[HIGH COURT OF AUSTRALIA.]

GELLING . . . . . APPELLANT;
PLAINTIFF,

AND

CRESPIN AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 27, 28, 29; *Sept.* 6.

Barton, Isaacs and Rich JJ.

Contract—Formation—Written memorandum—Evidence of omitted term—Construction—Sale of f.a.q. wheat—Wheat grown in particular State—Performance—Impossibility—Acquisition of wheat by State—Wheat Acquisition Act 1914 (*N.S.W.*) (*No.* 27 *of* 1914), *secs.* 3, 7, 8.

Where a document is prepared and executed with the intention that it shall be the record of a contract, prior negotiations are inadmissible for the purpose of qualifying the contract expressed in the document.

Therefore, where a contract was evidenced by the bought and sold notes prepared by the broker who brought about the sale, which note described merely the quantity and quality of certain wheat together with the season of its growth,

Held, that evidence was not admissible to show that the sale was of a specific parcel of wheat.

By a contract made in August 1914 between the plaintiff and the defendants, who were grain merchants, the defendants agreed to sell and the plaintiff to buy at a certain price per bushel "15,000 bags wheat f.a.q. of season 1914-15 of State where delivery is made." Delivery was to be made on trucks at Adelaide, Melbourne or Sydney, "at seller's option," and 5,000 bags were to be delivered in each of the first three months of 1915. The defendants elected to deliver at Sydney. On 24th December 1914 the Government of New South Wales, pursuant to the *Wheat Acquisition Act* 1914 (N.S.W.), which had come into operation on 11th December 1914, acquired all wheat in New South Wales

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excluding wheat then actually in transit to other States of the Commonwealth, and thereafter the authority controlling the wheat so acquired would not sell to grain merchants.

Held, that on the defendants' election to deliver at Sydney they were bound to deliver wheat grown in New South Wales in the season 1914-1915 which was of fair average quality of that season according to the standard in New South Wales for that season.

Held, also, that in the absence of evidence that it was impossible for the defendants to obtain wheat of the specified kind then in, or in course of transit to, other States sufficient in quantity to satisfy the contract, the defendants were not excused from performing the contract, even if the acquisition by the Government would have afforded an excuse upon such evidence.

Decision of the Supreme Court of New South Wales: *Gelling* v. *Crespin*, 16 S.R. (N.S.W.), 558, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Christopher James Gelling against Godwin George Crespin and George Henry Claude Crespin, trading as grain merchants under the firm name of G. G. Crespin & Sons, for non-delivery of certain wheat pursuant to a contract of sale and purchase made between the defendants and Gelling & Sons Ltd., a company registered in New South Wales, which had subsequently gone into voluntary liquidation, and the liquidator of which had transferred and assigned the benefit of the contract to the plaintiff. The action was heard before *Ferguson* J., who, with the consent of the parties, discharged the jury and after hearing evidence formally entered judgment for the plaintiff for £3,328 2s. 6d., reserving all questions of law and fact for the Court. The defendants thereupon moved for a rule setting aside the verdict and ordering a nonsuit or entering a verdict for the defendants or reducing the amount of the verdict. The Full Court made an order setting aside the verdict and ordering a verdict to be entered for the defendants: *Gelling* v. *Crespin* (1).

From that decision the plaintiff now appealed to the High Court.

Knox K.C. (with him *Delohery*), for the appellant. Notwithstanding the election of the respondents to deliver in New South Wales the contract does not require the respondents to supply

(1) 16 S.R. (N.S.W.), 558.

wheat grown in New South Wales. The contract requires delivery of wheat of a certain quality (see *Azémar* v. *Casella* (1)), and if it is of that quality it does not matter where it is grown. If the contract requires delivery of wheat grown in New South Wales, the evidence does not establish that it was impossible for the respondents to perform the contract. All that the evidence establishes is that all the wheat in New South Wales on 24th December 1914 not then in transit to other States became the property of the Government. The burden was on the respondents to show that they could not have obtained sufficient New South Wales wheat then in, or in course of transit to, another State to satisfy the contract. Apart from that, the acquisition by the Government did not render the contract impossible so as to excuse the respondents, for under the *Wheat Acquisition Act* 1914 (N.S.W.) the Board appointed under the Act had power to sell wheat which had been acquired (sec. 7), and the fact that they would not sell to grain merchants affords no excuse to the respondents. The position is the same as if the wheat market had been cornered. [He referred to *Wilson & Co. Ltd.* v. *Tennants (Lancashire) Ltd.* (2) ; *Bolckow, Vaughan & Co. Ltd.* v. *Compania Minera de Sierra Minera* (3).] Even if the respondents established that it was impossible for them to perform the contract they are not excused, because the contract was not for the sale of specific goods (*Brown* v. *Royal Insurance Co.* (4) ; *In re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration* (5)).

[ISAACS J. referred to *Horlock* v. *Beal* (6) ; *E. Hulton & Co. Ltd.* v. *Chadwick & Taylor Ltd.* (7).]

Impossibility is also not an excuse, because it arose from an act of a State other than the State where the contract was made—that is, Victoria. In a contract of this kind it cannot be implied as a condition that if all the wheat gets into the hands of persons who will not sell it, the vendors are to be excused. The only condition that will be implied is that if the contract becomes physically impossible, for example, if the whole wheat crop fails, the vendors

(1) L.R. 2 C.P., 431.
(2) (1917) 1 K.B., 208.
(3) 85 L.J.K.B., 1776.
(4) 1 El. & El., 853.
(5) (1915) 3 K.B., 676.
(6) (1916) 1 A.C., 486.
(7) 33 T.L.R., 363.

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are to be excused. Where the performance is rendered impossible by the act of another State not directed to rendering contracts of that kind illegal but having the incidental effect of rendering performance of the contract impossible, the vendor is not excused (*Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (1) ; *Barker* v. *Hodgson* (2) ; *Spence* v. *Chodwick* (3)). [Counsel also referred to *Zinc Corporation Ltd.* v. *Hirsch* (4) ; *Maine* v. *Lyons* (5).]

Leverrier K.C. (with him *Coghlan*), for the respondents. [Counsel was not called on to argue as to the construction of the contract.] It is not necessary that the respondents should show that performance by them of the contract was absolutely impossible. It is commercial impossibility which the respondents must show (*Horlock* v. *Beal* (6)), and it was sufficient to prove generally that they were prevented from delivering by the action of the Government. It was in the contemplation of the parties that the wheat should be procured in New South Wales ; that is shown by the provision that delivery is to be on trucks at Sydney, which implies that the wheat had come on the trucks from some part of New South Wales. Where the state of things which the parties contemplated at the time the contract was made is entirely altered by some event which they did not contemplate, the contract is discharged (*Krell* v. *Henry* (7)). The state of things contemplated by the parties was completely altered by the acquisition by the Government; it was a cutting off of the New South Wales supply. The burden was upon the appellant to show that the respondents could have got sufficient wheat outside New South Wales to fulfil the contract. On the evidence, the subject matter of this contract was the wheat bought by the respondents from Aitken, and the contract was therefore for specific goods. The broker's note is not the contract but is only a memorandum of it. There was a concluded contract when the broker informed the respondents that Gelling & Sons had accepted their offer, and if one term of it is not set out in the note that term can be supplied by other evidence (*Pitts* v. *Beckett* (8)).

(1) 12 Q.B.D., 589.
(2) 3 M. & S., 267.
(3) 10 Q.B., 517 ; 16 L.J.Q.B., 313.
(4) (1916) 1 K.B., 541.
(5) 15 C.L.R., 671.
(6) (1916) 1 A.C., 486, at p. 499.
(7) (1903) 2 K.B., 740.
(8) 13 M. & W., 743.

[ISAACS J. referred to *Gordon* v. *Macgregor* (1).]

In order that a contract with respect to wheat should be avoided by sec. 8 (2) of the *Wheat Acquisition Act* 1914, it is not necessary that the wheat which is the subject of it should be absolutely limited to wheat which is the subject of another contract which is avoided by sec. 8 (1), but it is sufficient if the parties look to wheat which is the subject of such other contract to fulfil their contract.

[ISAACS J. referred to *New South Wales* v. *The Commonwealth* (2).]

Cur. adv. vult.

Sept. 6.

The following judgments were read :—

BARTON J. At the trial the plaintiff recovered a formal verdict for £3,328 2s. 6d., all questions of law and fact being reserved for the Supreme Court of this State, who set aside the verdict and entered a verdict for the defendants. The present appeal is against that judgment.

The following summary is from the judgment delivered by *Street* J. for the Full Court, which consisted of the learned Chief Justice of the State, and *Street* and *Gordon* JJ. : —" On 30th July 1914 Lindley Walker & Co., a firm of grain brokers carrying on business in this State and in Victoria, negotiated a sale, in Sydney, of 15,000 bags of wheat from a firm named Aitken Brothers to the defendants. The subject matter of the contract, and the price to be paid, were described in the bought and sold notes in the following terms :— '15,000 bags wheat f.a.q. of season 1914-15 of State where delivery is made. Three shillings and ten pence farthing per bushel on trucks, Adelaide, Melbourne, or Sydney, at sellers' option.' The sellers' option as to the place of delivery was to be declared by 1st December 1914, and 5,000 bags were to be delivered in each of the three months of January, February and March 1915. On 17th August 1914 Lindley Walker & Co., again acting as brokers, negotiated, in Victoria, a sale of a similar quantity of wheat from the defendants to Gelling & Sons Ltd. The bought and sold notes were in identical terms, except as to price, with those employed

(1) 8 C.L.R., 316, at p. 322. (2) 20 C.L.R., 54, at pp. 96-97.

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on the purchase by the defendants from Aitken Brothers. On 30th November 1914 Aitken Brothers notified the defendants that they proposed to deliver at Sydney under their contract, and on 2nd December the defendants wrote to Gelling & Sons Ltd., notifying them of a similar election under their contract. Nothing turns upon the circumstance that the latter notice was a day or two late."

The price of the wheat sold by Gelling & Sons Ltd. to the respondents was 4s. $0\frac{1}{4}$d. a bushel.

On 11th December in the same year there came into operation the *Wheat Acquisition Act* 1914, which empowered the Governor to declare by notification published in the *Gazette* that any wheat therein described or referred to was acquired by His Majesty, and enacted that upon such publication the wheat should become the absolute and unencumbered property of His Majesty, and that the rights and interests of every person in the wheat at the date of the publication should be taken to be converted into a claim for compensation. Pursuant to that authority on 24th December 1914 a notification was published acquiring all wheat then in New South Wales other than wheat actually in transit to other States of the Commonwealth. No wheat was delivered either by Aitken Brothers to the defendants, or by the defendants to Gelling & Sons Ltd. Gelling & Sons Ltd. are now in liquidation, and the plaintiff is the assignee of their rights under their contract. The action by the appellant is for non-delivery of the wheat sold to Gelling & Sons Ltd. by the respondents, whereby the purchasers were deprived of the profit which would otherwise have accrued to them.

The first plea was withdrawn during the argument before us. The second plea had already been abandoned. The pleas remaining to be considered are the third and fourth. The third was that the contract was one with respect to wheat which was the subject matter of a certain other contract made in the State of New South Wales prior to the passing of the *Wheat Acquisition Act* for the sale of New South Wales 1914-15 wheat to be delivered in that State, that the last-mentioned contract had not at the date of the passing of the Act or at all been completed by delivery, nor under such last-mentioned contract had any portion of the wheat relating to

such contract been delivered at the said date or at all. I do not think that this plea, which relies on sec. 8 (2) of the *Wheat Acquisition Act*, is sustained. Both the contracts were probably made in Victoria, and therefore escape the provisions of sec. 8. However that may be, I think the respondents have failed, as I shall presently show, to prove the essential allegation in this plea that the contract sued on was in respect of wheat which was the subject matter of a certain other contract as described, by which the respondents mean their purchase from Aitken Brothers.

But the defence on which the respondents mainly rely is stated by their fourth plea, which sets up that the contract was for the delivery of wheat grown in the State of New South Wales (duly declared by the respondents as the State in which delivery would be made under the contract); that after contract and before breach the Governor, acting under the Acquisition Act made the notification already mentioned, which acquired all wheat in the State of New South Wales other than wheat actually in transit on its date to Australian States outside New South Wales; that the wheat the subject matter of the contract, being wheat then in New South Wales and not at the date of the notification actually in transit, was compulsorily acquired under the Act and notification, whereby the defendants were unable to deliver any of the wheat.

It will be seen that the respondents rely for this main part of their defence on two branches: first, that on their electing Sydney as the place of delivery, the contract became one for the delivery of wheat grown in New South Wales, and next, that the compulsory acquisition of the wheat described in the Governor's notification rendered it impossible for them to perform that contract.

As to the first branch I agree with the Full Court in thinking "that the contract must be read as if the wheat stipulated for were f.a.q. wheat, of season 1914-15, of the State of New South Wales," *i.e.*, grown in that State. The reasons given by their Honors of the Supreme Court for their opinion on this point are quite satisfactory to me, and I see no necessity for adding to them. With the opinion of their Honors on the second branch, namely, the

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question of impossibility, I find myself, with great respect, unable to agree.

The attempt of the respondents to show that the wheat sold by them to Gelling & Sons Ltd. was the specific wheat purchased from Aitken Brothers has, I think, failed. It is true that the two contracts were in identical terms, but that mere fact does not confine a description of the subject matter, expressed so as to refer to a certain class of wheat, to any specific parcel of such wheat. It must be established in the first instance, if it is sought to prove that the two were identical, that the grain sold by Aitken Brothers was some specific parcel. Aitken's sale, like that of the respondents, was in general terms, and would be satisfied, as theirs would be, by the delivery of any wheat grown in New South Wales which answered the description of f.a.q. wheat of the season 1914-15. It is fruitless, therefore, to attempt to identify as something specific wheat sold by either Aitken Brothers or the respondents in those general terms. An attempt was made to identify them by means of the letter of the brokers' manager to the respondents of 2nd February 1915, five months after the contract now sued upon. This, if admissible, does not seem to me to carry the case any further. If it is admissible, so also is the telegram sent by the brokers to Gelling & Sons Ltd. on 15th August, which the manager of Gelling & Sons Ltd. admitted that he had seen. That was simply that "Crespin offer five thousand sacks each month January February and March Sydney Melbourne or Adelaide, sellers' option declared December four shillings one farthing per bushel, advise you to accept the offer no prospect of doing better"; the answer to which was as follows: "in reply to your letter of yesterday you may buy Golding's contract hundred cash" (the letter clearly referred to Golding's contract because there was no such letter as to Crespin's offer) "also Crespin's line three States four shillings one farthing per bushel, do better if possible." From these telegrams it is plain that Gelling & Sons Ltd. at the time of their acceptance had no knowledge of the Aitken transaction, and therefore could have no knowledge of any assumed identity of Aitkens' parcel with Crespins'. But in point of law the contract created by the bought and sold notes could

not be varied by the parol evidence tendered by the respondents at the trial. *Pitts* v. *Beckett* (1) was relied on. That went entirely on the question of the broker's authority to sign the contract sued on, and is not at all applicable to the present case. The case of *Gordon* v. *Macgregor* (2) is in favour of the appellant rather than the respondents.

We must take the case, then, as resting on the bought and sold notes of 17th August, and upon these it is impossible to contend with success that the contract sued on was for the sale of specific goods.

The respondents, nevertheless, maintain that they have established the defence that they were excused from their contract by the impossibility of delivery. It is not necessary to inquire whether such a defence is maintainable where the article sold is not specific, for if it were maintainable it has not been proved. As has been stated, the notification of 24th December 1914 relied on contained a proviso which prevented it from operating on all wheat then in the State of New South Wales, because the proviso expressed that the declaration of acquisition should not extend to wheat then actually in transit to States of the Commonwealth other than New South Wales. Moreover, any of the wheat untouched by the proviso could have been sold by the Government after acquisition, had they so chosen, and the fact that they refused to sell could not establish impossibility as a defence, any more than it would have done in the case of any other possessor of wheat not compulsorily acquired, who declined to sell. The respondents admitted that the "cornering" of the market by any private speculator would not have given them a defence. The acquisition by the Government does not appear to me to be of greater avail to them by reason of its having been a compulsory purchase. But even supposing that the Government's retention of its wheat had established any impossibility, that would only have been *pro tanto*, and the contract, for all that appears, could have been satisfied by purchases of wheat then in or in transit to other States. The respondents say that as there was a limitation of the quantity of wheat available caused by

(1) 13 M. & W., 743. (2) 8 C.L.R., 316.

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the notification the onus was shifted to Gelling & Sons Ltd., so that they would have to show that there was sufficient wheat in or in transit to other States to enable the sellers to satisfy their contract. I am by no means of that opinion. Even supposing that the Government's acquisition could be held to establish a partial impossibility, it was still for the respondents to show that their contract was impossible of performance because sufficient other wheat could not be obtained, and this they have not shown. But they would have to show it for the purpose of establishing what they call practical impossibility in relation to a mercantile contract, and the authorities cited do not help them in the absence of evidence to bring this case within them. I think it unnecessary either to canvass the numerous cases cited or to discuss the evidence any further. I think that the plaintiff should hold his verdict and that the appeal should be allowed with costs.

ISAACS J. The first question to be determined is: What is the contract? The respondents say the contract includes a verbal stipulation made, it is said, between the brokers' Melbourne manager, and Wiseman, the respondents' Melbourne manager, in the course of negotiations. This is put in two ways. First, that the bought and sold notes countersigned by the parties are no more than memoranda of the verbal contract, and the verbal stipulation referred to is omitted. Then it is urged that even if the countersigned documents were intended as the reduction of the contract itself to writing, it is open to the defendants to rely on the verbal stipulation referred to. There is no doubt of the materiality of the stipulation in question. It is directed to make the contract between the present parties dependent on a contract between Aitken and the respondents.

But the answers to the respondents' contention are these. The countersigned documents, according to their own internal content and the evidence relating to them, were written and signed for the purpose of reducing the agreement to writing. The bargain is a written agreement. There is not, and, according to the New South Wales procedure in such a case, there could not be, any claim for rectification. The document being the agreed record of the contract,

the authorities are clear that it is conclusive and that prior negotiations are inadmissible for the purpose of qualifying it. Some of the most important authorities are collected in *Gordon* v. *Macgregor* (1). The latest, and for us perhaps the most authoritative on the subject, is *Yorkshire Insurance Co.* v. *Campbell* (2).

The next step is to construe the written contract. The first important passage is the description of the wheat sold, namely "Fifteen thousand (15,000) bags wheat f.a.q. of season 1914-15 of State where delivery is made." The view taken by the Supreme Court as to this is clearly right. It means, when coupled with the declared option, that the wheat was to be wheat grown in New South Wales in the season 1914-15 and to be fair average quality according to the standard for New South Wales of that season. The appellant's contention that any wheat would do, so long as it was equal to fair average quality of that season's New South Wales wheat, is an inadmissible interpretation.

But the respondents went further, and contended that it must be not only wheat grown in New South Wales, but also wheat which the seller was to procure in New South Wales. It was said this was shown by the fact that it was to be placed "on trucks Sydney," the inference being that it was to reach Sydney from the country districts of the State. But certainly it could be procured in Sydney so far as the contract was concerned; and the strict answer is that the contract leaves it open to the sellers to procure the wheat where they please, so long as it complies with the description and they place it where prescribed. This eliminates the New South Wales expropriation as a sufficient justification for failure to deliver, even disregarding the point as to the Board being at liberty to sell.

But then, say the respondents, at least the contract left it open to them to buy the wheat either in New South Wales or elsewhere, and as the opportunities for buying in New South Wales were so extensive proportionately to the opportunities of getting 15,000 bags of New South Wales wheat elsewhere, the deprivation of the opportunity within the State so altered the contemplated situation as to go to the root of the contract and relieve the sellers from

(1) 8 C.L.R., 316, at pp. 322-323. (2) (1917) A.C., 218, at p. 225.

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liability to deliver. There was considerable discussion as to what would constitute an impossibility sufficient to exonerate a party from performance The case of *Horlock* v. *Beale* (1) contains several authoritative passages on this point. See per Lord *Atkinson* at pp. 496 *et seqq*; per Lord *Shaw* at pp. 512-513; and per Lord *Wrenbury* at pp. 525 *et seqq*. The result of what is there said may, I think, be stated in the following formula, which reconciles most if not all the cases of authority: Exoneration of a party charged with a breach of contract all depends, not upon purely external causes preventing the operation of the contract, but upon the construction of the contract itself. The question always is this: Was the obligation which is said to have been broken absolute, or was it conditional upon an event which has failed? If upon its true construction—regard being had to all circumstances which legitimately enter into construction — the contract is found by the appropriate tribunal to include a condition express or implied that the parties must be taken to have regarded as essential to performance by one or both of them, the obligation is not absolute and the non-fulfilment of the condition relieves any party for whose benefit it exists of his obligation of performance.

If the present contract itself on its true construction would be satisfied—as it would be—by delivery of wheat to be wholly procured entirely outside New South Wales so long as it complied with the stated description, it is impossible to imply the suggested condition as one which the parties are to be taken to have regarded as essential to its performance by the sellers. The expectation by the sellers that any particular source or sources would be available to them may have operated as a material inducement to them to enter into the contract; but that is very different from a condition which the Court construing the written contract must assume was assented to by both parties. Another condition suggested was that the wheat should be "commercially procurable" either inside or outside New South Wales. It is unnecessary to pronounce upon this as a condition, because, taking it at its best for the respondents, they

(1) (1916) 1 A.C., 486.

have the onus of establishing its non-fulfilment. And so the whole matter resolves itself into a pure question of fact upon the evidence in this particular case.

It is clear from the evidence that what is termed " a fair quantity " of New South Wales wheat was at the time of the Proclamation in transit beyond the State, and went out up to the beginning of January 1915, that is, for about a week. The evidence says it went out in " small quantities " making up in all " a fair quantity," but that is quite comparative, and when millions of bushels are in question " a fair quantity " may easily far exceed 15,000 bags. The actual quantity and quality of that wheat are left practically undetermined. The return which the Chairman of the Wheat Acquisition Board said he could easily give was not in evidence or accounted for. The answer of Mr. Wiseman referred to in the judgment appealed from, which was as follows : " The action of the Government in acquiring the whole of the wheat in New South Wales prevented us from supplying wheat in New South Wales under the contract," when read with the rest of his evidence, is manifestly confined to the wheat within New South Wales actually taken by the Government. From his answers to the three preceding questions it is plain he based the answer relied on upon his view of the contract, that the wheat he had sold to Gelling was the identical wheat he had bought from Aitken, and for that or some other reason, the wheat he sold was not in course of transit on 24th December. There is little doubt he answered as he did assuming a construction of this contract, and very likely assuming in that connection that he could rely on the prior negotiations. In that view his answer could be read as strictly accurate, but otherwise not. The question and answer following strengthen the impression stated as to his meaning.

In the result, the respondents have failed to adduce evidence to substantiate the " commercial impossibility " of procuring outside New South Wales wheat to satisfy the contract, that is assuming, but certainly without deciding, that that fact if proved would afford a sufficient defence in law.

The appeal should, therefore, be allowed, and the judgment of *Ferguson* J. restored.

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My learned brother *Rich* has authorized me to state that he agrees with this judgment.

[*Note.*—Since delivering this judgment I have seen the case of *Tennants (Lancashire) Ltd.* v. *C. S. Wilson & Co. Ltd.* (1), decided by the House of Lords, to which case I refer on the question of "commercial impossibility."—*I.A.I.*]

Appeal allowed. Judgment appealed from discharged with costs. Judgment entered for plaintiff for £3,328 2*s.* 6*d. with costs. Respondents to pay costs of this appeal.*

Solicitors for the appellant, *Dibbs & Farrell*, Temora, by *F. R. Cowper.*

Solicitors for the respondents, *C. A. Coghlan & Co.*

B. L.

(1) 33 T.L.R., 454; (1917) A.C., 495.