penny difference to the institutions concerned, as the will directs that all the legacies are to be paid free of State and Federal estate duties. The general residue bears all the burden of duty.

H. C. OF A. 1921. DALY v. STATE OF VICTORIA.

STARKE J. I concur in the opinion given by my brother *Higgins*.

Judgment for the defendant with costs.

Solicitors for the plaintiffs, *Emerson & Tietyens*, Albury, by *W. E. Pearcey*.

Solicitor for the defendant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

LENNON . . . . . PLAINTIFF;

AGAINST

SCARLETT & CO. . . . . DEFENDANT.

H. C. OF A. 1921. MELBOURNE, *Oct.* 6, 7, 19. Knox C.J., Higgins and Starke JJ.

Contract—Formation—Offer and acceptance—Telegrams—Request for written contract—Intention of parties—Subsequent negotiations—Sale of maize—Anticipatory breach by purchaser—Measure of damages—Goods Act 1915 (*Vict.*) (*No.* 2663), *sec.* 54.

On 1st June 1920 the plaintiff in Cairns sent to the defendant in Melbourne a telegram offering to sell 500 tons of prime maize at £16 a ton free on board at Cairns for delivery in July or August at seller's option. On the same day the defendant sent in reply a telegram accepting the offer, and adding "Please forward contract." The plaintiff by telegram on the same day acknowledged receipt of the last-mentioned telegram, adding "Confirm sale 500 tons." On 9th June the plaintiff sent to the defendant a contract note containing terms in addition to those stated in the telegrams; and on 19th June the defendant wrote in reply stating that he objected to certain of the added

H. C. OF A. 1921. LENNON v. SCARLETT & CO.

terms, and saying "The contract we purchased from you was a clean contract f.o.b. Cairns for shipment during July or August at seller's option." On 29th June the plaintiff sent a telegram to the defendant in which he said that the contract must have some conditions, and that he agreed to delete certain of the terms objected to. On 2nd July the defendant sent a telegram to the plaintiff in the following terms:—"Cannot accept terms contained your wire twenty-ninth ulto. All negotiations for purchase can now be considered off." On 3rd July the plaintiff sent to the defendant a telegram in the following terms:—"Contract entered into on 2nd June. Does your telegram of 2nd inst. mean that you consider that contract never entered into? I am ready and willing to perform that contract. Are you going to carry out your part of the bargain?" On 5th July the defendant replied by telegram:—"Your wire 3rd received. Consider no contract was entered into." In an action brought by the plaintiff against the defendant for breach of contract,

Held, that a binding contract was concluded between the plaintiff and the defendant by the first two telegrams of 1st June; that the attempt by the plaintiff to add new terms to that contract did not amount to a repudiation by him, and that the defendant had repudiated the contract and was liable in damages.

Held, also, that the measure of damages was the difference between the contract price and the market price on the date on which the contract should have been performed.

SPECIAL CASE.

An action was brought in the High Court by William Lennon, a merchant residing and carrying on business at Cairns in Queensland, against the defendant, a merchant residing and carrying on business at Melbourne in Victoria, under the name of Scarlett & Co., claiming £1,500 for damages for breach of a contract for the sale of maize. The plaintiff alleged in his statement of claim that, by an agreement duly evidenced by writing signed by the defendant made on 1st June 1920, it was agreed that the plaintiff would sell to the defendant and the defendant would purchase from the plaintiff 500 tons of prime maize free on board at Cairns to be shipped in July or August in the year 1920 at the price of £16 per ton; that the plaintiff was ready and willing to perform the agreement, but that before the due date for shipment of the maize the defendant repudiated the agreement and claimed that no such agreement had been entered into.

The parties concurred in stating a case for the opinion of the Court, in which, after setting out the facts already stated, was also

set out (in pars. 4, 5 and 6) the following correspondence between the plaintiff in Cairns and the defendant in Melbourne :—A telegram dated 1st June 1920 from the plaintiff to the defendant : " Offer you five hundred tons prime maize sixteen pounds ton aboard Cairns July or August shipment seller's option." A telegram dated 1st June from the defendant to the plaintiff in reply to the last mentioned telegram :—" Urgent received. Accept five hundred tons prime maize sixteen pounds aboard Cairns July or August. Please forward contract." A telegram from the plaintiff to the defendant dated 1st June :—" Your telegram received. Confirm sale five hundred tons. Offer further five hundred tons same price July September. Reply urgent." A letter from the defendant to the plaintiff dated 2nd June, acknowledging receipt of the plaintiff's telegram of 1st June, setting out the defendant's reply, and asking the plaintiff to offer him any further parcels he had to offer. A letter from the defendant to the plaintiff dated 3rd June :—" Your urgent wire of 2nd inst. to hand reading : 'Your telegram received. Confirm sale 500 tons. Offer you further 500 tons same price July September. Reply urgent,' which only reached us this morning, and we replied :—'Urgent received. Position here easier. Buyers holding off. If you can offer a parcel firm at £15 might lead to business.' We now await your reply. Since the rain in New South Wales, buyers have practically left off operating in Victorian maize altogether, and there is no doubt that if New South Wales gets a further fall during the next fortnight our growers will have to reduce their values by shillings per bushel." A letter from the plaintiff to the defendant dated 9th June, and containing enclosure :—" I enclose herewith contract note covering the sale of 500 tons of prime yellow maize at £16 per ton f.o.b. Cairns. I would ask you to kindly confirm the contract. I offered you a further 500 tons at the same price, but had your advice that you were unable to do any further business at £16, but indicated the possibility of booking at £15 f.o.b. In reply I advised you that £16 was the lowest that we could possibly put maize aboard Cairns." The enclosure was as follows :—" Cairns, 9th June 1920.—Contract Note.—I have this day sold to Messrs. Scarlett & Co. Melbourne, 500 tons of prime yellow Atherton maize at £16 f.o.b.

H. C. OF A. 1921. LENNON v. SCARLETT & CO.

Cairns, packed in second-hand bags and subject to the following condition: Shipment.—During the months of July or September, sellers' option. Subject to freight space being available, strikes, lock-outs or any other cause beyond sellers' control. Sellers' responsibility ceases at port of shipment. Country railway station weighbridge weights supported by weighbridge tickets dated within three months of shipment, final. In the event of no freight space being available during the months specified, sellers have the right to cancel without obligation. Cairns Government inspection supported by certificate of quality, final, or alternatively maize to be passed at Cairns by a representative of buyer who must be approved of by ourselves. In the event of any increase of present rates of railway or shipping charges to put f.o.b. from country railway station, buyers to be responsible. Payment.—Demand draft with documents attached. Insurance.—Buyer's care unless otherwise instructed. Confirmed." A letter from the defendant to the plaintiff dated 19th June:—"Your wire of the 17th inst. to hand reading: 'Offer further 500 tons £15 aboard Cairns August/September delivery. Same conditions last. Reply prompt.' The conditions have altered considerably during the last few weeks, and there is every appearance of maize going still lower. However, we would not consider any further purchase until we receive your reply to our previous letter." A letter from the defendant to the plaintiff dated 19th June:—"Your letter of 9th inst. to hand enclosing contract for 500 tons of prime yellow maize at £16 per ton f.o.b. Cairns, but we herewith return the contract as we cannot accept same under the terms mentioned therein. Our purchase was for shipment during the months of July and August, not July or September; neither can we accept the clauses reading 'Country railway station weighbridge weights supported by weighbridge tickets dated within three months of shipment, final. In the event of no freight space being available during the months specified, sellers have the right to cancel without obligation.' 'In the event of any increase of present rates of railway or shipping charges to put f.o.b. from country railway station, buyers to be responsible.' The contract we purchased from you was a clean contract f.o.b. Cairns for shipment during July or August at sellers' option." A telegram from the

plaintiff to the defendant dated 29th June :—"Your letter nineteenth re contract. Contract must have some conditions. Regret contract contained typographical errors. Weighing should read three weeks not three months before shipment also shipment July August not July September. Willing to delete clause cancel without obligation also clause increasing price if charges increased to put aboard. Price to-day aboard Cairns equal fifteen pounds. Do not anticipate lower value after end month. Sydney bought largely at fifteen and sixteen and still buyers fifteen July September." A letter from the plaintiff to the defendant dated 29th June with enclosure :—"I received your letter returning my contract note and note that you object to certain clauses. I telegraphed you that there were some typographical errors in connection with the contract sent to you. The months mentioned in the contract should have been July and August as telegrams exchanged. Another error was a matter of weighing. Weighbridge tickets should be dated within three weeks not three months as shown. The reason that three weeks are asked in connection with the weight is that this maize has got to be weighed on country weighbridges as there is no weighbridge at Cairns and it is quite possible that the maize may be on the Cairns wharf for a week or so before shipment can be effected. The clause that in the event of no freight space being available sellers have the right to cancel without obligation is practically unnecessary as seller is protected by the second clause reading 'Subject to freight space being available, strikes, lock-outs, or any other causes beyond seller's control.' The concluding clause provides for increase f.o.b. price. In the event of any increase of present rates of railage or shipping charges to put f.o.b. I have also deleted. Although I might mention to you this particular clause is being insisted upon by most of the shippers from Cairns, I am enclosing herewith amended contract and would ask you to kindly confirm same. I also advised you in my telegram yesterday that maize was worth £15 aboard Cairns to-day, and that I do not think this market will decline. There has been a lot of maize sold to Sydney and Melbourne between £15 and £16 aboard, and it will be at least two months before there can be any decline owing to the extensive operations that will take place during this

H. C. OF A. 1921.

LENNON v. SCARLETT & Co.

month when sellers from Cairns commence buying from the garden. The only thing I can see that would affect the market would be if South African maize comes on Australian markets, and my advices from Sydney indicate that there was no possibility of negotiations between South Africa and Australia being successfully concluded." The enclosure was as follows:—"Cairns, 29th June 1920.—Contract Note.—I have this day sold to Messrs. Scarlett & Co., Melbourne, 500 tons of prime yellow Atherton maize at £16 per ton f.o.b. Cairns, packed in second-hand bags and subject to the following conditions:—Shipment.—During the months of July or August, sellers' option. Subject to freight space being available, strikes, lock-outs or any other causes beyond sellers' control. Sellers' responsibility ceases at port of shipment. Country railway station weighbridge weights, supported by weighbridge tickets, dated within three weeks of shipment, final. Cairns Government inspection supported by certificate of quality, final, or alternatively maize to be passed at Cairns by a representative of buyer who must be approved of by ourselves. Payment.—Demand draft with documents attached. Insurance.—Buyers' care unless otherwise instructed. Confirmed." A telegram from the defendant to the plaintiff dated 2nd July:—"Cannot accept terms contained your wire twenty-ninth ulto. All negotiations for purchase can now be considered off." A letter from the defendant to the plaintiff dated 2nd July, acknowledging the receipt of and repeating the plaintiff's telegram of 29th June and setting out the defendant's reply. A telegram from the plaintiff to the defendant dated 3rd July:—"Contract entered into on second June. Does your telegram of second instant mean that you consider that contract never entered into? I am ready and willing to perform that contract. Are you going to carry out your part of the bargain?" A telegram from the defendant to the plaintiff dated 5th July:—"Your wire third inst. received. Consider no contract was entered into." A letter from the defendant to the plaintiff dated 5th July:—"Your wire of the 3rd inst. to hand reading 'Contract entered into on 2nd June. Does your telegram of 2nd inst. mean that you consider that contract never entered into? I am ready and willing to perform that contract. Are you going to carry out your part

of the bargain ? ' To which we replied to-day ' Your wire 3rd received. Consider no contract was entered into,' which we now confirm. The correspondence clearly shows there was no completed contract. Such being the case, we wired you on the 2nd inst. as follows :—' Cannot accept terms contained your wire twenty-ninth ulto. All negotiations for purchase can now be considered off,' which we now confirm and consider the matter is ended and there is no contract between us." A letter from the plaintiff to the defendant dated 5th July :—" I beg to acknowledge the receipt of your telegram reading as follows :—' Cannot accept terms contained your wire twenty-ninth ulto. All negotiations for purchase can now be considered off.' To which I have replied :—' Contract entered into on second June. Does your telegram of second instant mean that contract never entered into ? I am ready and willing to perform that contract. Are you going to carry out your part of the bargain ? ' I await your reply." A telegram from the plaintiff to the defendant dated 6th July :—" Your telegram fifth instant received. I claim my telegram second June your telegram third June constituted contract. Intend holding you responsible. Want definite reply your intentions." A telegram from the defendant to the plaintiff dated 9th July :—" Your wire sixth instant received. Our intentions contained in our telegram of second instant and letter of fifth instant." A telegram from the plaintiff's solicitor to the defendant dated 4th August :—" Behalf William Lennon of Cairns we notify you that he is ready and willing deliver maize terms contract made by telegrams to and from you first and second June. Do you still refuse accept delivery ? If so Lennon intends sell best market and will hold you liable deficiency. Reply." A telegram from the defendant to the plaintiff's solicitor dated 5th August :—" Received telegram. No contract completed. Will not accept delivery."

The questions asked by the special case were as follows :—

(1) Having regard to the matters set forth in pars. 4, 5 and 6 of this case, is the plaintiff entitled to succeed against the defendant for breach of contract as alleged in the statement of claim herein ?

(2) If yes, what date should be regarded as the date of breach of such contract for the purpose of measuring damages ?

H. C. OF A. 1921.

LENNON v. SCARLETT & CO.

The special case now came on for hearing before the Full Court.

Latham (with him *Robert Menzies*), for the plaintiff. A binding contract was entered into by the first two telegrams of 1st June, and the fact that the acceptance of the offer was accompanied by a request to "forward contract" does not prevent the acceptance from concluding the bargain. It was a clean acceptance of a full offer in which the parties, the subject matter, the price, and the place and time of delivery were stated. There were no circumstances prior to the acceptance from which a conclusion can be drawn that the parties were in negotiation only, as in *Hussey* v. *Horne-Payne* (1); and subsequent negotiations or expressions of intention will not alter a contract already made (*Perry* v. *Suffields Ltd.* (2)).

[STARKE J. referred to *Love & Stewart Ltd.* v. *Instone & Co.* (3); *Niesmann* v. *Collingridge* (4).

[HIGGINS J. referred to *Barrier Wharfs Ltd.* v. *W. Scott Fell & Co.* (5).]

Having regard to the daily variations in the price of maize (which the correspondence shows) and to the terms of the offer, it cannot be supposed that the parties were not to be bound until a contract was signed. When the parties have made a contract, the fact that one or other endeavours to introduce, or even insists on introducing, further terms does not prevent the contractual relation from existing (*Bellamy* v. *Debenham* (6); *Heyworth* v. *Knight* (7); *Hussey* v. *Horne-Payne* (8)). Even if the subsequent correspondence is looked at, the defendant on 19th June recognized that a contract had been entered into. Under sec. 54 of the *Goods Act* 1915 (Vict.) the measure of damages is the difference between the contract price and the market price at the time the contract ought to have been performed, and, as the contract was to be performed in July or August and the defendant repudiated the contract on 5th August, the market price should be the average for the rest of that month.

(1) 4 App. Cas., 311.
(2) (1916) 2 Ch., 187.
(3) 33 T.L.R., 475, at p. 477.
(4) 29 C.L.R., 177.
(5) 5 C.L.R., 647.
(6) 45 Ch. D., 481, at p. 486.
(7) 33 L.J. C.P., 298.
(8) 4 App. Cas., at pp. 319 *et seqq.*

A party to a contract by repudiating before the time for performance has arrived cannot procure damages to be assessed at a time more favourable to him than the time for performance would be (*Melachrino* v. *Nickoll & Knight* (1)). [Counsel also referred to *Ripley* v. *M'Clure* (2); *Millett* v. *Van Heek & Co.* (3).]

Cussen (with him *Ian Macfarlan*), for the defendant. There was no binding contract between the parties. The request to forward the contract shows that the telegrams of 1st June were not intended to constitute a contract (*Goodall* v. *Harding* (4); *Vale of Neath Colliery Co.* v. *Furness* (5); *Barrier Wharfs Ltd.* v. *W. Scott Fell & Co.* (6)).

[KNOX C.J. referred to *Filby* v. *Hounsell* (7).]

The subsequent correspondence shows that; for the plaintiff sent a contract note containing further conditions. The defendant when he said that he had made a clean contract meant a contract with usual conditions. If there was a contract constituted by the telegrams of 1st June the plaintiff has not shown that at the date of repudiation he was ready and willing to carry it out. The plaintiff by insisting on the inclusion of terms other than those in the telegrams of 1st June has himself repudiated the contract (*Morris* v. *Baron & Co.* (8); *Summers* v. *The Commonwealth* (9); *Withers* v. *Reynolds* (10); *Cohen & Co.* v. *Ockerby & Co.* (11)). The measure of damages should be with regard to the market price at the date when the plaintiff would have been likely to have delivered the maize, subject to some earlier date being fixed if in the opinion of the assessor the plaintiff should have sold the maize earlier.

Latham, in reply. There was never any repudiation of the contract by the plaintiff (*Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (12)). If there was anything which might have amounted to a repudiation by the plaintiff, the defendant never accepted it

(1) (1920) 1 K.B., 693.
(2) 18 L.J. Ex., 419.
(3) (1920) 3 K.B., 535.
(4) 52 L.T., 126.
(5) 45 L.J. Ch., 276, at p. 279.
(6) 5 C.L.R., at p. 669.
(7) (1896) 2 Ch., 737.
(8) (1918) A.C., 1, at p. 41.
(9) 25 C.L.R., 144; 26 C.L.R., 180.
(10) 2 B. & Ad., 882.
(11) 24 C.L.R., 288, at p. 297.
(12) 9 App. Cas., 434.

H. C. OF A. 1921. LENNON v. SCARLETT & CO.

as such, but insisted that he had not made a contract. [Counsel also referred to *Rhymney Railway Co.* v. *Brecon and Merthyr Tydfil Junction Railway Co.* (1); *Brauer* v. *Shaw* (2).]

[HIGGINS J. referred to *Moroney* v. *Roughan* (3).]

Cur. adv. vult.

Oct. 19.

THE COURT delivered the following written judgment:—

The questions submitted in the special case stated by the parties are:—(1) Having regard to the matters set forth in pars. 4, 5 and 6 of this case, is the plaintiff entitled to succeed against the defendant for breach of contract as alleged in the statement of claim herein? (2) If yes, what date should be regarded as the date of breach of such contract for the purpose of measuring damages? The decision must rest on the correspondence set out in pars. 4, 5 and 6 of the special case.

The telegram of 1st June from the plaintiff to the defendant was in terms an offer of 500 tons of maize at £16 a ton, free on board at Cairns, to be shipped in July or August at seller's option, and the telegram in reply of the same date was in terms an unconditional acceptance of that offer unless the acceptance is to be treated as qualified by the words "Please forward contract." It is said that the effect of these words read in the light of the subsequent correspondence is that the execution of the formal contract was a condition precedent to the existence of a binding agreement between the parties. In determining this question the rule to be applied is that stated by *Jessel* M.R. in *Winn* v. *Bull* (4) in these words:—"It comes therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not

(1) (1900) W.N., 169.
(2) 168 Mass., 198.
(3) 29 V.L.R., 541; 25 A.L.T., 103.
(4) 7 Ch. D., 29, at p. 32.

expressed in detail." In construing the letters relied on the Court ought to construe them in the light of the rest of the correspondence between the parties. On this question of construction it is to be noticed that all the essential terms of the contract are stated in the two first telegrams—parties, price, subject matter, and mode and date of performance. The words "Please forward contract" are not in themselves apt to express a condition. Their natural meaning is "please forward a form of document embodying the terms on which we have agreed." Turning to the subsequent correspondence, we find it is clear that the plaintiff understood them in this sense from his telegram sent later on the same day—"Your telegram received. Confirm sale five hundred tons. Offer further five hundred tons same price July September." And that the defendant understood them in the same sense is equally clear from his letter of 19th June objecting to the insertion in the formal contract of additional terms, and concluding "The contract we purchased from you was a clean contract f.o.b. Cairns for shipment during July or August at sellers' option." Consequently we feel no doubt that a binding contract was concluded between the parties by the telegrams of 1st June.

It was suggested during argument that subsequent negotiations between the parties show that no contract had been concluded on 1st June; but, adopting the language in *Fry on Specific Performance*, 6th ed., p. 266, par. 553, "if the letters of proposal and acceptance in fact contain all the terms agreed on at the time, and were written with the intent of binding the writers, this complete contract could not be affected by subsequent negotiations not resulting in a new contract" (see *Perry* v. *Suffields Ltd.* (1)). It is not suggested that the subsequent negotiations resulted in a new contract.

Another argument was that the plaintiff had insisted on the insertion of new and essential terms in the contract note which he forwarded, and that this conduct should be regarded as inconsistent with a continued intention to observe the contractual obligations, and so disentitled him to recover damages from the defendant (*Morris* v. *Baron & Co.* (2); *Summers* v. *The Commonwealth*

(1) (1916) 2 Ch., 187.

(2) (1918) A.C., 1.

H. C. OF A. 1921.

LENNON v. SCARLETT & Co.

(1)). The argument is, in substance, that the plaintiff repudiated the contract and that the defendant by accepting his repudiation put an end to the contract. There are two answers to this argument, either of which is sufficient. The first is that the attempt by the plaintiff to add new terms is not sufficient in the circumstances of this case to establish an intention on his part to repudiate, and the second is that in any case the defendant did not accept the repudiation, insisting at first on the contract of 1st June, and subsequently denying that any contract had ever been entered into between the parties.

The remaining question is as to the measure of damages. As to this the facts stated in the special case enable us to say no more than that the true measure of damages is the difference between the contract price and the market price on the date on which the contract should have been performed.

We answer the questions submitted as follows :—(1) Yes. (2) The true measure of damage is the difference between the contract price and the market price of the goods on the date on which the contract should have been performed.

Judgment for the plaintiff for an amount in damages to be assessed by the Principal Registrar of the Court and costs of action, to be taxed.

Order accordingly.

Solicitors for the plaintiff, *Murray & McLaughlin*, Cairns, by *A. G. Proudfoot & Turner.*

Solicitors for the defendant, *Leach & Thomson.*

B. L.

(1) 25 C.L.R., 144.