1955

*Jan. 14, 15
*Apr. 26

CANADA EGG PRODUCTS, LIMITED (*Defendant*) ..... APPELLANT;

AND

CANADIAN DOUGHNUT COMPANY LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contract—Breach by repudiation—Whether continuing—Whether issue of writ sufficient notice of acceptance of repudiation, and made within a reasonable time.

By a contract in writing entered into in Feb. 1951, the appellant agreed to sell and the respondent to buy a quantity of powdered egg yolk and egg albumen. It was provided that initial deliveries were to begin July 15 following, and that if the powder was not satisfactory, or not in accord with the specifications, it was to be returnable within 14 days of delivery. On May 7 the appellant notified the respondent that the contract was not valid and that it would not make delivery. Despite the notice, the respondent continued negotiating for delivery until June 1, when because of the appellant's continued refusal to deliver the order, other than a small quantity of albumen, the respondent without notifying the appellant made the purchases elsewhere. On June 25 it brought action for a declaration that a valid contract had been entered into and claimed damages for an anticipatory repudiation thereof.

Held: That the refusal by the appellant on May 7 to perform the contract, which it never retracted, constituted in the circumstances, a continuing refusal. *Ripley* v. *McClure* 4 Ex. R. 344; *Hochster* v. *De la Tour* 2 E. & B. 678, 22 L.J. (Q.B.) 455. The issue of the writ by the respondent was sufficient notice of its acceptance of the appellant's

*PRESENT: Kerwin C.J. and Estey, Locke, Fauteux and Abbott JJ.

continuing repudiation, and even if there was on June 1 another and independent act of repudiation, the acceptance thereof was made within a reasonable time. *Roper* v. *Johnstone* L.R. C.P. 167; *Ripley* v. *McClure, supra.*

Decision of the Court of Appeal for Saskatchewan (1954) 11 W.W.R. (N.S.) 193, affirmed.

APPEAL from a judgment of the Court of Appeal for Saskatchewan (1) dismissing an appeal, from the judgment of Doiron J. who awarded the respondent damages in the sum of $54,843 because of the appellant's repudiation of a contract to deliver certain quantities of powder egg yolk and powdered egg albumen to the respondent.

G. H. Yule, Q.C. and *I. Nitikman, Q.C.* for the appellant.

E. M. Hall, Q.C. and *R. F. Reid* for the respondent.

THE CHIEF JUSTICE:—This is an action brought by the respondent against the appellant for a declaration that a valid contract had been entered into between the parties and for damages for an anticipatory repudiation thereof. In its statement of defence, at the trial and before the Court of Appeal, the appellant set up a number of defences, one of which was that no contract had been entered into between the parties. That defence was abandoned in this Court and, therefore, the record contains much that is now not material.

In February, 1951, the appellant agreed to sell and the respondent agreed to purchase 100,000 pounds of Grade A Spray Powdered Egg Yolk and 10,000 pounds of Powdered Egg Albumen. The transaction took the form of an order on the respondent's standard form, which the appellant accepted. On the face of the form appears the specifications, followed by this clause printed in red ink:—"This order subject to conditions printed on reverse side", and this typed clause:—"It is understood that if the powder is not satisfactory and within the above specifications upon arrival at Trenton, it can be returned to the seller within 14 days for full credit, plus transportation and charges." On the reverse side are the printed conditions, number 6 of which reads as follows:—

All goods furnished will be received subject to inspection, and if found defective, or not in accordance with the specifications, will be returned to the seller at the latter's risk and expense.

(1) (1954) 11 W.W.R. (N.S.) 193.

1955

CANADA EGG PRODUCTS LTD. v. CANADIAN DOUGHNUT CO. LTD.

Kerwin C.J.

One argument on behalf of the appellant which may be immediately disposed of is that the typewritten clause on the face of the order renders the contract too vague to be enforced, or, alternatively, that it renders the contract unenforceable for want of mutuality. There is no substance to the last branch of this submission because, the parties having entered into the contract, they are bound by its proper construction. As to the first branch, emphasis is placed upon the word "satisfactory" and it is said that, even if goods supplied under the contract would have complied with all the specifications and would have been free from defect, the respondent could still have rejected them on the ground that they were unsatisfactory. As against this there is much to be said for the view of Chief Justice Martin that the goods could not be returned by the respondent unless found defective, or unless found to be not in accordance with the specifications. It appears difficult to hold that the typed clause is mere surplusage, as the trial Judge considered, since it may well be that the real reason for inserting it, as indeed he indicated, was that the respondent desired fourteen days to ascertain if the goods were defective or were not in accordance with the specifications. However, whatever its proper construction may be and even if it were to be left to the respondent to decide if goods furnished by the appellant were satisfactory, the parties agreed to the terms and the mere fact that disputes might arise as to their meaning is of no consequence.

The appellant's main submission was that there had been no repudiation of the contract. Even if it be not admitted that both Courts have found against the appellant, there appears to be no doubt that it unequivocally repudiated the contract on May 7, 1951. It is true that at that time the appellant did not treat the repudiation "as a wrongful putting an end to the contract", to quote the words of Chief Justice Cockburn in *Frost* v. *Knight* (1). Adapting the language used earlier by the Chief Justice, the respondent might have treated the repudiation as inoperative and awaited the time when the contract was to be executed and then hold the appellant responsible for the consequence of non-performance; in which case it would have kept the

(1) (1872) L.R. 7 Ex. 111 at 113.

contract alive for the benefit of both; it would remain subject to all its own obligations and liabilities under the contract and would have enabled the appellant not only to complete the contract, if so advised, notwithstanding its previous repudiation of it, but also to take advantage of any supervening circumstance which would justify it in declining to complete it.

However, the matter does not rest here. In a conversation between the representatives of the parties on May 30, 1951, the appellant insisted that there was no contract. Objection was taken by the appellant to any evidence of a further discussion on June 1st on the ground that it was without prejudice. Although I understood Mr. Yule to admit that he had waived that objection by his introduction of evidence, I do not proceed upon any such admission. The important fact is that after June 1st the appellant continued to put forward its claim that there was no contract and that it was not bound to deliver the goods to the respondent, and the result is that the respondent was entitled to treat that continuing repudiation as a breach of the contract. In fact that claim was advanced at the trial and before the Court of Appeal. Shortly after June 1st the respondent's purchasing agent was instructed to buy egg yolk wherever possible. Once it is found that the repudiation was still alive, the respondent was not obliged to say in so many words, orally or in writing, that it treated the repudiation as putting an end to the contract, but it was sufficient to bring this action while the matter remained in that position. *L. Roth & Co. (Ltd.)* v. *Taysen, Townsend, & Co. and Grant and Grahame* (1). In *Heyman* v. *Darwins, Ltd.* (2), Viscount Simon states that the issue of a writ claiming a declaration that an agreement had been terminated by the wrongful repudiation by the defendants which had been accepted by the plaintiffs may sometimes be regarded as amounting to the exercise of the plaintiffs' claim to rescind. In *American National Red Cross* v. *Geddes Brothers* (3), Geddes Brothers had agreed to sell and the Red Cross to purchase a quantity of yarn. The single question for determination was whether an unequivocal and

(1) (1896) 12 T.L.R. 211 at 212. (2) [1942] A.C. 356 at 362.
(3) (1921) 61 Can. S.C.R. 143.

1955

CANADA EGG PRODUCTS LTD. v. CANADIAN DOUGHNUT CO. LTD.

Kerwin C.J.

absolute written renunciation by the former of the contract had been adopted by the Red Cross. At p. 145 Chief Justice Davies says:—

> The question then, it seems to me, in every such case must be whether under the proved facts adoption of one party to a contract of its repudiation by the other party may be inferred from the proved facts, or whether an actual notice of acceptance or adoption must be given by the party receiving notice of the repudiation to the party repudiating.
>
> It seems to me from reading the authorities that such an actual notice of acceptance or adoption is not necessary but that adoption may be reasonably inferred from all the circumstances as proved.

The facts in that case lead the Court to the conclusion that the Red Cross had adopted Geddes Brothers' renunciation; the evidence in the present case requires the same result. Other cases were cited, but an examination of them shows that the judgments depend upon their particular facts.

At one stage of the proceedings it was contended that paragraph 8 of the statement of claim indicated that the respondent was relying only upon the repudiation of May 7. That paragraph reads as follows:—

> 8. On or about the 7th day of May 1951, the said A. E. Leary in his capacity of Manager at Toronto aforesaid of the defendant and on behalf of the defendant, notified the plaintiff that the defendant did not intend to carry out its contract to deliver to the plaintiff the products described in paragraph 3 hereof as agreed.

Paragraph 3 of the defence reads:—

> 3. As to Paragraph 8, the defendant repeats its denial that Leary was Manager for the defendant at Toronto but says that on or about the 7th of May, 1951, and on divers occasions prior thereto the said Leary did notify the plaintiff that the defendant took the position that it had not entered into a contract with the plaintiff for delivery of the products referred to in Paragraph 3 of the statement of claim.

Before the trial the appellant had sought, but was refused, leave to amend this paragraph. In view of the course of the trial, Mr. Yule quite frankly admitted that he could not ask the Court to restrict paragraph 8 to an averment that the repudiation of the appellant ceased on May 7th, but that it should be taken as alleging a continuing repudiation. It was not necessary that the appellant should have pleaded that it had treated that continuing repudiation as a wrongful putting an end to the contract, since it was made quite clear that that was the position it had adopted.

Because of what occurred with reference to the albumen, it is argued that it was impossible for the respondent to contend that it had "accepted" the repudiation. In my opinion, no difficulty arises. The agreement was for 10,000 pounds of albumen "as required to March 31, 1952". While declining to deliver any yolk the appellant, when pressed by the respondent to carry out its contract, agreed to send what albumen it had on hand. Some of this was in the form of crystals which had to be pulverized, and the respondent agreed to pay and did pay an independent company's charge of three cents per pound for this process, in addition to the contract price. The appellant continuing to refuse to carry out any other part of the bargain, the respondent had the right, notwithstanding the arrangement with reference to the albumen, to treat the appellant's repudiation as a breach of all else and bring its action,—which it did, after the delivery of the last of the albumen which the appellant had on hand.

A question was raised as to the amount of damages awarded in connection with the albumen purchased elsewhere by the respondent after March 31, 1952, in order to complete the total of 10,000 pounds. The action was tried in March, 1953, and no point appears to have been made there that there was any substantial difference between the prices of the albumen before and after March 31, 1952, and, in the absence of any relevant material to which our attention was drawn, the $881.61 allowed by the trial Judge under this heading and approved by the Court of Appeal should not be interfered with by this Court.

The appeal should be dismissed with costs.

The judgment of Estey, Fauteux and Abbott JJ. was delivered by:—

ESTEY J.:—The appellant in this Court conceded (except as to a submission of ambiguity to be hereinafter discussed) the contract and there are concurrent findings of fact, fully supported by the evidence, that it denied the validity of the contract and refused performance of its obligations thereunder on May 7, 1951. The essential issues in this appeal are, therefore, (*a*) on June 25, 1951, was it open to the respondent to adopt the appellant's repudiation; and (*b*) if so, did the issue of the writ on that date constitute an adoption.

1955

CANADA EGG PRODUCTS LTD. v. CANADIAN DOUGHNUT CO. LTD.

Estey J.

The parties hereto, on February 9, 1951, entered into a contract under which the appellant agreed to sell and the respondent to purchase 100,000 pounds of Grade A spray powdered egg yolk (hereinafter referred to as egg yolk) to be delivered on July 15, 1951, and July 31, 1951, and 10,000 pounds of powdered egg albumen (hereinafter referred to as egg albumen), delivery to be made as required to March 31, 1952.

About the middle of April the appellant, either because of its inability to purchase sufficient eggs or because it could not purchase eggs at a price that would enable it to make deliveries under the contract, decided it would not carry out its obligations thereunder. This the appellant's representatives in Toronto intimated to those of respondent at some preliminary discussions and finally, on May 7, definitely stated to respondent that a valid contract had not been concluded on February 9, 1951, and, in any event, the appellant would not make the deliveries thereunder as required.

The appellant, prior to the issue of the writ, in its pleadings and both at trial and in the Court of Appeal consistently adhered to its position of May 7. Only in this Court has it admitted the validity of the contract and, in the main, rested its case upon the fact that respondent had not adopted its repudiation.

Appellant's repudiation prior to the time fixed for performance gave respondent the opportunity to adopt that repudiation and thereby rescind the contract, reserving a claim for damages, or to ignore the repudiation, in which event the contract remained in force. *Hochster* v. *De la Tour* (1); *Johnstone* v. *Milling* (2); *Dalrymple* v. *Scott* (3); *Principles of Rescission of Contracts,* Morison, c. 4.

It is, therefore, necessary to determine whether the respondent has adopted appellant's repudiation. After the interview on May 7, appellant's representatives reported that respondent "would like to get together" with the officers of the appellant "and see what kind of a compromise can be worked out." The interview of May 30 was apparently as a consequence of this attitude on the part of the respondent, but at its conclusion the parties continued

(1) (1853) 2 E. & B. 678. (2) (1886) 16 Q.B.D. 460.
(3) (1891) 19 O.A.R. 477.

to maintain the positions as of May 7. In fact, the appellant's representative left that interview on the understanding that he would return, as he did, on June 1.

On June 1 the interview in the morning was without prejudice and no evidence was given with regard to what was then said. In the afternoon the interview was continued, but nothing was said as to whether it was then without prejudice. As it was admittedly an adjourned meeting relative to the same matter, it might well be regarded as being without prejudice. However, both parties adduced evidence as to the result of the afternoon conversation and at least to that extent the protection provided by its being without prejudice would be waived. *Georgia Construction Co.* v. *Pacific Great Eastern Ry. Co.* (1). This evidence makes it clear that at the conclusion of the interview of June 1 the parties were still persisting in the positions they had taken on May 7. While at all times throughout these interviews the respondent consistently took the position that it desired the contract carried out, I do not think, in the circumstances, it can be said that this was done other than as part of the negotiations out of which it was hoped that the appellant might be induced to withdraw its repudiation and deliver the egg yolk and albumen. It ought not to be said that respondent, by so urging a withdrawal, intended to accept or refuse appellant's repudiation.

After the interview of June 1 respondent, at a conference of its officers, concluded that further negotiations with the appellant would be futile and that it would, as in fact it did, go into the market and buy egg yolk and albumen. However, the respondent did not make known to the appellant, expressly or by appropriate conduct, that it did not intend to negotiate further or to go into the market.

The appellant had on hand about 4,000 pounds of egg albumen which, as requested, it delivered to the respondent. These deliveries, apart from that of May 16, were made as a result of the conversation on May 30, upon which occasion the parties, as to the egg yolk and the balance of egg albumen, continued their respective positions as of May 7. In these circumstances such deliveries do not affect the issues involved in this action.

(1) [1929] S.C.R. 630.

1955

CANADA EGG PRODUCTS LTD. v. CANADIAN DOUGHNUT CO. LTD.

Estey J.

No further correspondence or interviews followed after June 1, except such as related to the delivery of the 4,000 pounds of egg albumen, until June 25, when the respondent issued the writ.

The appellant, at all times material hereto, has maintained that there was no binding contract between the parties and, even if there were, it would not perform its obligations thereunder. It has adhered to that position in its pleadings and submissions both at trial and in the Court of Appeal. Apart from its conceding the validity of the contract in this Court, it has not in any way withdrawn from the position it took on May 7. In my view its refusal has continued and is properly described in the language of Baron Parke as "a continuing refusal." In *Ripley* v. *McClure* (1), on March 16, 1847, the plaintiff agreed to sell and the defendant to purchase one-third of a cargo of tea upon its arrival at Belfast. The defendant repudiated its obligations and when it persisted in that attitude throughout "a long correspondence" it was held to constitute "a continuing refusal." The cargo did not arrive at Belfast until September 21 of the same year and action was brought after that date. Baron Parke, referring to the judge's charge to the jury, stated at p. 358:

> He left the questions in writing, whether there was a refusal at any time, and whether that refusal had been subsequently retracted; and the jury having found, as we think they were warranted by the evidence to do, that it had not, there was certainly evidence of a continual refusal down to and inclusive of the time when the defendant was bound to receive, . . .

In *Hochster* v. *De la Tour, supra,* Lord Chief Justice Campbell, in referring to *Ripley* v. *McClure* at p. 693, stated:

> And they held that a refusal by one party before the day when the act is to be done, if unretracted, would be evidence of a continual refusal down to, and inclusive of, the time when the act was to be done.

In *Roper* v. *Johnson* (2), in April, 1872, the plaintiff agreed to purchase and the defendant to sell 3,000 tons of coal in May, June, July and August. Keating J. stated at p. 175:

> There was some controversy as to the facts; but there can be no doubt that the defendant, soon after the contract was entered into, intimated his determination not to perform it; and it seems to be agreed

(1) (1849) 4 Ex. R. 344. (2) (1873) L.R. 8 C.P. 167.

that, at all events, that repudiation of the contract was accepted by the plaintiffs on the 3rd of July, when they brought this action for the non-performance of it.

Even if, as it was contended, there was on June 1 another and independent act of repudiation on the part of the appellant, it would appear that the respondent would, having regard to all the circumstances, have until at least June 25 to make its election whether to adopt appellant's repudiation or not. It is stated the adoption must be made known "with every reasonable dispatch" (*Halsbury's Laws of England,* 2nd Ed., Vol. 7, p. 229) and "with all reasonable dispatch" (*Leake on Contracts,* 8th Ed., p. 675 and *Pollock on Contracts,* 13th Ed., p. 219). These phrases are not equivalent to immediately, or forthwith, but rather would appear to mean what is reasonably required or dictated by the circumstances. The authorities cited by the learned authors would appear to support this construction. When regard is had to the preliminary discussions prior to May 7, the negotiations thereafter and the nature and character of the egg market, the period of twenty-four days, apart from evidence to the contrary, would not be in excess of what would be reasonable in the circumstances. The foregoing authorities, and particularly *Ripley* v. *McClure* and *Roper* v. *Johnson,* would appear to support this view.

Therefore, when the writ in this litigation was issued the appellant's refusal continued and respondent had not adopted appellant's repudiation.

Whether or not the issue of the writ will constitute an adoption must depend upon the circumstances of the particular case. Where the repudiation arises out of a disagreement as to the construction of a contract the issue of a writ to determine the meaning thereof would not constitute an adoption of the act of repudiation. There is no such suggestion in the case at bar. The respondent here asks a declaration that the contract was duly executed, that there was a wrongful repudiation thereof by the appellant, and damages. Upon the authorities it would appear that the issue of such a writ did constitute an acceptance of the appellant's repudiation. In *Hochster* v. *De la Tour, supra,* and *Frost* v. *Knight* (1), there does not appear to have been any adoption apart from the issue of the writ. In *Roper* v.

(1) (1872) L.R. 7 Ex. 111.

1955

CANADA EGG PRODUCTS LTD. v. CANADIAN DOUGHNUT CO. LTD.

Estey J.

Johnson, supra, the contract was made in April and shortly thereafter the defendant intimated that he would not perform it. It was held that this repudiation was adopted by the issue of the writ on July 3. In 1925 Lord Atkinson, speaking for the Privy Council, stated:

> On the other hand, in no way could this repudiation by Mr. Martin be more unequivocably accepted by Mr. Stout, and by him acted upon, than by instituting within forty-eight hours of the telegram reaching him an action claiming to recover damages for breaches of those very contracts so repudiated. *Martin* v. *Stout* (1).

See also *Heyman* v. *Darwins, Ltd.* (2).

It would, therefore, appear that respondent's action is not premature.

The appellant submitted that the contract is too vague to be enforceable. This submission is based upon a typewritten clause in the purchase order and accepted as a term of the contract. It reads:

> It is understood that if the powder is not satisfactory and within the above specifications upon arrival at Trenton, it can be returned to the seller within 14 days for full credit, plus transportation charges.

This provision, it is suggested, gives to the respondent a right which it is free to exercise in a manner arbitrary or otherwise and, therefore, in reality, there is no agreement or, as counsel for respondent expressed it, the contract is unenforceable "for want of mutuality." In support of this submission counsel quoted a statement from *Williston on Contracts,* 1936, Vol. 1, s. 43, p. 124, and *Leake on Contracts,* 7th Ed., p. 3. The latter reads:

> Promissory expressions reserving to the promiser an option as to the performance do not create a contract: as in cases of employment upon the terms of such remuneration as the employer thinks right to give; . . .

In the cases there cited no binding obligation was concluded. The case of *Roberts* v. *Smith* (3), illustrates the type of case the learned author had in mind. There the plaintiff claimed remuneration for work done. In dismissing the action Baron Martin stated at p. 320:

> . . . the plaintiff put himself in this condition—"I will work for you, and I leave the remuneration in your hands." In reason and common sense that is a liability in honour, and not a liability by contract.

(1) [1925] A.C. 359 at 363. (2) [1942] A.C. 356.
(3) (1859) 4 H. & N. 315.

The statement quoted from *Williston* is followed by a sentence:

> Thus an agreement to pay such wages as the employer wishes is invalid, though an agreement to pay such wages as the employer considers "right and proper" is not too uncertain, since performance of such a promise does not leave the promisor free to do as he may choose.

These authorities emphasize that where performance by one of the parties is entirely a matter for his own decision there is no enforceable contract. In the case at bar there is a contract under which the appellant undertook to deliver egg powder which, if not satisfactory to the respondent, as purchaser, might be returned. The meaning of the clause is neither indefinite nor vague, nor is the language thereof different in effect from that which has been recognized and enforced by the courts over a long period of time. In *Truman* v. *Ford Motor Co. of Canada Ltd.* (1), the plaintiff undertook to supply sods and place them in a manner satisfactory to the defendant. When the latter became dissatisfied with the sods it cancelled the contract and the plaintiff brought an action for breach thereof. The jury found that the defendant, in rejecting the sods, had acted honestly but not reasonably. Upon these findings the learned trial judge directed judgment for the plaintiff and this was reversed in the Court of Appeal on the basis that the defendant, having acted honestly, was acting within his contractual rights.

It would appear, under a contract providing for the delivery of powdered egg, which, if not satisfactory, might be returned, the purchaser is within his contractual rights if he honestly rejects the powder. The fact that others might have been satisfied or that he has acted unreasonably is not material. *Stadhard* v. *Lee* (2); *Grafton and Others* v. *The Eastern Counties Ry. Co.* (3); *Diggle* v. *Ogston Motor Co.* (4); *Benjamin on Sale,* 8th Ed., p. 582.

Scammell v. *Ouston* (5), cited by appellant, is an example of a case where the language used is so indefinite, and in relation to which the parties had not adopted a meaning, that it cannot be said the parties had agreed upon the essential terms and, therefore, no *consensus ad idem* and

(1) [1926] 1 D.L.R. 960.
(2) (1863) 3 B. & S. 364.
(3) (1853) 8 Ex. 699.
(4) [1915] 84 L.J.K.B. 2165.
(5) [1941] 1 All E.R. 14.

1955

CANADA EGG PRODUCTS LTD. v. CANADIAN DOUGHNUT CO. LTD.

Estey J.

consequently no contract. See also *Lethbridge Brewing & Malting Co. Ltd.* v. *Webster* (1); *Coldwell & Jennings Ltd.* v. *J. W. Creaghan Co.* (2).

Parties may, subject to exceptions not material hereto, embody in a contract such terms as they may agree upon. In the case at bar, under the terms agreed upon, the parties assumed obligations that were clearly expressed and with respect to which no misunderstanding is suggested. In such a case, as stated by Cockburn C.J.:

> . . . to ascertain and give effect to the intention of the parties as evidenced by the agreement; and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable, yet, if the terms are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not. *Stadhard* v. *Lee, supra,* at p. 372.

The appellant objects to an item of $881.61, being damages allowed by the learned trial judge in respect to two shipments of egg albumen dated respectively October 28 and November 4, 1952. These purchases were, upon the evidence, made as a result of the appellant's failure to deliver egg albumen and there is no evidence to the contrary. The mere fact that it was purchased after the date when the respondent might have required deliveries under a contract is not necessarily inconsistent therewith. It would, therefore, appear that the judgment of the learned trial judge and the Court of Appeal allowing this item should be affirmed.

The appeal should be dismissed with costs.

LOCKE J.:—That there was a binding contract made between the parties by the acceptance of the respondent's written order of February 9, 1951, subject to the variation asked for in the telegram from the appellant of February 13 which the respondent agreed to in the answering telegram of February 14, 1951, is conceded on behalf of the appellant.

It was contended before us that, by reason of the fact that as it was a term of the agreement that if the egg powder was not satisfactory and did not comply with the specifications it might be returned by the seller within 14 days, it was too vague to be enforceable. Whatever be the proper interpretation of the word "satisfactory" in the context, a matter which the Court would have been required

(1) (1919) 49 D.L.R. 250. (2) [1951] 4 D.L.R. 840.

to determine had the need arisen, the acceptance of the respondent's offer obligated the appellant to deliver the material at the price and at the times specified. There is neither vagueness nor uncertainty in the terms in which that obligation was expressed. The decision of the House of Lords in *Scammell* v. *Ouston* (1), relied upon by the appellant, turned upon the fact that, in the opinion of the House, there was no completed contract. Here it is conceded that there was.

The objection that the action was premature raises a question of more difficulty. It is clear from the evidence of the witness Livingston that on May 2, 1951, Leary, the appellant's salesman who had negotiated the sale, informed the respondent that the appellant was not going to deliver the goods sold, saying that it contended that there was no enforcible contract and that this statement was repeated at a meeting between the representatives of the parties in Toronto on May 7. The respondent did not then elect to rescind the contract or, as it might be more accurately expressed, elect to treat this as a repudiation of the contract and treat it as at an end but, maintaining its stand that there was an enforcible contract, endeavoured to induce the appellant to carry out its obligations.

On May 7, and again on May 23, 1951, the solicitors for the respondent wrote to the appellant at Saskatoon asking if they intended to carry out the contract, but these communications were not answered. On a date which appears to have been May 30, Bernard Halstead, then the sales manager of the appellant, met the representatives of the respondent in Toronto, at which time it was arranged that the appellant would deliver some 4,000 pounds of albumen which it then had in Eastern Canada on account of its obligations under the contract, to be paid for at the agreed price. As to the balance of the material to be delivered, however, Halstead said that they had no egg yolk available and that the plant was not in operation. The parties met again on the morning of June 1st but the discussions that morning were without prejudice. Later that day, however, Halstead had a further discussion with D. H. Beskind and

(1) [1941] A.C. 251.

1955

CANADA EGG PRODUCTS LTD. v. CANADIAN DOUGHNUT CO. LTD.

Locke J.

one Goldhill, an American lawyer representing the respondent, at which time Halstead informed them that the appellant could not and would not make delivery of the goods.

While the discussion during the morning had been expressly stipulated to be without prejudice, nothing apparently was said as to this regarding the meeting in the afternoon and the evidence of Beskind as to Halstead's final refusal was given without objection. Halstead also was called as a witness for the appellant and gave evidence as to the afternoon meeting. It is thus clear that neither party regarded the discussion during the afternoon as being privileged from disclosure. If it were to be regarded as merely a continuation of the meeting in the morning and thus protected by the stipulation then made, it is clear that both parties waived the privilege. It was shown by the evidence of the witness Livingston that Halstead's statement then made, that the appellant refused to complete, was accepted as final by the respondent. Following the meeting, a conference was held by Beskind with Goldhill and the Toronto solicitor for the company, following which Beskind instructed Livingston to go into the market and buy egg powder for the company's requirements.

There is no evidence to suggest that the election of the respondent to treat the contract as at an end was communicated to the appellant otherwise than by the delivery of the Statement of Claim in the action. In that pleading the respondent alleged that the appellant had on May 7, 1951, declared its intention not to carry out the contract, and the prayer for relief which claimed, *inter alia,* a declaration that there was a valid contract asked a further declaration that the appellant had wrongfully repudiated and wrongfully refused to carry it out.

It is, of course, true that no legal consequences result from a simple declaration by a party to a contract that it does not intend to carry out his part of it. When, however, such a declaration is made, the other contracting party may either insist on holding his co-contractor to the bargain or elect to treat the contract as at an end and claim damages for its breach, even though the time for performance has not arrived.

Where the promisee elects to treat the contract as at an end or, as it is sometimes described, to rescind the contract, his election is not complete until it is communicated to the other party, and this must be done within a reasonable time. In the present matter, as shown by the evidence to which I have referred, it was on or shortly after June 1, 1951, that the respondent, acting apparently on legal advice, elected to treat the contract as at an end and went in the market to obtain the goods which the appellant had contracted to deliver. It was on June 25, 1951, that the action was commenced.

Where one party to a contract declares his intention to repudiate his obligations under it, the other party, if he insists upon performance, cannot until after the time fixed for performance bring an action to recover damages for its breach. The contract is then kept alive for the benefit of both parties. Thus, the respondent in the present matter cannot rely, in my opinion, upon what occurred on May 7, 1951, to support an action brought before the time fixed for performance. Where, however, as in the present case, the respondent after the refusal of May 7 continued its efforts to induce the appellant to alter its position and discharge its obligations, it is entitled, in my opinion, to rely upon the final refusal of June 1st and its own election to then treat the contract as at an end to support the action brought before the time fixed for performance.

While an election to treat a contract as at an end is not complete until notice of such election is given to the other party and until such notification the latter is entitled to treat the contract as subsisting and insist upon carrying out its terms, no particular manner of communicating such election is required. In *Syers* v. *Syers* (1), the notice required to terminate a partnership at will was held sufficiently given by the answer filed in the action. In *Roper* v. *Johnson* (2), the election of the plaintiff to accept the repudiation of the obligations under a contract made on June 11 was, in the language of Keating J. (p. 175), "accepted" by the plaintiffs on July 3, when they brought the action for the non-performance of it. There was, apparently, no other notice of the plaintiffs' election to treat the contract as at an end.

(1) (1876) 1 App. Cas. 174. (2) (1873) L.R. 8 C.P. 167.

1955

CANADA EGG PRODUCTS LTD. v. CANADIAN DOUGHNUT CO. LTD.

Locke J.

In the present matter I consider that the service of the Statement of Claim was a sufficient notice of the election of the respondent to treat the contract as at an end and that it was given within a reasonable time, in the circumstances. In my opinion, the action was not prematurely brought.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *G. H. Yule.*

Solicitors for the respondent: *Hall, Maguire & Wedge.*