets consigned on 12th February 1953 were intended to be delivered in pursuance of Order No. M53, but the position is not clear. Nor does it seem material to clear it up. There may or may

not have been a small balance outstanding under M53, but there is nothing to show that there had been any delivery before 12th February 1952 of any of the 2,000,000 bullets comprised in M58 and M73. It is not clear why 1,800,000 bullets and not 2,000,000 were consigned to Melbourne.

The bullets were packed in cases, each containing 10,000 bullets. The 180 cases consigned from Sydney were picked up by a carrier, apparently on instructions from the defendant, at the railway station in Melbourne, and were taken by him to the defendant's store. Mr. Baird, however, immediately telephoned Mr. Bell and told him that the defendant would not take delivery, and on 15th February the defendant returned the whole of the consignment by rail to Sydney. Freight was not prepaid. The goods were there placed by the plaintiff "without prejudice" in Young's store in Sydney. On 31st March 1952 twenty cases (200,000 bullets) were taken by the plaintiff to fulfil a local order. It should also be mentioned here that at the end of March 1952 the defendant took delivery from the plaintiff's Melbourne store of 200,000 bullets and some time later paid for these. The balance of 160 cases (1,600,000 bullets) were still in Young's store at the time of the trial of the action. When the plaintiff commenced its action, it sued in respect of 1,600,000 bullets, i.e. the 2,000,000 comprised in M58 and M73 (of which, however, it had tendered delivery only of 1,800,000) less the 200,000 delivered and accepted in Melbourne and the 200,000 taken by the plaintiff from Young's store in Sydney.

Pausing here for a moment, one would have thought that the two substantial questions between the parties were (1) whether the defendant, by taking the goods into its store, had accepted them and become bound to pay for them, and (2) if it had not, whether it could justify a refusal to accept them on the ground that they had not been delivered within the time required by the contract. It might well have been open to the defendant (which may well have been surprised by the sudden delivery without warning of goods ordered nine and six months before) to contend that, because delivery had not been made "at earliest" or "about earliest", it was not bound to take delivery, but was entitled to rescind both contracts. However, in the lengthy correspondence which followed the return of the goods to Sydney, no such point was ever raised. Nor was there any mention until a very late stage in that correspondence of an allegation made at the trial of the action that there had been a cancellation by mutal consent of the second of the two contracts. It is necessary now to examine this correspondence, which for the most part was between the plaintiff's solicitors in

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Sydney and the defendant's solicitors in Melbourne. It is in the course of this correspondence that the contract on which the plaintiff ultimately sued is alleged to have been made.

The first letter, which is dated 3rd March 1952, was from the plaintiff's solicitors to the defendant. It referred to the contracts, to the " delivery " in Melbourne, and to the reconsignment to Sydney. It said that " 180 cases comprising the contract " were " now lying at the Darling Harbour Railway Stores ", and it " required " the defendant to " accept these goods ". In fact, anticipating the defendant's acquiescence, the plaintiff had caused Young's to take the cases into store on 25th February. The letter said that, " failing a satisfactory solution ", their client would take the necessary steps to enforce its rights. The defendant's solicitors replied on 6th March 1952, saying that it had been agreed in the beginning between the defendant and the Melbourne representative of the plaintiff that, " irrespective of the provisions for delivery contained in any order for bullets ", delivery should be made only as and when the defendant required bullets to fulfil orders received from its customers. Such an agreement could, of course, have no legal effect, being clearly inconsistent with the written contract: cf. *Hoyt's Pty. Ltd.* v. *Spencer* (1). The same letter also raised the point that delivery at a railway station in Melbourne was not a delivery in accordance with the contracts. By letter of 18th March 1952 the plaintiff's solicitors denied the making of any agreement for delivery on request, and suggested that the defendant should instruct Young's, Sydney, to take the goods into their store, the question of liability for railway charges to be " thrashed out later ". The defendant's solicitors replied to this letter on 21st March 1952. The letter of that date is one of the two letters which are of primary importance in the case. It re-asserted the making of a qualifying oral agreement and refused to give any instructions to Young's. It also said: " We informed you in our letter of 6th instant that our client intended to carry out the agreement for delivery " (i.e. presumably to require delivery of bullets only if and when it ever wanted bullets) " but it is prepared without prejudice to its legal rights to depart therefrom to the extent that it will undertake that delivery instructions covering the balance of bullets will be given so that the final delivery will be made not later than 30th September next ".

By letter of 26th March 1952 the plaintiff's solicitors repeated their denial of the alleged qualifying agreement and refused to agree to the suggested " arrangement for delivery " on instructions

(1) (1919) 27 C.L.R. 133.

to be given before 30th September, but offered to extend the time for payment to three months or, alternatively, to make an allowance of $2\frac{1}{2}$ per cent for prompt payment, provided that delivery was taken and responsibility for railway charges and storage accepted by the defendant. They also said that they would store the goods with Young's in the defendant's name pending arrangements being made for delivery. On 3rd April 1952 the defendant's solicitors refused to agree to either of the two alternative suggestions as to payment and said that the defendant was " not prepared to vary the proposal for delivery made in our letter of 21st March ". This letter was headed " without prejudice ". There the matter rested for some two months. On 4th June 1952 in a letter, also headed " Without Prejudice ", the plaintiff's solicitors wrote: " We refer to your letters of 21st March and 3rd April and have now been instructed to accept your client's offer contained in the letter of 21st March to the effect that delivery of the balance of this order for bullets will be accepted not later than 30th September next ". This is the second of the two letters which are of primary importance in the case.

This letter of 4th June was not acknowledged by the defendant's solicitors, and there was no further relevant communication until 8th July 1952, when the defendant itself wrote a letter direct to the plaintiff. This letter commenced: " We have been informed by our solicitors that you have accepted the offer we made to take delivery of the balance of our contract, 600,000 bullets, by the end of September ". The reference to 600,000 bullets, instead of 1,600,000, is explained by a later passage in the letter, in which the defendant asserts definitely for the first time that the second contract (Order No. M73) for 1,000,000 bullets had been (in effect) cancelled by mutual agreement shortly after its making. The letter, after asserting that the defendant has been " shabbily treated " by the plaintiff, says: " We would like to make it clear at this stage that we cannot under any circumstances accept responsibility for the last order of 1,000,000 bullets . . . . The situation has deteriorated since our offer was made to you over three months ago. We are holding substantial stocks, and sales are slow. The present position is that we do not anticipate being able to take delivery of the balance of 600,000 bullets on 30th September but will do so at the earliest opportunity ". A good deal of further correspondence followed, but it does not appear to affect any matter now in question. It should be mentioned, however, that on 20th October 1952 the defendant's solicitors wrote to the plaintiff's solicitors a letter which was headed " Without Prejudice " and

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which said: " We are now instructed to make the following without prejudice offer in full settlement of all agreements relative to the undelivered balance under contract herein, amounting to 1,600,000 Hungarian bullets as mentioned in your letter: (1) Our clients to take immediate delivery of 600,000 bullets and pay for same within seven days after delivery; (2) Contract for the balance of 1 million bullets to be cancelled. We shall be glad if you will submit this offer to your clients and advise us in due course ". It is to be noted that this letter refers to the contract as covering 1,600,000 bullets and not 600,000. This " offer " was rejected in forceful terms.

It must also be mentioned that the defendant's solicitors, after a threat of legal proceedings, wrote on 6th November 1952 offering to accept service of a writ issued out of the Supreme Court of Victoria. To this the plaintiff's solicitors replied on 21st November 1952 saying: " We acknowledge your letter of 6th instant. It is not our client's intention to issue process out of a Victorian Court, but to sue on the agreement made in Sydney. We therefore propose to issue a New South Wales Supreme Court writ and have it served on your client under the provisions of the *Service and Execution of Process Act* ". The defendant's solicitors in their reply of 25th November 1952 said: " Our client will contest your right to issue a writ out of the New South Wales Supreme Court and will submit that it has no jurisdiction in this matter."

The writ was issued out of the Supreme Court of New South Wales on 8th December 1952. It was indorsed as follows: " The Plaintiff claims the sum of Eight thousand eight hundred pounds (£8,800.0.0) in respect of a contract made between the Plaintiff and the Defendant whereby the Plaintiff undertook to supply and the Defendant undertook to accept and pay for inter alia 1,600,000 bullets at the price of £5.10.0 per thousand. Alternatively the Plaintiff claims from the Defendant damages for breach of a contract made between the Plaintiff and the Defendant for delivery to the Defendant by the Plaintiff of certain bullets of which the Defendant has either failed to take delivery or alternatively failed to pay for " (*sic*). The writ also bore the indorsement required by s. 5 of the *Service and Execution of Process Act*, and it was served on the defendant in Melbourne on 15th December 1952. A conditional appearance was entered on 8th January 1953, and on the following day a summons was issued by which the defendant sought to have the writ set aside on the ground that the Supreme Court of New South Wales had no jurisdiction in the matter. The summons was supported by an affidavit showing that the contracts for the sale

and purchase of the bullets had been made in Melbourne and were to be performed in Melbourne.

It is at least consistent with the indorsement on the writ that the plaintiff was originally seeking to enforce by action at law the two contracts made in May and August 1951. There was no lack of jurisdiction in the Supreme Court of New South Wales to deal with such a claim, although both contracts were made outside New South Wales. The issue of the writ was, therefore, perfectly proper. English and Australian Courts, however, do not claim or exercise jurisdiction in an action unless their writ or other originating process can be served on the defendant within the territorial jurisdiction. The position has been modified by statute or Rules of Court made under statute. In New South Wales provision for service out of the jurisdiction of a Supreme Court writ in certain limited classes of case is made by s. 18 of the *Common Law Procedure Act* 1899, and the *Service and Execution of Process Act* 1901-1953 (Cth.) makes general provision for the service in any State of the process of the courts of any other State. If the matter had been free of authority, one would have thought that the power given in general terms by s. 4 of that Act ought to be regarded as limited by implication to the classes of case specified in s. 11. (An action in New South Wales on the contracts of 1951, whether for the price of the goods or for damages, would not fall within any of those classes.) Great difficulty, however, is occasioned by the decision of three justices of this Court in *Luke* v. *Mayoh* (1), in which it is important to note that a conditional appearance had been entered by the defendant. A practice, which has much to recommend it, but is difficult to reconcile with *Luke* v. *Mayoh* (1), appears to have become established in New South Wales by *Ex parte Walker*; *Re Caldwell's Wines Ltd.* (2); see also *Blunt* v. *Collingwood Pty. Tin Mining Co., N.L.* (3); *Clarke & Co. Pty. Ltd.* v. *Kerin* (4); *Braemar Woollen Mills Co-op. Ltd.* v. *Poinsettia Hosiery Mills Pty. Ltd.* (5); *Re Fowles* (6) (in which an escape was found from the dilemma which *Luke* v. *Mayoh* (1) might be thought to pose) and *Friedman* v. *Kemp's Nurseries Ltd.* (7). That practice is to follow the same course as that provided for cases where a writ has been served out of the jurisdiction under a State law: see *General Rules of the Supreme Court of New South Wales* 1952, Order IX, r. 6, and cf. *Rules of Supreme Court of Victoria*, Order XII, r. 30; *Annual Practice* 1956,

(1) (1921) 29 C.L.R. 435.
(2) (1931) 31 S.R. (N.S.W.) 494, at pp. 503, 504; 48 W.N. 189, at p. 192.
(3) (1903) 20 W.N. (N.S.W.) 158.
(4) (1926) V.L.R. 559.
(5) (1933) 51 W.N. (N.S.W.) 6.
(6) (1936) V.L.R. 96.
(7) (1954) V.L.R. 336.

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pp. 144, 145. The defendant enters a conditional appearance, objecting to the jurisdiction, and then applies by summons to have the writ set aside. If the defendant establishes that the case does not fall within any of the classes specified in s. 11 of the *Service and Execution of Process Act*, an order is made setting aside the writ. (Strictly speaking, it would seem that the service of the writ, and not the writ itself, should be set aside.) If it appears that the case falls within one of the classes mentioned in s. 11, the appearance becomes unconditional.

It may well be that *Luke* v. *Mayoh* (1) will some day have to be reconsidered, but, by reason of what actually happened in this case on the defendant's summons, it is unnecessary to pursue this matter further. By an order made by the Prothonotary by consent on 5th March 1953 the summons was dismissed. The order, however, recited that the defendant's consent was given " without prejudice to its right to dispute the jurisdiction of the Court in respect of any cause of action based on any contract other than the contract alleged in the indorsement on the writ ". It has not been disputed that it was understood and agreed by counsel for both parties that the " contract alleged in the indorsement on the writ " was a contract alleged to have been made in Sydney by the " acceptance " on 4th June 1952 of an " offer " made on 21st March 1952—that is to say, by the letters written on those dates by the defendant's solicitors and the plaintiff's solicitors respectively. The order of the Prothonotary was made conditional on the plaintiff's making certain slight amendments to the indorsement on the writ, the amendments being designed to make it clear that all the causes of action on which the plaintiff sued were based on the same alleged contract. These amendments were in fact made.

A declaration was delivered on 8th May 1953 containing three counts. The first count was based on the common money counts of goods bargained and sold, goods sold and delivered, money paid and accounts stated, and the plaintiff claimed £8,800 as the price of 1,600,000 bullets and £124 19s. 6d. for storage and insurance charges. The second count was based on an alleged contract for the sale of 1,600,000 bullets by the plaintiff to the defendant and a promise by the defendant to take delivery of and pay for those bullets not later than 30th September 1952. The third count alleged (in effect) a contract for the sale of " certain bullets " by the plaintiff to the defendant, a dispute about the terms of the contract, and a compromise whereby the defendant promised to take delivery of the " balance of the said bullets " and pay £8,800 for them not later

(1) (1921) 29 C.L.R. 435.

than 30th September 1952. After the delivery of the declaration certain correspondence took place with regard to what were thought by the defendant's solictors to involve possibly a departure from the " arrangements made between counsel ". It is unnecessary to set this out or to refer to it beyond saying that it is made clear that, as to all the counts, the contract on which the plaintiff was relying was " the one arising from the correspondence between the respective solicitors of the parties subsequent to the making of the original contract ". The position created by the reservation contained in the Prothonotary's order and the " agreement " or " arrangement " of counsel is not, we think, in doubt. Actually, it seems to have been more a matter of mutual assumption than of agreement. It was assumed that the service of the Supreme Court writ was unauthorised by law in the particular case unless the plaintiff established a cause of action based on a contract made in New South Wales. It was assumed that the original contracts of May and August 1951 were made in Victoria, and it was also assumed that no relevant contract was ever made in New South Wales unless such a contract could be found in the correspondence of 1952. It was further assumed that, if such a contract could be found in that correspondence, that contract, because the letter of 4th June was posted in Sydney, was made in New South Wales. It was accordingly agreed that the plaintiff should be regarded as suing on a contract to be found in that correspondence and on no other contract.

Clancy J. gave judgment for the plaintiff for £8,800—apparently as the price of goods sold. He held that a new and independent contract had been made in Sydney by the letters of 21st March and 6th June 1952. He rejected the contention of the defendant that the new contract related only to 600,000 bullets and not to 1,600,000. Only two comments need be made on his Honour's judgment. It would seem that he was clearly right in holding that the correspondence, on its true construction, must be regarded as relating to 1,600,000 bullets and not merely to 600,000. But it would seem that he was clearly wrong in holding that the plaintiff's remedy (if it had a remedy available in the action) was for the price of goods sold. On the view which he took, the plaintiff's remedy was not by way of action for the price but by way of action for damages. It was not established that the bullets were valueless at the material date.

The Full Court, on appeal, assumed, without deciding, that the letters of 21st March and 4th June affected the contractual obligations of the parties, but allowed the appeal on the ground that those

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letters did not create a new and independent contract made in Sydney for the sale of the goods. The view of their Honours is made clear by the following passage from their judgment: " It is sufficient for us to say that in our view the new contract preserved the rights of the parties under the original contract and merely agreed that a mode of performance would be accepted by both parties in lieu of that provided for under the original contract but without prejudice to their rights thereunder " (1).

We are very far from being satisfied that the two letters of 21st March and 4th June affected the legal position as between the parties in any way whatever. In the first place, *both* letters were expressed to be without prejudice. It is, of course, clear that, if, during a dispute, an offer of a compromise is made " without prejudice " and is accepted *simpliciter*, the fact that the offer was made without prejudice ceases to have any significance. The common sense view, and the view of the law, is that the offeror is saying: " I make you this offer in the hope of avoiding legal proceedings between us. If you accept it, we shall both be bound. But I make no admissions, and, if you do not accept it, our legal position remains unaffected." But it might well be said that no corresponding interpretation can be given to an acceptance without prejudice. Do not the words " without prejudice " mean that there is no real acceptance ? We pass over this point, however, because we think, as will be seen, that in the particular case effect could be given to those words in the letter of 4th June if, apart from them, it would be right to hold that agreement had been reached.

In the second place, the so-called acceptance by the letter of 4th June was given after the " offer " of 21st March had been rejected by the letter of 26th March. It could, no doubt, be suggested that the offer was, in effect, renewed by the defendant's solicitors' letter of 3rd April, in which, after rejecting a counter-offer, they say that the defendant " is not prepared to vary the proposal for delivery " made in their letter of 21st March. We think it is very doubtful whether the letter of 3rd April should be regarded as renewing the offer of 21st March. But in any case the " acceptance " did not follow until more than two months after 3rd April. We should have thought it impossible to maintain that the offer had been accepted within a reasonable time. There was no acknowledgment of the letter of 4th June until the defendant itself wrote its letter of 8th July. That letter was (not unnaturally) regarded by the plaintiff as a general repudiation of admitted obligations, and it did no doubt amount to a " repudiation ", if the plaintiff's

(1) (1957) S.R. (N.S.W.), at p. 418; 73 W.N., at p. 301.

view of the defendant's obligations was correct. But, in our opinion, it was not so intended and cannot be so construed. We think that its real effect was to intimate to the plaintiff that, the position having " changed for the worse " in the meantime, its " acceptance " of the " offer " of 21st March was too late, and that the defendant did not regard that acceptance as creating any obligation. The defendant was, in our opinion, fully justified in taking up this attitude. It then proceeded to reassert the position (which it had never really abandoned) that delivery under the original contracts was to be made as and when required—a position which, as we have said, does not seem to us to have been legally tenable.

However, passing over the foregoing points, we will assume, as the Full Court assumed, that the letters of 21st March and 4th June 1952 did effect some alteration in the legal position of the parties. On those assumptions we are of opinion that the Full Court was clearly right in deciding that the plaintiff must fail.

The case was dealt with by the Full Court on the footing that the two critical letters effected a *permanent* alteration in the legal position of the parties—that is to say, that, whereas before 4th June 1952 their rights and duties were governed by the terms of Order No. M58 and Order No. M73, after 4th June 1952 their rights and duties were governed, and continued at all subsequent times to be governed, by the terms of those orders and the terms of the two letters. On this footing it was, of course, conceded that the contracts constituted by the two orders were made in Melbourne. But it was said that, because the second of those letters " accepted "an " offer " contained in the first, a new contract came into existence, and, because that letter of acceptance was posted in Sydney, that new contract was made in New South Wales. The assumption that the posting of that letter in Sydney meant that, if a new contract was made, it was made in New South Wales, was the whole basis of the agreement or arrangement made between counsel when the summons to set aside the writ was dismissed. One would have thought that that whole basis was misconceived. The general rule is that a contract is not completed until acceptance of an offer is actually communicated to the offeror, and a finding that a contract is completed by the posting of a letter of acceptance cannot be justified unless it is to be inferred that the offeror contemplated and intended that his offer might be accepted by the doing of that act: see *Henthorn* v. *Fraser* (1), per *Kay* L.J. In that case, as in *Household Fire & Carriage Accident Insurance Co. (Ltd.)* v. *Grant* (2), it was easy to draw such an inference, but, in such a case as the present, where

(1) (1892) 2 Ch. 27, at pp. 35, 36. (2) (1879) 4 Ex. D. 216.

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solicitors are conducting a highly contentious correspondence, one would have thought that actual communication would be regarded as essential to the conclusion of agreement on anything. However, the understanding of counsel was plainly based on a contrary assumption, and the case must be dealt with on that assumption.

Dealing with it on that assumption, it may be regarded as established that, where a contract is made by the posting of a letter accepting an offer, and it becomes, for any purpose of the law, material to determine where it was made, it must be taken to have been made at the place where the letter of acceptance was posted. The case generally cited in this connexion is *Cowan* v. *O'Connor* (1), see also *Benaim & Co.* v. *L. S. Debono* (2). The rule seems sound enough in principle, because, in the cases with which it deals, the contract is actually made—the binding obligation between the parties actually comes into existence—by virtue of the posting of the letter of acceptance. It seems necessarily to follow that the place of the making of the contract is the place where that letter is posted: cf. *Anson* on *Contracts*, 10th ed. (1903), p. 34. The rule with regard to contracts made by correspondence is indeed only a particular application of a more general rule that a contract is to be regarded as made at the place where that act or thing was done or said which finally created the contractual obligation: cf. *Muller & Co.'s Margarine Ltd.* v. *Commissioners of Inland Revenue* (3). But what is the position where a contract is concluded in one place and subsequently varied by agreement in another place? There is only one contract, and one would think it clear that that contract must, if it ever becomes material to inquire where it was made, be regarded as made at the place where it was originally concluded. The variation affects the content of the obligation but not the obligation itself. The place where the parties assumed that obligation, and became bound to one another, is the place where their contract was really made.

The plaintiff, in argument before the Full Court and before this Court, sought, in effect, to escape from this position by saying that the letters of 21st March and 4th June 1952 had the effect of rescinding the contracts of May and August 1951 and bringing into existence a new and different contract. The argument thus tended to centre round the distinction drawn between " rescission " and " variation " in *Morris* v. *Baron & Co.* (4) and *British and Benningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (5). In these cases a distinction is drawn, for the purposes of the *Statute of Frauds*,

(1) (1888) 20 Q.B.D. 640.
(2) (1924) A.C. 514, at p. 520.
(3) (1900) 1 Q.B. 310.
(4) (1918) A.C. 1.
(5) (1923) A.C. 48.

between a mere parol variation of an original contract in writing on the one hand and on the other hand a parol rescission of an original contract in writing: the parol rescission may or may not be accompanied or followed by a new substituted parol contract. In the former case the parol variation cannot be enforced, and the original contract in writing stands unaffected. In the latter case the original contract in writing is discharged. It is not a satisfactory distinction. It appears to be a matter of degree. Thus we find Lord *Atkinson* in the *British and Beningtons' Case* (1) saying: "A written contract may be rescinded by parol either expressly or by the parties entering into a parol contract entirely inconsistent with the written one, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it" (2). His Lordship went on to say that in the particular case no such rescission could be found, the purpose of the parol contract being "merely to vary the written contract with respect to one of its provisions" (2).

If that is the test to be applied here, the plaintiff must, as the Full Court held, fail. On the conventional basis on which the action was tried, it could not succeed unless it established a new and independent contract made in 1952. It proved, at most, a contract made as to some of its terms in 1951 and as to some of its terms in 1952. This was a contract other than that to which it had agreed to limit itself, and a contract in respect of which the defendant was entitled, by the reservation contained in the Prothonotary's order, to object to the jurisdiction. It is impossible, in our opinion, to maintain that a new and independent contract was made in New South Wales in 1952. The two material letters are unintelligible without reference to the original contracts of May and August 1951, and it seems almost absurd to say that those contracts were being rescinded and replaced by a new and different contract for the sale of bullets.

So far we have dealt with the case, as the Full Court dealt with it, on the footing that the rights and duties of the parties were permanently altered by what was contained in the two material letters—in other words, that there was a true variation of the original contracts of sale. But this was not, in our opinion, really the position. What was brought about by those letters was, in our opinion, no new contract—not even a varied contract—but a mere accord executory, and, when that accord was not executed, but was repudiated, the parties were relegated to their position under the original contracts, which became, as they had been before the accord, the exclusive charter of their rights and duties.

(1) (1923) A.C. 48.

(2) (1923) A.C., at p. 62.

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The rules of law relating to accord and satisfaction are explained by *Dixon* J., as he then was, in *McDermott* v. *Black* (1), and *Fullagar* J. had occasion to consider them in *Scott* v. *English* (2). The substance of the matter is thus stated by *Dixon* J. in the earlier case: "The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But, whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired" (3). In the present case, we feel no doubt that what the plaintiff intended to take in satisfaction was not a promise but an act or thing promised. The plaintiff was threatening to sue the defendant on the contracts of May and August 1951, and we think that what it was saying, and all that it was saying, when it purported to accept the "offer" contained in the letter of 21st March, was that it would not seek to enforce whatever rights it had under the original contracts if the defendant accepted delivery of the goods on or before 30th September. We think that this would have been the position even if the words "without prejudice" had not been used. But those words seem to us to put the matter beyond doubt. They make it perfectly clear that the plaintiff is not abandoning at all its existing legal position. It is not taking a new promise in discharge of any right which it may have. If the promise is not performed, it is to be where it was before. It is not really material to consider whether, if it had sued on the original contracts before 30th September, the letters of 21st March and 4th June could have been pleaded in bar—as to which reference may be made to *Ford* v. *Beech* (4). But, in our opinion, they could not have been so pleaded. It is in any case clear, to our minds, that the plaintiff after 30th September was not merely at liberty to sue on the original contracts, but had no other cause of action on which it could sue.

The appeal, in our opinion, fails. We think, however, that the plaintiff should not be left in any danger of being held to be precluded by the judgment in this action from asserting any right which it might, apart from the conventional basis on which this action was fought, have been able to assert against the defendant. We think accordingly that the judgment in this action should be a judgment of non-suit. Subject to that variation, the appeal should be dismissed with costs.

(1) (1940) 63 C.L.R. 161, at pp. 183 et seq.
(2) (1947) V.L.R. 445.
(3) (1940) 63 C.L.R., at pp. 183, 184.
(4) (1848) 11 Q.B.D. 852, at pp. 870-872 [116 E.R. 693, at pp. 699, 700].

WILLIAMS J. This is an appeal by the plaintiff in an action brought in the Supreme Court of New South Wales at common law to recover from the defendant the sum of £8,800 as the purchase price of 1,600,000 Hungarian bullets or alternatively to recover the same sum as damages for breach of contract to take delivery of these goods and pay for them. *Clancy* J. who tried the action without a jury gave a verdict for the plaintiff for £8,800. There were three counts in the declaration the first, the common money counts, to recover the price of the goods and the second and third counts to recover damages for breach of contract, the breach alleged in the second count being refusal to take delivery of or pay for the goods and in the third count repudiation of the contract. It does not appear in respect of which of these counts his Honour gave his verdict. In his reasons for judgment he did not discuss whether there was any evidence of the damage the plaintiff had suffered from the breaches alleged in the second and third counts so that he may have awarded the sum of £8,800 under the first count as the purchase price of the goods. But this is not necessarily so because the amount that should be awarded as damages may be the same, the only evidence of damage at the date of breach, that is 30th September 1952, being the evidence tendered on behalf of the plaintiff that the bullets were then unsaleable. From that verdict the defendant appealed to the Full Supreme Court consisting of *Roper* C.J. in Eq., *Ferguson* and *Manning* JJ., which court unanimously allowed the appeal, and ordered that the verdict for the plaintiff should be set aside and a verdict entered for the defendant. From that order of the Full Supreme Court the plaintiff has appealed to this Court. I shall not refer to the oral evidence or correspondence in any detail because this has already been done for me by other members of this Court. It is sufficient to say that the origin of the dispute was a dispute that arose early in 1952 regarding the rights and obligations of the parties under three orders dated respectively 20th April 1951, 14th May 1951 and 2nd August 1951 given by the defendant, a company incorporated in Victoria, with its headquarters and store in Melbourne, to the plaintiff, a company incorporated in New South Wales with its headquarters in Sydney but with a branch in Melbourne. Each of these orders was for 1,000,000 Hungarian bullets at 110s. per thousand, delivery to be into defendant's store, the date of delivery to be "about earliest", and payment to be "net seven days or cash on delivery at seller's option". In the action the plaintiff sought to prove that in February 1952, 2,170,000 bullets had still be to be delivered under these orders. Be that as it may, it is clear that in that month the plaintiff forwarded

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1,800,000 bullets, that is 180 cases, by rail to Melbourne consigned to the defendant, that these cases were picked up by the defendant's carrier and taken to its store, but that after a short delay the defendant refused to accept them and caused them to be consigned back to the plaintiff to Darling Harbour Sydney by rail. On 3rd March 1952, the plaintiff's solicitors wrote to the defendant requiring it to accept the bullets and stating that, failing a satisfactory solution, they would have no alternative but to take the necessary steps to enforce their rights in the usual way. This threat of litigation was followed by correspondence mostly between the solicitors for the plaintiff and the solicitors for the defendant in which the defendant at first asserted that, despite the words in the orders " delivery about earliest ", it had been agreed that deliveries would be made as and when the defendant required bullets to fulfil orders received by it from its customers. In a letter of 21st March 1952 the defendant stated that it intended to carry out this agreement for delivery but that it was prepared without prejudice to its legal rights to depart therefrom to the extent that it would undertake that delivery instructions covering the balance of bullets would be given so that the final delivery would be made not later than 30th September next. After some intermediate correspondence without prejudice in which the defendant refused a counter-offer but nevertheless repeated this offer the plaintiff's solicitors in a letter to the defendant's solicitors dated 4th June 1952 posted in Sydney headed " without prejudice " stated that they had now been instructed to accept the defendant's offer to the effect that delivery of the balance of " this order " for bullets would be accepted not later than 30th September next. Between the offer of 21st March and this acceptance 200,000 further bullets had been delivered by the plaintiff to the defendant at its request so that the balance of the 1,800,000 bullets of which the defendant had refused to take delivery had been reduced to 1,600,000 bullets. In a letter of 8th July 1952 to the plaintiff the defendant stated that since their offer of three months ago the situation had deteriorated and that it was holding substantial stocks and sales were slow. It raised the new assertion that the number of bullets it had contracted to purchase still undelivered was not 1,800,000 (then reduced to 1,600,000) as the plaintiff claimed but 800,000 (then reduced to 600,000) because the order of 2nd August 1951 had never been accepted by the plaintiff. The letter ended: " The present position is that we do not anticipate being able to take delivery of the balance of 600,000 bullets on the 30th September, but will do so at the earliest opportunity." This attempt on the part of the defendant to repudiate

its offer of 21st March 1952 which the plaintiff had accepted on 4th June 1952 to give instructions for the delivery of the balance of the bullets on or before 30th September 1952 and to reduce the number of bullets of which it was obliged to take delivery to 600,000 bullets was naturally resented by the plaintiff which denied that it had not accepted the offer of 2nd August 1951. The defendant failed to give delivery instructions for any further bullets on or before 30th September 1952 and no further bullets were delivered either on or after that date.

After some further negotiations which proved fruitless, the plaintiff in December 1952 commenced the present action. The writ was served on the defendant in Victoria under the *Service and Execution of Process Act* 1901-1950. The defendant entered a conditional appearance and moved to set aside the writ on the ground that the causes of action sued upon arose in Victoria and not in New South Wales. This application was dismissed by consent after it had been agreed between the parties that the plaintiff would confine its action to an action to enforce a contract made in Sydney arising from the correspondence between the parties and their respective solicitors. To give effect to this agreement the endorsement on the writ was amended so that it read: " The Plaintiff claims the sum of Eight thousand eight hundred pounds (£8,800 0s. 0d.) in respect of a contract made between the Plaintiff and the Defendant whereby the Plaintiff undertook to supply and the Defendant undertook to accept and pay for inter alia 1,600,000 bullets at the price of £5 10s. 0d. per thousand. Alternatively the Plaintiff claims from the Defendant damages for breach of the said contract made between the Plaintiff and the Defendant for delivery to the Defendant by the Plaintiff of the said bullets of which the Defendant has either failed to take delivery or alternatively failed to pay for ". In correspondence between the solicitors for the plaintiff and the solicitors for the defendant at the time of the service of the declaration the solicitors for the plaintiff informed the solicitors for the defendant that the contract sued upon in all three counts was the contract arising from the correspondence between the respective solicitors and parties subsequent to the initial contract referred to in the third count in the declaration. This count is in the following words: " And for a third count the plaintiff as aforesaid sues the Defendant as aforesaid for that prior to the making of the promises hereinafter set forth there was a certain contract binding between the Plaintiff and the Defendant relating to the sale of certain bullets by the Plaintiff to the Defendant and prior to and at the time of the making of the said promise a dispute existed between the Plaintiff and the

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Defendant relating to certain terms of the said contract and thereupon in consideration that the Plaintiff would waive the performance of certain matters claimed by it in the said dispute and would settle the said dispute on certain terms then agreed upon between the parties the Defendant promised the Plaintiff that it would buy and take delivery from the Plaintiff of the balance of the said bullets namely One million six hundred thousand (1,600,000) and pay to the Plaintiff for the same the sum of eight thousand eight hundred pounds (£8,800) not later than the thirtieth day of September One thousand nine hundred and fifty-two and all things happened all times elapsed and all conditions were fulfilled entitling the Plaintiff to a performance by the Defendant of its said promise and yet the Defendant did not and refused to take delivery of the said balance of the said bullets or to pay to the Plaintiff the sum of Eight thousand eight hundred pounds (£8,800) not later than the thirtieth day of September One thousand nine hundred and fifty-two and has repudiated the said promise and refused to be bound by the same whereby the Plaintiff lost the benefit of the Defendant's said promise." The initial question that arises is therefore whether such a contract was made and that depends basically upon the effect of the acceptance by the plaintiff on 4th June of the defendant's offer of 21st March. When the solicitors for the defendant in the letter of 21st March stated that the defendant without prejudice to its legal rights was prepared to depart therefrom to the extent mentioned it must have meant that the offer was to be without prejudice to the defendant's legal rights if the offer was not accepted. Where an offer is made without prejudice but is subsequently accepted "a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one. A contract is constituted in respect of which relief by way of damages or specific performance would be given": *Walker* v. *Wilsher* (1); *Holdsworth* v. *Dimsdale* (2); *In re River Steamer Co.*; *Mitchell's Claim* (3). When the solicitors for the plaintiff said that they accepted the offer in a letter headed "without prejudice" they may have inserted the words "without prejudice" because the offer had been made by the defendant "without prejudice" but in the letter of 4th June these words could have no meaning because when an offer is accepted the contract is complete and the acceptance of the offer could not be made without prejudice to its legal effect. Then what was the legal effect of the offer and acceptance? *Clancy* J. was of opinion

(1) (1889) 23 Q.B.D. 335, at p. 337.
(2) (1871) 24 L.T. 360.
(3) (1871) L.R. 6 Ch. App. 822, at p. 832.

that it had the effect of bringing into existence a new contract entered into by way of compromise made in Sydney, where the letter of acceptance was posted, for the purchase by the defendant of the 180 cases of bullets as to which the dispute arose incorporating the provisions of the orders relating to price and delivery into store and payment upon delivery but including the new term as extending the time for delivery of the bullets until 30th September 1952. But their Honours in the Full Supreme Court in their unanimous reasons for judgment reached a contrary opinion. They said: "It was not disputed that the original contract for the sale of the bullets was made in Melbourne; nor was it disputed that at a later date the parties entered into an arrangement in Sydney. Assuming, but without so deciding, that this arrangement was a binding contract, the right of the respondent to succeed in the action depended upon whether the second contract amounted to a rescission of the first contract and the substitution for it of the new contract (the old conditions being imported into it so far as applicable) or whether the second contract merely related to the mode or manner of performance of the first contract and left the first contract in full force and effect" (1). Later in their reasons their Honours said that in their opinion the second of these alternatives was correct. They could find no intention that the parties intended by the later contract, assuming the offer and acceptance created contractual relations, to rescind the earlier contract and to substitute a second contract made in Sydney for it. They said: "It is sufficient for us to say that in our view the new contract preserved the rights of the parties under the original contract and merely agreed that a mode of performance would be accepted by both parties in lieu of that provided for under the original contract but without prejudice to their rights thereunder. The use of the expression 'without prejudice' in the context in which it appears is cogent evidence of the fact that the contractual liability of the parties under the original contract was intended to be preserved. However, there are many other indications that such is the case which are apparent when regard is had to the precise expressions used in the material letters and the general tenor of the whole of the correspondence" (2). I find it difficult with all respect to understand exactly what their Honours meant in this passage. In the earlier passage cited they had assumed without deciding it that the effect of the offer and acceptance created contractual relations between the parties. In this later passage they seem to suggest that no such contractual

(1) (1957) S.R. (N.S.W.), at p. 416; 73 W.N., at p. 300.

(2) (1957) S.R. (N.S.W.), at pp. 417, 418; 73 W.N., at p. 301.

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relations were created. If the existing contract or contracts between the parties provided for delivery at one time and the parties agreed to change that to another time the existing obligations of the plaintiff to make and of the defendant to accept delivery and the existing obligation of the defendant to pay for the goods must all have been changed. The existing contractual relations of the plaintiff and the defendant must have been varied to that extent. It would appear that their Honours must have considered that in the letter of 21st March the defendant was making the business suggestion that as a way out of the difficulty it would undertake that orders for the delivery of the balance of the bullets would be given on or before 30th September if the plaintiff would concede to the defendant this further time to take delivery of and pay for the goods. In other words it was asking the plaintiff if it would forbear from suing to enforce what it asserted but the defendant denied to be its rights under the existing contract or contracts in the meantime and would accept this method of performance as a waiver of its rights under that contract or contracts. If this was all that the offer and acceptance meant there would, of course, be no variation of the existing contractual rights at all. No fresh contractual rights would be created. It would simply be a case of voluntary waiting and not an alteration of the contract: *Hickman* v. *Haynes* (1); *Plevins* v. *Downing* (2); *Besseler Waechter Glover & Co.* v. *South Derwent Coal Co. Ltd.* (3). But in my opinion the letter of 21st March cannot be read as a request to the plaintiff voluntarily to concede the defendant further time to take delivery of the bullets and as a consequence further time to pay for them. The defendant was not asking the plaintiff to make a concession. It was insisting that it was not bound to take delivery of any bullets until it required them to fulfil orders from its customers. It was not requesting the plaintiff to give it time to perform its admitted obligations in a different manner to that provided for in the existing contract or contracts. It was not requesting the plaintiff voluntarily to forbear from enforcing its rights within the principle of such cases as : *Ogle* v. *Vane* (*Earl*) (4) ; *Hickman* v. *Haynes* (5) ; *Levey & Co.* v. *Goldberg* (6). It was asserting that under the existing contractual rights the plaintiff could not force it to take delivery of any bullets but that it was prepared to offer, without prejudice to its existing legal rights if the offer was not accepted, to make a new and altered

(1) (1875) L.R. 10 C.P. 598, at p. 606.
(2) (1876) L.R. 1 C.P.D. 220, at pp. 225, 226.
(3) (1938) 1 K B. 408, at p. 416.
(4) (1867) L.R. 2 Q.B. 275; (1868) L.R. 3 Q.B. 272.
(5) (1875) L.R. 10 C.P. 598.
(6) (1922) 1 K.B. 688.

agreement which should prove satisfactory to both parties because it would give the defendant a reasonable time within which to dispose of the 1,800,000 bullets to its customers and place itself in funds to pay the plaintiff for them, and the plaintiff would be able to dispose of the bullets and recover the purchase price in a reasonable time. In other words the defendant was offering to compromise the dispute in the manner suggested in the offer. In *Callisher* v. *Bischoffsheim* (1), a case that is frequently cited, it was held that the compromise of a disputed claim made bona fide is a good consideration for a promise, even although it ultimately appears that the claim was wholly unfounded. *Cockburn* C.J. said: "The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference" (2).

In the present case the plaintiff was claiming that under the existing contract or contracts the defendant was bound to take delivery of the 1,800,000 bullets it had railed to Melbourne and that the defendant either had taken delivery or had wrongly refused to take delivery of these bullets, while the defendant was claiming that it was not bound to take delivery of them and had not done so. In other words, the plaintiff was claiming that under the existing contractual relations the defendant was in default and the defendant was claiming that it was not. The offer that the defendant made and the plaintiff accepted was an offer to compromise this dispute by treating the 1,800,000 bullets as though they had not been delivered to the defendant, the defendant in that event agreeing to take delivery of the 1,800,000 bullets on or before 30th September 1952.

After the defendant's offer had been accepted by the plaintiff, there was a binding contract that the defendant would give orders for the delivery of the balance of the bullets on or before 30th September 1952 and that the plaintiff would deliver the bullets pursuant to such orders.

There can be no doubt as to what was meant by the balance of bullets in the letter of 21st March. It must have meant the 1,800,000 bullets (subsequently reduced to 1,600,000) that had been railed to Melbourne and back to Sydney. These were the bullets in dispute. They were the balance of the bullets undelivered under more than one order but by the time the letter of 21st March was written all these orders were referred to as one contract, as well they might be

(1) (1870) L.R. 5 Q.B. 449.

(2) (1870) L.R. 5 Q.B., at p. 451.

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because each order was identical in all its terms except as to date. The major item in the dispute that existed between the parties was as to whether the defendant should have taken delivery of these bullets when they were railed to Melbourne and thereby have become liable to pay for them. The minor item was whether the plaintiff or the defendant should pay the railage and storage charges which had been incidentally incurred. In these circumstances the offer and the acceptance can only be regarded as a settlement by way of compromise of the major item, the settlement of the minor item being by agreement left in abeyance. It is immaterial to my mind whether the compromise should be regarded as a completely new contract made in New South Wales whereby impliedly the existing contract or contracts were completely rescinded and a new contract substituted for them, the new contract incorporating the terms of the orders as to price, delivery into store and time for payment and including the new term providing for delivery on or before 30th September 1952 required to give effect to the offer of 21st March and its acceptance of 4th June, or merely as a variation of the existing contract or contracts by substituting a new term as to delivery for the old term. In the former event there could be no question that the whole of the new contract was made in New South Wales. It would only be made when the letter of 4th June was posted in Sydney. But assuming that the offer and acceptance amounted to no more than a variation of the existing contract or contracts there would still be a new contract and this contract also would only be made when the letter of 4th June was posted in Sydney. There is in the case of contracts required to be evidenced by writing under the *Statute of Frauds* a distinction between the effect of a subsequent parol agreement which is intended to rescind an existing contract evidenced by writing whether the parol agreement can be enforced or not and a parol agreement which is intended to vary the existing contract but not to rescind it. In the first case the parol agreement is effective to rescind the existing contract although it cannot be sued upon, whereas in the second case the parol agreement is ineffective to rescind the existing contract or even to vary it because the variation is not evidenced by writing and the existing contract can be sued upon as though the parol agreement had never been made: *Morris* v. *Baron & Co.* (1); *British & Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (2). The question in each of these cases was whether the old contract or contracts was or were still on foot. It was held in *Morris* v. *Baron & Co.* (1) that the old contract was not because the parties had

(1) (1918) A.C. 1.

(2) (1923) A.C. 48.

intended to rescind it by the unenforceable parol agreement whether that agreement was itself enforceable or not. It was held in *British & Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (1) that the old contracts were still on foot because in the subsequent parol agreement there was no intention to rescind them. The only intention was to vary them but this variation could not be proved in the absence of writing so that the old contracts, which were all that could be proved, could still be sued upon as though the variation had never been attempted. In *British & Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (1) Lord *Sumner* said: "It was, however, argued before your Lordships that, even so, the old contracts were discharged because a varied contract is not the old contract, and as you cannot have a new and varied contract and an old and unvaried contract regulating the same thing at the same time, the old contract, like other old things, must be disregarded. As a matter of formal logic, this may possibly be so, but such was not the view taken by this House in *Morris* v. *Baron & Co.* (2), since, if their Lordships had thought that any variation whatever would make a new contract and discharge the old one, they would have said so expressly and would not have dealt with the extent and completeness of the changes, as they did. The variation may be a new contract, so as to make writing, duly signed, indispensable to its admissibility, for this is a matter of form and of the words of the statute, but the discharge of the old contract must depend on intention, tested in the manner settled in *Morris* v. *Baron & Co.* (2)" (3).

In *Morris* v. *Baron & Co.* (2) and *British & Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (1) their Lordships were dealing with the somewhat special case of an original contract required to be evidenced by writing by the *Statute of Frauds* that was enforceable because it complied with the statute and of a subsequent parol contract varying that contract which was a perfectly good contract but was not enforceable because the statute was not complied with. In deciding whether or not the effect of the subsequent contract was impliedly to rescind the original contract so that the enforceable legal relations between the parties were completely dissolved, it was recognised that one important consideration to be taken into account was that the parties would probably not intend such a dissolution and would only intend the subsequent contract to have this effect if it was itself enforceable or in other words if it was itself evidenced by writing as required by the statute. If it was itself so evidenced

(1) (1923) A.C. 48.
(2) (1918) A.C. 1.
(3) (1923) A.C., at pp. 68, 69.

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then it would not be difficult to imply that the parties did intend the original contract to be rescinded and to be completely replaced by a new contract, the subsequent contract containing such of the terms of the old contract as had not been affected by the variation and the new terms introduced by that variation if any. Two passages in the judgment of *Willes* J. in *Noble* v. *Ward* (1) illustrate the point: "Mr. *Holker* has contended, that though the contract of the 27th of September cannot be looked on as a valid contract in the way intended by the parties, yet since, if valid, it would have had the effect of rescinding the contract of the 18th, and since the parties might have entered into a mere verbal contract to rescind *simpliciter*, we are to say that what would have resulted if the contract had been valid, will take place though the contract is void; or, in other words, that the transaction will have the effect which, had it been valid, the parties would have intended, though without expressing it, although it cannot operate as they intended and expressed . . . . It is quite in accordance with the cases of *Doe d. Egremont* v. *Courtenay* (2) and *Doe d. Biddulph* v. *Poole* (3), overruling the previous decision of *Doe d. Egremont* v. *Forwood* (4): see (5) to hold that, where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention" (6). The second of these passages was cited by Lord *Dunedin* in *Morris* v. *Baron & Co.* (7). His Lordship said: "The difference between variation and rescission is a real one, and is tested, to my thinking, by this: In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself" (8).

(1) (1867) L.R. 2 Ex. 135.
(2) (1848) 11 Q.B. 702 [116 E.R. 636].
(3) (1848) 11 Q.B. 713 [116 E.R. 641].
(4) (1842) 3 Q.B. 627 [114 E.R. 647].
(5) (1848) 11 Q.B., at p. 723 [116 E.R., at p. 644].
(6) (1867) L.R. 2 Ex. 135, at pp. 137, 138.
(7) (1918) A.C., at p. 27.
(8) (1918) A.C., at pp. 25, 26.

In the present case the offer of 21st March and its acceptance on 4th June are in writing so that both the original contract or contracts and this subsequent variation are evidenced by writing and equally enforceable. No implication should therefore arise that the original contract or contracts were only intended to be rescinded if an enforceable contract was substituted for them. If it is necessary to decide whether the acceptance by the plaintiff of the offer of 21st March had the effect of rescinding the existing contract or contracts and substituting an entirely new contract for them, I am prepared to decide that it had this effect. The offer if accepted was intended to resolve the whole of the major dispute between the parties. The plaintiff was to give up its right to claim that the 1,800,000 bullets had been duly delivered to the defendant in which case it could have sued the defendant for the purchase price if it was not paid. The bullets were to be considered as though they had not been delivered at all. Executory rights and obligations were created with respect to their delivery. The plaintiff had to be ready and willing to deliver the bullets in whatever quantities they were ordered from time to time until 30th September. The defendant had the option of taking delivery of the bullets in such quantities and at such times up to that date as it thought fit. Prior to the offer and acceptance, subject to the defendant's claim that there was an overriding agreement that it need not take delivery of the bullets until it required them to supply its customers, an agreement which was probably unenforceable for want of writing under s. 9 of the *Goods Act* 1928 (Vict.), the plaintiff had the right to deliver the goods " about earliest " which must have meant as soon as it was reasonably practicable and the defendant was bound to accept them and pay for them whether it had managed to resell them or not, and on the other hand the defendant could have refused to accept delivery if the plaintiff had not been ready and willing to deliver the bullets at this time. The rights and obligations of the plaintiff and the defendant with respect to the 1,800,000 bullets arose under three contracts and it was intended to combine these rights and obligations in one contract and to provide for the delivery of the whole of the bullets on or before the same date irrespective of the due dates of delivery under the existing contracts. The plaintiff's right to recover the price of the goods depended upon their delivery. Until then they were at its risk and the alteration of the time for delivery was a very material alteration in the existing contractual rights. An intention to rescind the existing contract or contracts and to substitute for them a single new contract incorporating such parts of the old contracts as the parties did not choose to alter is

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in these circumstances not difficult to imply and it is even less difficult when the new term is like the old terms evidenced by writing so that the rescission of the old contract or contracts will not leave the altered rights and obligations of the parties unenforceable for want of writing. A subsequent executory agreement substituting a new time or mode for the delivery of goods for that contained in an existing contract was held in two of the older cases *Stead* v. *Dawber* (1) and *Marshall* v. *Lynn* (2) impliedly to have rescinded the existing contract even where the substituted agreement could not be enforced for want of writing. These cases were referred to by *Blackburn* J. in *Ogle* v. *Earl Vane* (3) when his Lordship was discussing the distinction between a seller saying to a purchaser, who finds it inconvenient to take delivery under a contract, as a concession: "I'll wait, but I do not bind myself to wait" and a seller promising a purchaser for a good consideration to give time. His Lordship said: "The question in such cases being, 'Have you ever bound yourself?' In *Stead* v. *Dawber* (4), the court evidently thought this distinction important. That was an action for non-delivery of a cargo of bones, which were by the written contract to be shipped on the 20th to the 22nd of May, and to be paid for by an acceptance at three months from the delivery; and the 22nd happening to be Sunday, in a conversation between the defendant and the plaintiff's agent, at the suggestion of the defendant, the Monday or Tuesday following was substituted; and the agent who proved this, also stated that the acceptance would also be proportionally enlarged. The court say the main question was whether the enlargement of this time was an alteration of the contract, or only a dispensation with its performance at the time. And after noticing the cases of *Cuff* v. *Penn* (5) and *Goss* v. *Lord Nugent* (6), as apparently contradictory, the court proceed to say: 'But it seems to us that we are mainly called upon to decide a question of fact; what, namely, was the intention of the parties in the arrangement come to for substituting the 24th for the 22nd as the day of delivery; did they intend to substitute a new contract for the old one; the same in all other respects, except those of the day of delivery and date of the accepted bill, with the old one?' And the court came to the conclusion—and I do not think they could well have come to any other—that though the variation was so slight, it did amount to a complete, new, and substituted contract for a

(1) (1839) 10 Ad. & E. 57 [113 E.R. 22].
(2) (1840) 6 M. & W. 109 [151 E.R. 342].
(3) (1867) L.R. 2 Q.B. 275.
(4) (1839) 10 Ad. & E. 57, at pp. 64, 65 [113 E.R. 22, at p. 25].
(5) (1813) 1 M. & S. 21 [105 E.R. 8].
(6) (1833) 5 B. & Ad. 58 [110 E.R. 713].

delivery on the 24th instead of the 22nd. In *Marshall* v. *Lynn* (1), there was more of a change in the contract. In that case, the defendant agreed in writing to buy certain potatoes of the plaintiff, to be shipped on board a certain vessel on her next arrival at Wisbeach; but on her next arrival, the defendant asked the plaintiff to allow the vessel to go an intermediate voyage; and the plaintiff agreed to this, which was clearly substituting one contract for another" (2). Perhaps I may add that in *Marshall* v. *Lynn* (3) the exact words of *Parke* B. were: "Now, in this case, by the original contract, the defendant was to accept the goods, provided they were sent by the first ship: the parties afterwards agreed by parol that the defendant would accept the goods if they were sent by the second ship, on a subsequent voyage: that appears to me to be a different contract from what is stated before. Such was my strong impression, independently of any decision on the point: but the case of *Stead* v. *Dawber* (4) is precisely in point with the present, and on looking at the judgment, it does not appear to proceed altogether upon the time being an essential part of the contract, but on the ground that the contract itself, whatever be its terms, if it be such as the law recognises as a contract, cannot be varied by parol. It has been said that the adoption of this rule will produce a great deal of inconvenience; I am not, however, aware of much practical inconvenience that can result from it, and none that furnishes any reason for altering the rule of law in respect of these mercantile contracts. They frequently vary in terms, and admit of some latitude of construction, but the expressions used in them generally indicate the intention of the parties sufficiently well; there is a sort of mercantile short-hand, made up of few and short expressions, which generally expresses the full meaning and intention of the parties. On the whole, it appears to me that no reasonable distinction can be made between this case and that of *Goss* v. *Lord Nugent* (5). This is a new contract, incorporating new terms" (6).

But if I am wrong, and the proper implication is that the old contracts were not impliedly rescinded at all or rescinded only so far as was necessary to give effect to the new term, the result would in my opinion be the same. There would be the two sets of contracts on foot, the old contracts and the new contract consisting of some of the terms of the old contracts and a new term. The old contracts

(1) (1840) 6 M. & W. 109 [151 E.R. 342].
(2) (1867) L.R. 2 Q.B., at pp. 282, 283.
(3) (1840) 6 M. & W. 109 [151 E.R. 342].
(4) (1839) 10 Ad. & E. 57, at pp. 64, 65 [113 E.R. 22, at p. 25].
(5) (1833) 5 B. & Ad. 58 [110 E.R. 713].
(6) (1840) 6 M. & W., at pp. 117, 118 [151 E.R., at pp. 345, 346].

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and those contracts as varied cannot be the same contract. They must be different contracts. The new contract must override the old contracts so far as their terms clash and the old contracts even if they are not rescinded rendered inoperative to this extent. An existing contract that is varied as to one of its terms must be in law a new contract. It only becomes a contract when the variation is made, in the present case when the offer of 21st March was accepted on 4th June. It is this new contract that the plaintiff is seeking to enforce and not the old contracts even if, contrary to my own opinion, they have not been rescinded. The question whether the plaintiff, without infringing the agreement as to jurisdiction between the parties, is entitled to sue in the Supreme Court of New South Wales really depends upon whether the effect of the acceptance on 4th June 1952 of the offer of 21st March 1952 was to create contractual relations between the parties, and in my opinion there is no doubt that this was their effect. It appears to me, as it does to *Kitto* J., that the real contract between the parties is that alleged in the third count and that this is a contract made in New South Wales. The plaintiff is entitled to succeed on this count provided there is evidence of the damage it has suffered from its breach. The evidence of this damage is slight. The price of 1,600,000 bullets was £8,800 but the plaintiff, who retained the bullets, would not normally be entitled to receive this amount as damages for breach of the contract. But there is evidence that the bullets were at the date of the breach, that is on 30th September 1952, unsaleable and valueless. Where there is no available market for the goods at the date of breach, and there was none in the present case, the measure of damages is that prescribed by s. 52 (2) of the *Sale of Goods Act* 1923 (N.S.W.), that is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract. There is evidence that on 30th September 1952 the sales tax on bullets which had been increased about a year before was impeding their sales, that the dire effect of myxamatosis on the rabbit population had reduced the demand for bullets, that there were plenty of locally made bullets on the market which were preferred to the imported variety and that there was a serious financial recession which had caused the falling off of sales. All these circumstances tended to make the sale of imported bullets in any quantities impossible. The defendant gave no evidence to contradict this evidence and it seems to be clear that the reason why the defendant did not want to take delivery of any further bullets from the plaintiff was that it could not resell them and this circumstance supports the plaintiff's evidence that no demand for

imported bullets existed in September 1952. But no serious attention seems to have been directed at the trial to the proper *quantum* of damages for breach of contract and I agree with *Kitto* J. that it would be advisable to order a new trial on this question.

KITTO J. This is an appeal against an order of the Full Court of the Supreme Court of New South Wales, by which a verdict given for the plaintiff in an action on the common law side of that court was set aside and a verdict was entered for the defendant.

The writ by which the action was commenced was endorsed with a statement of the nature of the plaintiff's claim in these terms: "The Plaintiff claims the sum of Eight thousand eight hundred pounds (£8,800.0.0) in respect of a contract made between the Plaintiff and the Defendant whereby the Plaintiff undertook to supply and the Defendant undertook to accept and pay for inter alia 1,600,000 bullets at the price of £5.10.0 per thousand. Alternatively the Plaintiff claims from the Defendant damages for breach of a contract made between the Plaintiff and the Defendant for delivery to the Defendant by the Plaintiff of certain bullets of which the Defendant has either failed to take delivery or alternatively failed to pay for."

The writ was endorsed for service out of New South Wales and in Victoria, and it was served on the defendant in the latter State. The defendant entered a conditional appearance pursuant to a provision in the Rules of the Supreme Court enabling that to be done by a defendant who desires to apply to set aside a writ on the ground that the court has no jurisdiction to entertain the action. The rule adds that the appearance shall become unconditional if no summons to set aside the writ is taken out by the defendant within seven days of entering the conditional appearance. (See r. 518 of the *Regulae Generales* which were in force until 1st January 1953, and r. 6 of O. II of the General Rules of the Court which came into force as from that date.) Within the seven days the defendant took out a summons to set aside the writ, and on the hearing of the application certain orders were made by consent. Only two need be mentioned. One was an order giving the plaintiff leave to amend the second paragraph of the endorsement on the writ of the nature of the claim, in effect by substituting "the said contract" for "a contract" and by substituting "the said bullets" for "certain bullets". This amendment the plaintiff undertook to make, and the result of doing so was to make it clear that the respective claims for a liquidated amount and for damages were alternatives, both being based upon the one contract. The second order

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was an order dismissing the application to set aside the writ. The defendant's consent to this order amounted to an acknowledgment that the course the plaintiff had taken, of identifying the contract under which damages were claimed with that under which the liquidated sum was claimed, had so confined the issues to be litigated in the action that no objection to jurisdiction was maintainable; but, consistently with this, the consent was expressed to be without prejudice to the defendant's right to dispute the jurisdiction of the court " in respect of any cause of action based on any contract other than the contract alleged in the endorsement".

The plaintiff's declaration contained three counts. The first was a money count for £8,800 as the price of 1,600,000 bullets, claimed as having become payable on 30th September 1952, together with storage and insurance charges. The second count alleged a contract obliging the defendant to buy from the plaintiff 1,600,000 bullets and to take delivery of and pay £8,800 for the same not later than 30th September 1952, and a failure and refusal " to take delivery or pay for the said bullets whereby the Plaintiff lost the benefit of the said promise and the profits it would otherwise have earned and incurred storage charges for the said bullets and was otherwise damnified". The third count alleged that there was a certain contract binding between the plaintiff and the defendant relating to the sale of " certain bullets " by the plaintiff to the defendant, that a dispute existed between the parties as to certain terms of that contract, and that, in consideration that the plaintiff would waive the performance of certain matters claimed by it in the dispute and would settle the dispute on certain agreed terms, the defendant promised the plaintiff that it would buy and take delivery from the plaintiff of " the balance of the said bullets ", namely 1,600,000, and pay for the same £8,800 not later than 30th September 1952; and it went on to allege a failure and refusal to take delivery or pay the sum and a repudiation of the promise.

By a letter written on the day of service of the declaration, the plaintiff's solicitors identified the contract sued upon in the second count with that referred to in the writ, as being " the one arising from the correspondence between the respective solicitors and parties subsequent to the initial contract referred to in the third count of the declaration ". The defendant's solicitors then pointed out that unless the first count also related solely to the same contract there would be a " breach of the arrangements made between counsel when we agreed not to proceed with our application to strike out the writ of summons herein for want of jurisdiction "; and the

plaintiff's solicitors in reply agreed that the first count did relate solely to the same contract.

It was thus made abundantly clear, first by the terms of the order made on the application to set aside the writ, and secondly by the terms of the declaration as explained by the letters which passed between the solicitors, that the action was concerned with one alleged contract and one only; and the letters further made it clear that that contract was to be found in correspondence which took place subsequently to an initial contract between the parties. It was common ground that if in that correspondence a contract was made it was made in Sydney, and that for that reason the result of confining the issues in the manner which has been stated was that no contest as to jurisdiction remained. It was not that the parties were following the procedure approved in *Ex parte Walker*; *Re Caldwell's Wines Ltd.* (1), for the application to set aside the writ had not resulted in a genuine contest as to jurisdiction being reserved for determination at the trial. There were Victorian elements in the antecedent dealings of the parties, and it may or may not be true, as the defendant's advisers seem to have supposed, that a cause of action based either wholly or partly upon those dealings would have lacked any sufficient connexion with New South Wales to give jurisdiction to the courts of that State. But that was a question which disappeared from the case once the ambit of the action was defined as it was.

The antecedent dealings consisted of the giving by the defendant to the plaintiff at its Melbourne address of certain written orders for Hungarian bullets, the plaintiff's acceptance of some or all of those orders, and delivery of some of the bullets ordered. Three orders were given, dated respectively 20th April 1951, 14th May 1951 and 2nd August 1951. Each was for 1,000,000 bullets to be delivered from the plaintiff's store (i.e. presumably, Melbourne store) into the defendant's store; and a blank in the form following the printed words "Date of Delivery about" was filled in with the word "Earliest". Presumably this meant at the earliest reasonably possible date: cf. *Schureck* v. *McFarlane* (2). The evidence disclosed that in February 1952 the parties were disagreeing as to the number of bullets still outstanding under these orders. There was even a question between them as to whether the latest of the orders had been cancelled altogether. On 6th February 1952 the plaintiff's Sydney office dispatched to the defendant by rail 1,800,000 bullets. A carrier in the service of the defendant picked

(1) (1931) 31 S.R. (N.S.W.) 494, at p. 504; 48 W.N. 189, at p. 192.

(2) (1923) 41 W.N. (N.S.W.) 3.

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them up at the railway station and took them to the defendant's store, but the defendant after a brief delay took the stand that it had not accepted and was not bound to accept delivery of these bullets and re-consigned them by rail to the plaintiff. The plaintiff declined to concede the defendant's right to send them back, and they lay in the railway stores at Sydney.

It was in this state of affairs that the correspondence took place to which the plaintiff's solicitors referred in their letters explaining the meaning of the declaration. The defendant maintained that the contracts it had entered into had been made with the plaintiff's Melbourne office, that there had been an overriding agreement that notwithstanding the terms of the orders deliveries should be made as and when required by the defendant, and that in any case the consignment sent from Sydney was not in accordance with "the terms of the contract". The plaintiff, in a letter of 18th March 1952 written by its solicitors to the defendant's solicitors, denied the alleged overriding agreement, and (referring to a request which had in fact been made by the defendant to the plaintiff for a delivery of 200,000 bullets) proceeded:—"We understand that your clients have recently applied to ours for delivery of a substantial quantity of the bullets in question, and this request will be complied with immediately provided that it is accepted by your clients as being entirely without prejudice to our clients' claim under their contract." They added that the bullets in the railways store were at the defendant's risk, and made a suggestion that the defendant should take delivery leaving the question of liability for storage charges to be thrashed out later.

On 21st March 1952 the defendant's solicitors replied. First, they reiterated the contention as to the overriding agreement that delivery should wait upon instructions. Next, they said that their client was prepared "without prejudice to its legal rights" to depart from that agreement to the extent that it would "undertake that delivery instructions covering the balance of bullets" would be given so that the final delivery would be made not later than 30th September 1952. Thirdly, they dealt with the request recently made for a delivery of 200,000 bullets, and complained that the request had not yet been complied with. And, finally, they rejected the proposal for the defendant to take delivery of the bullets in the railway store, urged the plaintiff to take delivery of them, and agreed that if they did it should be without prejudice to the determination of liability for the railway storage charges. On 26th March 1952 there was a letter from the plaintiff's solicitors dealing with all these matters, but all that needs to be noticed is that the offer

to give delivery instructions so that final delivery should be made not later than 30th September 1952 was rejected and a counter-offer was made. On 3rd April 1952 the defendant's solicitors rejected the counter-offer and added that their client " is not prepared to vary the proposal for delivery made in our letter to you of 21st ultimo ". This I construe as a renewal of the offer. On 4th June 1952 the plaintiff's solicitors wrote that they had been instructed " to accept your clients' offer contained in the letter of 21st March to the effect that delivery of the balance of this order for bullets will be accepted not later than 30th September next ".

There is no need to go through the further correspondence that passed. It is common ground that although the 200,000 bullets referred to in the letters of 18th March were delivered and paid for, the defendant declined to take delivery of, or to pay for, any more bullets. The 30th September passed without any further delivery instructions having been given.

Several questions of construction arise on the two crucial letters, the plaintiff's solicitors' letter of 21st March 1952 and the defendant's solicitors' letter of 4th June 1952. The first question is, what is meant by " the balance of bullets " in the former letter. The phrase evidently had a fixed meaning for both parties, notwithstanding that differences had existed between them as to the number of bullets which the defendant was bound to take in respect of the orders it had given in April, May and August 1951. On the whole of the correspondence it seems to me reasonably clear that they were treating the conflict between them as being only upon three points: whether the defendant was bound to accept as many as 1,800,000 further bullets; whether the defendant was bound to accept deliveries otherwise than as and when it required them; and who was responsible for the storage charges in respect of the particular 1,800,000 bullets reconsigned by the defendant from Melbourne to Sydney. The letter of 21st March 1952, read in the context of the whole correspondence, seems to me to mean that the defendant, while continuing to maintain its contentions on all points, makes two offers. The first offer is that it will bind itself to give instructions for deliveries so that the balance of bullets (1,800,000 including the 200,000 recently asked for) may be delivered not later than 30th September 1952. This offer seems to me necessarily to imply that it is made on the footing that the defendant's right to nominate dates and quantities for delivery is to be conceded, subject to the qualification offered. Acceptance of it would clearly have the result that the bullets in the railway stores would be treated as not having been duly delivered to the defendant. The second offer

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is that if the plaintiff will take up the bullets in the railway stores, the question of the ultimate liability for storage charges will be unprejudiced by its doing so. The implication, in a letter which contained also the first offer, is that the question as to storage charges, although it depends upon whether the property in the bullets in the railway stores passed to the defendant when the bullets reached the defendant's Melbourne store, is to be determined upon the facts as they existed before the letter was written and not upon the footing of the concession which the first offer requires.

The next question is whether the two letters, on their true construction, bind the defendant to take delivery of and pay for the 1,800,000 bullets not later than 30th September 1952, or merely bind the plaintiff to treat the defendant as satisfying his existing contractual obligations if he gives delivery instructions for that quantity of bullets to be delivered not later than 30th September, accepts delivery of them accordingly, and pays for them upon delivery. The answer, in my opinion, is that the defendant's offer in the letter of 21st March 1952 is to depart from the legal rights it has been asserting, and to accept a new contractual obligation. The plaintiff's solicitors' letter of 4th June 1952 seems to me to exhibit an understanding of the offer in this sense, and to amount to an unqualified acceptance of it. The expression " the balance of this order for bullets " is quite an apt phrase to refer, in the course of commercial dealings, to the particular quantity of bullets which had become the subject of the current negotiations. The acceptance is of " your client's offer contained in the letter of 21st March "; and the words which follow, introduced as they are by the words " to the effect that " appear to be intended, not to introduce any qualification upon the acceptance, but to paraphrase the terms of the offer for no other purpose than to distinguish it from the offer to agree that if the plaintiff takes up the bullets in the railway stores its action will be treated as without prejudice to the question of liability for storage charges.

It was suggested in argument that nevertheless no binding contract resulted from the interchange of these letters, because there was no consideration moving from the plaintiff for the defendant's promise to give instructions for delivery of the full quantity of bullets by 30th September. But, as I have already indicated, the defendant's solicitors' letter of 21st March carries a plain implication that the plaintiff must agree that the defendant has the right to decide at what times and in what quantities the 1,800,000 bullets shall be delivered, subject only to the newly-offered term that it will accept delivery of the whole quantity by 30th September. The

plaintiff could not understand the letter as meaning anything less; and, by accepting the offer, it necessarily gave up its former contention that the defendant was bound to accept and pay for such deliveries as the plaintiff might find itself able to make in accordance with the orders of April, May and August 1951.

The question remains whether the contract made by the letters in the period between 21st March and 4th June 1952 will by itself support the action; for the agreed limitation upon the issues to be decided precludes the plaintiff from recovering either a price under, or damages for breach of, a contract existing before that period and merely varied by the contract constituted by the letters. Before the Full Court of the Supreme Court, and again in this Court, counsel for the plaintiff essayed the task of maintaining as a proposition of law that even if the correspondence disclosed only an intention to vary existing contractual rights and obligations it must nevertheless be held to have discharged the antecedent contracts and put another in their place. Of this the Full Court would have nothing; and indeed the attempt was hopeless, for a long line of authorities has committed the law to an acceptance of the doctrine that an agreement which deals with subsisting rights and obligations of the same parties under an earlier contract may vary that contract without terminating it, and that whether it effects a variation on the one hand or a discharge on the other is a question depending upon the intention of the parties as appearing from the new agreement. As Lord *Hanworth* observed in *Royal Exchange Assurance* v. *Hope* (1), a variation may be in strict logic a new contract, but the discharge of an old contract is a matter of intention.

Failing in this, the plaintiff fell back upon a contention that there was no earlier contract, or at least that no earlier contract was proved, because, if the orders given in 1951 were in fact accepted with the addition of the alleged term that deliveries should be made as and when required by the purchaser, there could not be an enforceable contract with respect to any bullets unless and until the purchaser should require delivery of them. It is a sufficient answer to refer to *Chapman* v. *Larin* (2) cited in *Benjamin* on *Sale*, 8th ed. (1950), p. 817; *Jones* v. *Gibbons* (3) and *Electronic Industries Ltd.* v. *David Jones Ltd.* (4). The contention would have more substance if the contract had been for delivery "if" required. The nearest case in the plaintiff's favour is perhaps *Moon* v. *Camberwell Corporation* (5); but it is plainly distinguishable.

(1) (1928) Ch. 179, at p. 191.
(2) (1879) 4 Can. S.C.R. 349.
(3) (1853) 8 Ex. 920 [155 E.R. 1626].
(4) (1954) 91 C.L.R. 288.
(5) (1903) 89 L.T. 595.

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When the letters of 21st March and 4th June are examined in order to discover the intention of the parties, it becomes clear enough that they were not making a new and substituted contract for the sale and purchase of 1,600,000 bullets, incorporating into it by implied reference the terms of their earlier contracts as to total quantity, description, quality, price, place of delivery, and all other matters except times of delivery and quantities of individual instalments. On the contrary, the intention plainly was to leave the earlier contracts standing, as contracts still unperformed to the extent of the 200,000 bullets recently asked for and a further 1,600,000, but to vary them by placing a limit upon the period within which deliveries must be required and accepted by the purchaser. All that the defendant offered in relation to the agreed balance of bullets was a limited departure from the agreement alleged by him that delivery would be made as and when required by it. For the rest, the alleged agreement as to delivery was to be accepted by the plaintiff as having been made, and was to continue in force. *A fortiori* all the terms of the earlier contracts on topics other than delivery were to continue in force. This may not be what was meant by the words " without prejudice to its legal rights ", though the learned judges of the Supreme Court considered that it was. These words may have meant only that it was the making of the offer that was without prejudice to the defendant's legal rights. But even so, the whole tenor of the letter is inconsistent with the notion that what was being proposed was a new contract for the sale and purchase of the bullets referred to.

Since, then, the letters of March-June 1952 did not bring about a contract of sale, the plaintiff was not entitled to a verdict on the first or second count in the declaration which claim respectively a price under a contract of sale and damages for breach of a contract of sale. (There was another reason also why the plaintiff was not entitled to a verdict on the first count, namely that even if the correspondence had produced a new contract of sale the price was not made payable on a day certain irrespective of delivery, and as the property in the 1,600,000 bullets had not passed to the defendant the price never became payable: *Sale of Goods Act* 1923 (N.S.W.), s. 51; *Benjamin* on *Sale*, 8th ed. (1950), p. 815.) But the third count was in a different position. Although it sought damages for breach of a contract arising from the correspondence alone, it set up that contract, not as a contract of sale, but as a contract superimposed upon an existing contract of sale and binding the defendant as to the date by which it would take delivery of (and pay for) the balance of the bullets comprised in that existing

contract of sale. The allegation that the defendant promised to "buy and take delivery from the Plaintiff of the balance of the said bullets" seems in the context to mean no more than that the defendant promised to do what was required under the earlier contract to enable a delivery to be made thereunder which would pass the property in the bullets to it. It will be noticed that the reference is to one earlier contract only, whereas the evidence at the trial showed that the outstanding bullets may have been comprised in more than one earlier contract. This, however, is a point upon which an amendment, if necessary, could be had for the asking, and I pass it by. It seems to me that the third count alleges exactly the contract which the correspondence proved, and the plaintiff was entitled to a verdict for damages for breach of that contract.

As to the quantum of damages recoverable the case is in an unsatisfactory state. On the view I have stated, the plaintiff was entitled at least to nominal damages. The learned judge, however, did not consider the question of damages. In the circumstances it appears to me that, while the verdict for the defendant which the Full Court of the Supreme Court ordered to be entered should stand in relation to the first and second counts, a verdict should be entered for the plaintiff on the third count and there should be an order for a new trial limited to the issue of damages under that count. Except to this extent, the appeal should be dismissed.

TAYLOR J. On 8th December 1952 the appellant caused to be issued out of the Supreme Court of New South Wales a writ of summons by which it claimed to recover from the respondent a sum of money representing the balance owing on the sale to the latter of a quantity of rifle ammunition and, alternatively, damages in respect of alleged breaches of the contract to purchase those goods. To say the least the case has had a curious history. The appellant, which has its head office in Sydney, carried on business both in New South Wales and Victoria whilst the respondent, apparently, carried on business in the latter State but did not do so in the former. Prior to the issue of the writ the parties had had many business transactions a number of which related to rifle ammunition described as .22 long rifle Hungarian bullets. From time to time written orders for specified quantities of these bullets were given by the respondent to the appellant's representative in Melbourne. In so far as such orders were accepted on behalf of the appellant acceptance took place in Melbourne and it is not suggested that any contracts of sale were, prior to the month of March 1952,

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made elsewhere. Prior to that month orders dated 20th April 1951, 14th May 1951 and 2nd August 1951 respectively had been given by the respondent to the appellant's representative. These orders were, each, for one million bullets. It is not altogether clear upon the evidence whether the goods specified in the last-mentioned order ever became the subject of a contract of sale between the parties and, quite apart from this difficulty, it is not clear from the evidence just how many of the bullets, the subject of the earlier orders, remained undelivered in February and March 1952. In the peculiar circumstances of this case it is, however, unnecessary that these difficulties should be resolved in these proceedings.

Each of the orders referred to above specified as the date of delivery " about Earliest ". Apparently the word " Earliest " had been typed in the space provided on a standardised form adjacent to the words " Date of Delivery about . . . ". But the evidence suggests that as between the parties the practice was adopted of allowing the contractual bullets to remain in the appellant's Melbourne store where they were drawn upon at such times and in such quantities as the respondent should find convenient. The stipulated term as to payment, it should be observed, was " Payment—Nett 7 days or cash on Delivery at Seller's Option ".

The dispute which has led to this litigation arose in February 1952. On 12th February the appellant consigned by rail to the respondent in Melbourne 180 cases each of which contained 10,000 bullets. This consignment, it is claimed by the appellant, constituted that portion of the contractual goods, which at that time, remained undelivered. The consignment was received in Melbourne by a carrier employed by the respondent and the goods were taken into the respondent's warehouse where they remained for some three days. Thereafter, on 18th February 1952, they were reconsigned by the respondent to the appellant in Sydney. A witness, who is said, at the relevant time, to have been in charge of the respondent's merchandise section, says that when the bullets were brought to the respondent's warehouse he telephoned the appellant's Melbourne representative and told him that they had " no intention of taking delivery ". He said that there were " included in the consignment one million that had been cancelled ", that they had not asked for delivery and, in any case, the contracts provided for " delivery into store ". He added " We do not want them. You have included one million that was cancelled and they will be sent back to Sydney". The arrival of the bullets in Sydney provoked from the appellant's solicitors a letter in the following terms: " We have been instructed by Tallerman & Co. Pty. Ltd. of this city to write you with reference

to your written contract for the purchase of a large quantity of Hungarian cartridges delivery of which was made to your carter in Melbourne in accordance with the contract. We understand that these goods were subsequently re-consigned to Sydney to our clients, and at the present time the 180 cases comprising the contract are lying at the Darling Harbour Railway stores. Our clients are not prepared to take these goods back, and we submit that, having taken delivery of them, you have no right to send them back to Sydney. Accordingly, we must notify you that the goods are at your risk and that any expense in connection with consigning them to Sydney is for your account. Our clients require you to accept these goods, and failing a satisfactory solution, they will have no alternative but to take the necessary steps to enforce their rights in the usual way. We shall be glad if you will notify us by return what your intentions are so that our clients may act accordingly."

In answer to this letter the respondent's solicitors on 6th March 1952 wrote as follows: "Your letter of 3rd instant to our client Company has been handed to us with instructions to reply. Our client has not at any time entered into a contract with your client for the purchase of Hungarian cartridges but it entered into a number of contracts with Tallerman & Co. Pty. Ltd. of 325 Flinders Lane Melbourne for the purchase of Hungarian bullets. However, it appears that your client and the Melbourne Company are associated as accounts for the bullets accepted by our client have been rendered from Sydney. At the time of giving the first order for bullets it was agreed between your client's Melbourne representative and our client that irrespective of the provisions for delivery in that order and any subsequent order delivery would in fact be made as and when our client required bullets to fulfil orders received by our client from its customers. That agreement has at all times been carried out and our client insists that it be carried out in respect of the contracts still to be complied with. Our client has in hand a substantial number of bullets from the last delivery made to it in January last. When it requires further bullets it will as heretofore notify the Melbourne office and accept delivery of the number required. We might add that even if the Agreement governing delivery above referred to had not been made it appears to us that delivery of the bullets recently consigned from Sydney was not made to our client in accordance with the terms of the contract."

It is unnecessary, perhaps, to observe that the claims made in the second and third paragraphs of this letter were untenable but the latter paragraph clearly indicates that, at this stage, the respondent objected to any delivery of the contractual goods being made

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except at its convenience and upon its request. On 18th March 1952 the appellant's solicitors replied and this letter should be set out: "We have now received our client's instructions with regard to the various matters mentioned in your letter of the 6th instant which has already been acknowledged by us, and from those instructions it would appear to be quite clear that the allegations in the third paragraph of your letter are not correct and that no such Agreement as is therein alleged was made at any time. Our clients must therefore adhere to what is stated in our letter to your clients of the 3rd inst. We understand that your clients have recently applied to ours for delivery of a substantial quantity of the bullets in question, and this request will be complied with immediately provided that it is accepted by your clients as being entirely without prejudice to our clients' claim under their contract. The goods recently returned to Sydney by your clients are still lying at the Railway store at their risk, and storage charges are accumulating every day, and it appears desirable to save this expense if possible. Our clients therefore suggest that your clients instruct Youngs of Sydney to take the goods into their store from the Railway Department, and that the question of the liability for the railway storage charges be thrashed out between us later. If the position is that your clients find it inconvenient under the existing difficult conditions prevailing to meet the whole cost of the contract goods now, our clients are quite willing to assist in the financing of the payment over a period of three months, but if this assistance is desired, it must be on the condition that your clients will accept liability for the Railway storage charges on the goods returned from Melbourne. This offer by our clients is, of course also made without prejudice to the legal position and solely with a view to assisting towards a settlement and in order to preserve the good business relations which have always existed between the parties. Please let us have an early reply".

The application referred to in the opening words of the second paragraph of this letter was a request which had been made to the appellant's Melbourne representative for a delivery of some 200,000 bullets. This request was subsequently complied with by a delivery made at the beginning of April 1952.

The respondent does not appear to have been interested in the suggestion made in the last paragraph of the last-mentioned letter and on 21st March its solicitors wrote in the following terms: "We are in receipt of your letter of 18th instant and have discussed the contents thereof with our client. Our client has instructed us

to inform you that finance has nothing whatever to do with its attitude and it is somewhat surprised that your client should raise the question. Our client adheres to its previous statement that there was an Agreement with Tallerman & Co. Pty. Ltd. of Melbourne that delivery of the bullets would be made as and when our client required them. The deliveries made to our client appear to support that statement. We informed you in our letter of 6th instant that our client intended to carry out the agreement for delivery but it is prepared without prejudice to its legal rights to depart therefrom to the extent that it will undertake that delivery instructions covering the balance of bullets will be given so that the final delivery will be made not later than 30th September next. Our client recently requested Tallerman & Co. Pty. Ltd. of Melbourne to deliver 200,000 bullets but the request has not yet been complied with our client still requires delivery of that number. Under the contract delivery is to be made into our client's store at 559 Lonsdale Street this city. Our client is not prepared to accede to your client's suggestion that our client should instruct Youngs of Sydney to take the goods into their store. Our client considers that your client should take delivery thereof or arrange the storage and if it does so our client will agree that such action on the part of your client shall be without prejudice to the determination of liability for the Railway Storage Charges."

The suggestion contained in the third paragraph of this letter was rejected by a letter dated 26th March written by the appellant's solicitors: "We received your letter of the 21st instant and submitted same to our clients for their instructions. We understand the matter was dealt with at a board meeting today, and we have been instructed to write you in reply. According to our instructions, there was no such agreement as you refer to in the second paragraph of your letter. With regard to the third paragraph, our clients cannot see their way to agree to the suggested arrangement for delivery, but they are prepared to extend the time for payment over three months as already mentioned, or alternatively they will make an allowance of $2\frac{1}{2}\%$ for prompt payment provided that delivery is taken and responsibility for storage and railway charges accepted by your clients. With regard to the fourth paragraph, instructions are being sent to Melbourne to deliver the 200,000 bullets which have been asked for. Regarding the fifth paragraph of your letter, our clients accept the suggestion that the goods should be taken up from the railway and stored without prejudice to the question of the liability for the railway storage charges as

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mentioned therein. These goods will be stored with Youngs in the name of our clients on account of your clients pending arrangements being made for delivery. Will you please submit these suggestions to your clients and see whether the matter can be adjusted amicably on the above lines."

Two further letters, one dated 3rd April 1952 from the respondent's solicitors, and the other dated 4th June 1952 from the appellant's solicitors, were in evidence. These were as follows: "We are in receipt of your letter of 26th ultimo the contents of which have been considered by our client. Our client will not agree to either suggestion set out in the third paragraph of your said letter and it is not prepared to vary the proposal for delivery made in our letter to you of 21st ultimo. Delivery of 200,000 bullets was recently made to our client pursuant to its request to Tallerman & Co. Pty. Ltd. of Melbourne."

"We refer to your letters of 21st March and 3rd April and have now been instructed to accept your client's offer contained in the letter of 21st March to the effect that delivery of the balance of this order for bullets will be accepted not later than 30th September next. With regard to the 200,000 bullets recently delivered by our client at your client's request, our client would be obliged if you would request your client to let it have payment for the same amounting to £1,100."

It is the appellant's contention that this correspondence evidenced an agreement whereby the respondent undertook that delivery instructions for the 1,600,000 bullets lying in store in Sydney after the beginning of April would be given no later than 30th September 1952 and since no such instructions were given and the respondent refused to accept the bullets in question the appellant commenced proceedings against the respondent by the issue of the writ previously referred to.

As already appears the appellant by its writ sued both in debt and damages and its writ was endorsed for service out of the State of New South Wales and in the State of Victoria. This and other endorsements on the writ appear to have been in the form required to make the writ effective for service under the *Service and Execution of Process Act* 1901-1950. But after service upon the respondent it moved to set aside the service of the writ on the ground that the causes of action sued upon arose in Victoria and that the respondent did not carry on business in New South Wales. This motion may, possibly, be thought to have raised for consideration some of the matters involved in the apparent conflict between cases such as

Ex parte Gove (1) and *Braemar Woollen Mills Co-op. Ltd.* v. *Poinsettia Hosiery Mills Pty. Ltd.* (2) on the one hand and other cases such as *John Sanderson & Co.* v. *Crawford* (3) and *Swan Hill Co-op. Society Ltd.* v. *Richardson* (4) but the appellant's attitude in this proceeding indicated an acceptance of the validity of the decision in *Ex parte Walker*; *Re Caldwell's Wines Ltd.* (5). In other words it was prepared to concede, in the circumstances of the case, that unless it could establish that the contract out of which the causes of action sued upon arose was entered into in New South Wales service of the writ should be set aside. The rule of practice settled by *Ex parte Walker* (5) has prevailed for a long time in New South Wales and, perhaps, it may be said that the validity of that decision is in no way affected by the differences of opinion expressed in the earlier cases referred to.

Consistently with the attitude adopted by it the appellant, however, resisted the respondent's application, maintaining that the arrangement evidenced in the correspondence above set out brought into existence a new contract for the sale by it to the respondent of the balance of 160 boxes of bullets. This contract, it was said, was made in Sydney because the offer which was the basis of the arrangement was accepted by a letter despatched by the appellant from that city. In the peculiar circumstances of the case this last proposition raises difficulties of its own but for reasons which will appear it is unnecessary to consider them.

In asserting that a new contract was made in Sydney the appellant contended that in law, it is impossible by a subsequent agreement, merely, to vary or modify an existing contract. Any agreement which purports to vary an existing contract operates, it is contended, first of all to abrogate entirely the existing contractual relationship and, then, to reinstate the terms of the old contract as varied or modified by the new agreement. In argument the appellant sought to support the statement made by Professor *Williams* in *The Statute of Frauds* (1932), s. 4, p. 178 that " Every variation, it would seem, is in the nature of a substituted contract, which, if it is to operate, must first rescind the prior varied contract ". But the argument advanced in support of this proposition misconstrued observations made by *Denman* C.J. in *Goss* v. *Lord Nugent* (6) and by Baron *Bramwell* in *Sanderson* v. *Graves* (7) in relation to the facts under consideration in those cases. I agree with the view of the Full

(1) (1921) 21 S.R. (N.S.W.) 548; 38 W.N. 189.
(2) (1933) 51 W.N. (N.S.W.) 6.
(3) (1915) V.L.R. 568.
(4) (1930) A.L.R. 156.
(5) (1931) 31 S.R. (N.S.W.) 494; 48 W.N. 189.
(6) (1833) 5 B. & Ad., at pp. 64, 65 [110 E.R., at pp. 715, 716].
(7) (1875) L.R. 10 Ex. 234.

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Court that the appellant's submission on this point should be rejected. It is firmly established by a long line of cases commencing at least as early as *Goss* v. *Lord Nugent* (1) and ending with cases such as *Morris* v. *Baron & Co.* (2) and *British & Beningtons Ltd.* v. *North Western Cachar Tea Co. Ltd.* (3)—and, indeed, including *Goss* v. *Lord Nugent* (1) itself—that the parties to an agreement may vary some of its terms by a subseuqent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement. Variation, of course, may involve partial rescission as is pointed out in *Salmond and Williams* on *Contracts*, 2nd ed. (1945), pp. 488, 489, but " Partial rescission . . . does not completely destroy the contractual relation between the parties. It merely modifies that relation by cutting out part of the rights and obligations involved therein, with or without the substitution of new rights and obligations in their place. Partial rescission is not the extinction of the contract but the variation of it." Hence it is said " A contract may be varied (1) by way of partial rescission without the substitution of new terms in place of those rescinded, or (2) by way of partial rescission with the substitution of new terms for those rescinded, or (3) by the addition of new terms without any partial rescission at all." These passages, in my view, correctly state the accepted view of the manner in which an agreement by way of variation operates.

In applying the proposition advanced by the appellant in the present case it was contended that the arrangement evidenced by the correspondence referred to was contractual in its nature and that, instead of merely modifying or qualifying the existing contractual rights and obligations of the parties, it operated to bring into existence, in the manner indicated, a new contract which redefined their rights. Since the last arrangement is said to have been made in Sydney it is contended that the contract upon which the appellant was entitled to sue was *wholly* made in New South Wales.

Upon the hearing of the respondent's motion to set aside service of the writ the matter took a curious turn. The contention abovementioned was advanced by the appellant and, ultimately, that motion was, with the consent of the respondent, dismissed. But it was dismissed only upon an undertaking, given by the appellant that it would, for the purposes of clarification, amend the endorsement of the particulars of its claim contained on the writ of summons.

(1) (1833) 5 B. & Ad. 58 [110 E.R. 713].
(2) (1918) A.C. 1.
(3) (1923) A.C. 48.

In its amended form the endorsement read as follows: "The Plaintiff claims the sum of Eight thousand eight hundred pounds (£8,800.0.0) in respect of a contract made between the Plaintiff and the Defendant whereby the Plaintiff undertook to supply and the Defendant undertook to accept and pay for inter alia 1,600,000 bullets at the price of £5.10.0 per thousand.

"Alternatively the Plaintiff claims from the Defendant damages for breach of the said contract made between the Plaintiff and the Defendant for delivery to the Defendant by the Plaintiff of the said bullets of which the Defendant has either failed to take delivery or alternatively failed to pay for."

The purpose of the amendment—which does not seem to have been achieved—was to make it clear that in the action the appellant rested his case solely upon a contract made, as suggested in the contention outlined above, in Sydney. Subsequently to the dismissal of the motion the plaintiff declared upon common money counts for money payable for goods bargained and sold and for goods sold and delivered and in the second and third counts of the declaration sued to recover damages for breaches, on the part of the respondent, of a contract to purchase 1,600,000 bullets. In the second count the breach alleged is a refusal to accept delivery, and in the third, repudiation of the contract.

It is difficult to see how the contention of the appellant could advance his case beyond, perhaps, establishing that the contract sued upon was *wholly* made in Sydney. But if the contention is erroneous and the contracts out of which the causes of action arose were the earlier contracts as modified or varied by an agreement made later in Sydney he would have been in a no less advantageous position; on that hypothesis the contracts sued upon did not assume their final form until the subsequent agreement was made and that, it is said, was made in Sydney. Indeed the distinction drawn by the appellant was, for all practical purposes, a matter of words only. Nevertheless, in the circumstances of the case, it assumed a vital importance and gave to the proceedings an air of complete unreality.

Reference has been made to the endorsement on the writ and to the form of the declaration but it is of little importance in this appeal whether their form operated to limit the appellant's claim to causes of action arising out of an agreement alleged to have been made *wholly* in Sydney. The fact is that the parties intended the issues in the action to be so confined and both the action itself and the subsequent appeal were determined on this basis. It should be added that the appellant does not now contend that they should have been decided upon any wider basis.

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Upon the trial of the action, which was tried without a jury, the learned trial judge entered a verdict for the appellant for £8,800. His Honour found that the parties made a new contract in Sydney for the sale of 1,600,000 bullets. The correspondence, he thought, evidenced the " formation of a valid contract " for the sale of those goods. But his Honour omitted to say whether he found that, under this contract, the respondent became liable to pay the price of the goods in question or was responsible for damages for breach of the contract. Reference to the concluding portion of his reasons and to the amount claimed as the price of the goods makes it sufficiently clear, however, that he intended to hold that the appellant was entitled to recover the price and, indeed, there was no evidence upon which that sum could have been awarded as damages. There was evidence from which it might have been inferred that the market value of the goods in question commenced to depreciate in June 1952—and this, no doubt, was responsible for the defendant's failure to carry out the arrangement made a few months earlier—but the evidence neither justified the inference that they had become worthless nor enabled the extent of the depreciation at the time of the alleged breaches to be assessed.

In these circumstances it is clear that the verdict of the learned trial judge was erroneous unless it can be said, upon the evidence, not only that a new contract giving rise to rights enforceable by action was *wholly* made in Sydney in February 1952, but also that the purchase price thereunder became payable by the respondent. Upon the evidence neither of these issues can be resolved in favour of the appellant. Reference to the correspondence which has been set out shows that at the end of February 1952 a dispute arose between the appellant and the respondent. The former claimed, by the letter of 3rd March 1952, that it had delivered goods to the respondent in fulfilment of existing contracts and, inferentially, that it was entitled to be paid the stipulated price. The respondent's answer—omitting matters unworthy of mention—was that the deliveries were premature. It was not bound, it was said, to accept delivery of the goods until after it had, at its convenience, given delivery instructions and, consequently, it insisted that no liability to pay for the goods had then arisen. The substance of the arrangement thereafter made was that delivery instructions covering the whole of the goods would be given by 30th September 1952 and that the appellant would deliver in accordance with such instructions. It may well be that, in view of the express terms as to delivery appearing on the written orders, the respondent was already in

breach and was in no position to insist upon deliveries being made on its instructions from time to time. But we are not concerned with trying an action based on causes of action arising out of the original contracts and it is possible that there are reasons, undisclosed by the evidence in the present case, which would induce a contrary view. Again, if the respondent was already in breach and the price had become payable, there would be sound grounds for saying that the correspondence cannot be regarded as evidencing a mere voluntary postponement of the time for acceptance of the goods or, indeed, an agreement to postpone that time: *Plevins* v. *Downing* (1) but cf. *Hartley* v. *Hymans* (2) and *Charles Rickards Ltd.* v. *Oppenhaim* (3). On the other hand, notwithstanding a breach on the part of the respondent, it was open to the appellant to keep the contracts on foot and insist upon performance of the respondent's obligations thereunder or, by way of accord and satisfaction, to accept the respondent's promise to receive the goods in question and pay for them at some later date. The fact that there is some lack of clarity concerning the respective rights of the parties immediately before the initial letter set out above gives rise to some difficulty in saying precisely what legal effect should be given to the arrangement evidenced by the correspondence. It is plain, however, that it amounted to something more than a mere *voluntary* forbearance by the appellant to insist upon delivery in accordance with the condition contained in the original contracts and it is equally plain, from the terms of the correspondence, that the appellant did not intend to accept the respondent's *promise* to take the goods and pay for them at some future time in discharge of its existing rights under those contracts. But, at the most, from the appellant's point of view, the arrangement constituted, either, a variation of the original contractual provision as to delivery or the first step in an accord and satisfaction. On either view, however, the appellant must fail. If the arrangement constituted a variation of the original contracts the appellant must fail for it did not make out the contract upon which it sued. That is to say, it failed in its undertaking to prove a new contract *wholly* made in Sydney. Again, it failed to prove that the stipulated price became payable by the respondent whether the contract was wholly new or constituted by the original contracts and a subsequent variation in Sydney, for there was no delivery subsequently to the making of the arrangement in Sydney. If there was an entirely new agreement

(1) (1876) L.R. 1 C.P.D. 220.
(2) (1920) 3 K.B. 475.
(3) (1950) 1 K.B. 616.

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that agreement must be taken as having incorporated, as one of its terms, a provision concerning payment of the same character as that contained in the original contracts. That obligation was to pay for the goods " Nett 7 days or cash on Delivery at Seller's Option ". Such a term evidences an intention that the purchaser shall not be bound to pay the price until delivery or within seven days therafter at the seller's option. Such a provision as to payment is wholly fatal to the appellant's claim to recover the price of the goods whether he sued upon a new contract wholly made in Sydney, or, upon the original contract as varied by the subsequent arrangement.

On the other hand if the arrangement made in Sydney should be regarded as the first step in an accord and satisfaction the failure by the respondent to give delivery instructions by the end of September 1952 did not give rise to any new cause of action at the suit of the appellant. As *Dixon* J. (as he then was) said in *McDermott* v. *Black* (1): " An accord executory neither extinguishes the old cause of action nor affords a new one " (2). The history of the development of the defence of accord and satisfaction is referred to in some detail in *British Russian Gazette and Trade Outlook Ltd.* v. *Associated Newspapers Ltd.* (3) and in that case views—which appear to have been unnecessary for the decision—were expressed that an accord executory is no different from any other contract and that the rights of each party thereto may be enforced in the usual manner. *Greer* L.J., with whom *Slesser* L.J. agreed, said: " In my judgment, at the present day, the law of this country is that where two people make mutual promises, the promise of each being the consideration for the promise of the other, this amounts to a contract in law for the non-performance of which an action for damages will lie. I think, however, that it is too late to say that the old rule that an accord without satisfaction does not discharge a liability after breach can be disturbed by a judgment of this Court. I think it is still the law that a mere accord without satisfaction does not put an end to an existing liability after breach, but I think it amounts to an agreement which can be enforced by a claim for damages if it is broken by one of the parties when the other has shown his readiness to perform the terms of the agreement " (4).

At a later stage his Lordship observed: " It will be seen that we have not been referred to any case in which it was necessary to decide that an action will not lie on an agreement which is a mere

(1) (1940) 63 C.L.R. 161.
(2) (1940) 63 C.L.R., at p. 184.
(3) (1933) 2 K.B. 616.
(4) (1933) 2 K.B., at p. 650.

accord, and has not been performed. On the question whether such an agreement can be a binding contract opinions of judges have varied. I therefore feel that we are now entitled to decide the question on principle, and I think at the present stage of the development of the law we ought to decide that an agreement for good consideration, whether it be an agreement to settle an existing claim or any other kind of agreement, is enforceable at law by action if it be an agreement for valuable consideration, and such valuable consideration may consist of the promise of the other party " (1).

There is no doubt upon authority that an agreement which is a mere accord, and which has not been performed, does not extinguish the cause of action with which the agreement deals. This, of course, is because, by the agreement of the parties, discharge is conditional upon performance. (See *Bayley* v. *Homan* (2); *Allies* v. *Probyn* (3); *Gabriel* v. *Dresser* (4); *Gifford* v. *Whittaker* (5) ; *Reeves* v. *Hearne* (6).) The giving of a negotiable security, payable at a future time, on account of a *simple contract debt* stands in a somewhat special position and will operate to suspend the cause of action in the meantime (*Kearslake* v. *Morgan* (7)). But even if the suggestion is open—and, in my opinion, it is not—that an accord is binding upon the parties as a contract and that, to an action brought upon the original cause of action before the time for performance under the new agreement has arrived, the defendant may set up a cross-action for breach of the new agreement, it by no means follows that such an agreement will give rise to a cause of action at the suit of *each* party. In the ordinary case of accord executory the injured party undertakes to discharge the other party from liability pursuant to an existing cause of action *conditionally* upon the future performance of some specified condition. The injured party, in effect, says : " If the specified condition be fulfilled my existing cause of action will be extinguished but if the condition be not fulfilled my existing cause of action will, in no way, be affected." Such an arrangement is quite inconsistent with the notion that the accord itself gives rise to a right to the performance of the condition for by the express agreement of the parties the old cause of action is to subsist until performance and is to be extinguished upon, and only upon performance. In effect the so-called promisor is in the position where he may, at his option, discharge his contractual obligations either by strict performance or, alternatively, by execution of the

(1) (1933) 2 K.B., at p. 654.
(2) (1837) 3 Bing. N.C. 915 [132 E.R. 663].
(3) (1835) 2 C.M. & R. 408 [150 E.R. 176].
(4) (1855) 15 C.B. 622 [139 E.R. 568].
(5) (1844) 6 Q.B. 249 [115 E.R. 967].
(6) (1836) 1 M. & W. 323 [150 E.R. 457].
(7) (1794) 5 T.R. 513 [101 E.R. 289].

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agreement by way of accord. Of course, it is always open to the parties to a contract, of which there has been a breach, to make an agreement expressly giving to the injured party alternative rights of action. That is to say the agreement may preserve to the injured party his original cause of action until performance of some specified condition and, alternatively, give to him a new right of action for breach of the condition. But this is not the general nature of an agreement which is a mere accord; such an agreement does not, in my view, create any new cause of action at the suit of the party who has agreed that his cause of action shall be extinguished upon performance, or, against the party who is given the option of performing the condition as the price of his release.

The result therefore is that the appeal must fail but it would be doing less than justice in the peculiar circumstances of this case if the judgment directed to be entered by the Full Court continued to stand. On the record as it stands at the present it may be that the existing judgment would operate to preclude any further action which the appellant might, otherwise, be advised to bring. The present action was tried on a completely artificial basis and this, no doubt, resulted from the appellant's desire to have its case determined in Sydney. Though, no doubt, the appellant is mainly responsible for the artificial complexion which the case assumed there is no reason why the judgment should stand in the way of substantial justice being done as between the parties. Accordingly I am of opinion that that judgment should be set aside and a judgment of non-suit entered. Otherwise the appeal should be dismissed.

Vary the judgment appealed from by entering a judgment of non-suit in lieu of judgment for the defendant. Otherwise appeal dismissed with costs.

Solicitors for the appellant, *Walter, Linton & Bennett.*

Solicitors for the respondent, *Fisher & Macansh* with *J. T. Ralston & Son.*

J. B.