1944 *Present:* **Howard C.J. and Wijeyewardene J.**

AMARASURIYA, Appellant, *and* DON ELARIS, Respondent.

14—D. C. Colombo, 13,454.

Contract—Sale of chests for immediate delivery—Agreement for postponement of delivery—No variation of contract—Measure of damages.

The plaintiff bought of the defendant five thousand chests on contract notes dated June 11, 1941, and June 30, 1941, delivery of the chests to be immediate.

On plaintiff's request for delivery within the period of the contract, the defendant asked for an extension of the time of delivery and the plaintiff agreed to a postponement of delivery till September, 1941.

Held (in an action by plaintiff for damages for breach of contract), that the original contract was unaltered and that the new arrangement with regard to delivery had reference only to the mode of performing it.

Held, further, that the plaintiff was entitled to damages assessed on the basis of the difference between the contract price and the market price in September, 1941.

APPEAL from a judgment of the District Judge of Colombo.

C. Thiagalingam (with him *E. F. N. Gratiaen*), for the defendant, appellant.

H. V. Perera, K. C. (with him *N. M. de Silva* and *R. N. Ilangakoon*), for the plaintiff, respondent.

Cur. adv. vult.

October 13, 1944. HOWARD C.J.—

The defendant in this case appeals from the judgment of the Additional District Judge, Colombo, ordering him to pay the plaintiff the sum of

Rs. 6,149.50 and costs and dismissing his claim in reconvention. The plaintiff brought his action on two contracts dated June 11, 1941, and June 30, 1941. These contracts were contained in two notes " P 1 " and " P 2 ", signed by the defendant, and are as follows:—

" P 1.

Don Elaris & Son.

24, Alston Place,
Cinnamon Gardens,
Colombo, 11th June, 1941.

B. Amarasuriya & Co.,
Foster Lane,
Maradana.

Dear Sirs,

With reference to the writer's telephone conversation with your Mr. B. Amarasuriya this afternoon, we confirm the sale of 5,000 No. 1 Full Chests @ Rs. 2/25 each. (Five thousand) Immediate delivery.

Please confirm.

Yours faithfully,
DON ELARIS & SON,
Sgd. (Illegible).''

" P 2.

Don Elaris & Son.

24, Alston Place,
Cinnamon Gardens,
Colombo, 30th June, 1941.

Messrs. B. Amarasuriya & Co.,
Foster Lane,
Colombo.

Dear Sirs,

With reference to your Mr. B. Amarasuriya's telephone conversation with the writer, we confirm the sale of 5,000 (Five thousand) New Momi Full Chests in shooks, No. 1 Qty @ Rs. 2/25 each immediate delivery.

Yours faithfully,
DON ELARIS & SON,
Sgd. (Illegible).''

The defendant delivered 2,250 of the 10,000 new Momi Chests to be supplied under the two contracts, and the plaintiff has brought this action claiming damages for the failure of the defendant to deliver the remaining 7,750 chests. In finding in favour of the plaintiff the learned Judge has held that the defendant in breach of contract failed to deliver 7,750 chests and, so far as damages are concerned, the plaintiff is entitled to claim the difference between the contract price of the chests, price Rs. 2.25, and the market price in September Rs. 3.75. Giving the defendant credit in Rs. 5,762.50 the value of the 2,250 chests delivered, and Rs. 413, value of goods supplied, he finds that there is a sum of Rs. 6,149.50 due to the plaintiff. The defendant in reconvention claimed the sum of Rs. 5,475.50 the value of the 2,250 chests, supplied under the contract.

The facts with regard to the delivery of the chests under the contracts are as follows: On June 11, 1941, the day of the first contract, the plaintiff wrote P 3 asking the defendant to deliver the 5,000 chests. According to the plaintiff no chests were sent to him on that delivery order. The receipt of this delivery order was admitted by the defendant's Counsel. A further delivery order " P 4 " was sent to the defendant on July 7, 1941. The plaintiff is unable to say whether he was supplied with any chests on " P 4 ". In fact no witness is in a position to say on which day the 2,250 chests were delivered. On August 15, 1941, the plaintiff wrote " P 5 " to the defendant. In this letter he referred to the two contracts and stated that only 2,000 chests had so far been delivered and although the plaintiff's lorry had on several occasions called for the balance, the defendant had failed to deliver a single chest. The plaintiff also warned the defendant that, unless arrangements were made for the delivery of the balance, he would be compelled to buy them elsewhere. The defendant replied to this letter by " P 6 " dated August 19, 1941, in which he stated that the plaintiff was having 20,000 chests landed by *ss.* Hakono Maru. Also that the defendant expected 50,000 chests on orders, but could not say when they would arrive. Also that the defendant could have delivered another 4,000 chests if the plaintiff had sent for them prior to July 15. The defendant further said that he would supply the plaintiff if he received the expected shipment by the *ss.* Hakodato Maru. The plaintiff replied to " P 6 " by " P 7 " dated August 21, 1941. In this letter the plaintiff pointed out that the defendant sold for immediate delivery of 10,000 chests and that the expected arrival of other chests had nothing to do with this purchase. The plaintiff also said that in view of present conditions he was prepared to wait until September 5 for the delivery of the balance of 8,000 chests. After this date the plaintiff would purchase them elsewhere on the defendant's account and at his risk. On August 21, 1941, the plaintiff sent the defendant a further delivery order for 250 chests, " P 9 ", and on August 27 one for 1,000 chests, " P 10 ". Delivery of 250 chests was made on " P 9 ". With regard to " P 10 " the defendant replied by " P 11 " of the same date stating that he had not a single chest in stock and that he was entirely dependent on the arrival of the shipment by *ss.* Hakodato Maru. On September 16, 1941, the plaintiff's Proctor by " P 14 " claimed damages from the defendant by reason of his failure to deliver 7,750 chests. By " P 15 " of September 18, 1941, the defendant pleaded for further time for delivery of the chests. By " P 16 " of September 23, 1941, the defendant's Proctor wrote to the plaintiff's Proctor alleging that the position which had arisen was partly caused by the plaintiff's failure to take delivery in July and August when deliveries were not according to the plaintiff's requirements. In this letter the defendant's Proctor contended that the defendant was in a position to make immediate delivery after the making of the contracts. It was also urged that further chests on order from Japan had not materialized for reasons over which the defendant had no control. In these circumstances it was contended that the defendant was relieved from any obligation to deliver the balance. The letter also contained a plea for further time to supply the balance. On October 2, 1941, the

plaintiff by " P 17 " wrote to the defendant repudiating the allegation made by the latter's Proctor in " P 16 " and offering to give the defendant further time to deliver the balance on condition that " P 16 " was withdrawn and the defendant agreed to pay Rs. 8,087 in the event of a failure to deliver the balance of the chests by the end of October. By " P 20 " of October 17, 1941, the defendant's Proctor informed the plaintiff's Proctor that the defendant could not agree to the proposal contained in " P 17 ".

Before the District Judge, and in this appeal, Counsel for the defendant maintained the position that had been put forward by the defendant's Proctor in " P 16 ". This position may be summarized as follows:—

(*a*) The contract was not for sales of " specified " or ascertained articles.

(*b*) The defendant had at the time of the contract enough stocks from which the plaintiff could have taken delivery within contract time.

(*c*) There was no obligation on the part of the defendant to keep stocks after the expiry of the contract time. No request was made to the defendant to extend the time allowed to the plaintiff to take delivery.

(*d*) " Immediate " delivery means delivery within a week or ten days. In exceptional cases and by arrangement an extension of one week may be allowed.

(*e*) Even if the defendant did not have the chests available for delivery, damages claimed by the plaintiff should be ascertained on the basis of difference between contract rates and market value at the dates of expiry of contract times.

(*f*) If the contracts were regarded as subsisting after July 27, there has been frustration of the contracts by reason of the " freezing orders ".

The learned District Judge has found that the plaintiff did not postpone taking delivery and hence the contract was not extinguished by any delay on his part in taking delivery. In my opinion that finding cannot be challenged. The two contracts were made respectively on June 11 and 30. Between these two dates no deliveries were made. Neither during this period nor at any time did the defendant require the plaintiff to take delivery nor ask him why he did not take delivery. On the other hand on August 15, 1941, by " P 5 " the plaintiff complained about the number of chests so far delivered in the following terms:—

> " We have to refer you to your letters dated 11th and 30th June, 1941, regarding 10,000 Momi Full Chests No. 1 quality sold to us for immediate delivery. Of this amount we have taken delivery of 2,000 chests only. Although our lorry has called for the balance on several occasions you have failed to deliver to us a single chest. Unless you make arrangements to give us delivery of the balance 8,000 chests within a week on receipt of this letter, we shall be reluctantly compelled to buy them elsewhere on your account.

We may mention that these chests were sold to us for immediate delivery and therefore should have been available to us when our lorry called for them and also could not have been disposed of without reference to us.

The delay in delivering these chests has placed us in an awkward position with our customers whose orders we had accepted against our purchase from you.''

The reply, '' P 6 '', to this letter is instructive. It suggests that delivery could have been made of another few thousand chests prior to about July 15, if the plaintiff had sent for them. There is not a suggestion that the defendant had called on the plaintiff to take delivery and the latter had refused to do so or asked that delivery should be postponed. Moreover at the end of the letter there is a reference to difficulties over the Japanese shipments and a request for forbearance by the plaintiff for any irregularity on the part of the defendant. It was not until the defendant's Proctor wrote '' P 16 '' of September 23, 1941, that any suggestion was made of the plaintiff's responsibility for the delay in taking delivery. The fact that this letter was written is all the more remarkable inasmuch as on September 18, 1941, the defendant had written '' P 15 '' asking for time until the end of October to deliver the balance. No suggestion was made in this letter that the plaintiff was in any way responsible for the delay in taking delivery. The defendant does not admit the receipt of '' P 7 '', the plaintiff's reply to ''P 6 ''. This letter was duly registered and must have been received by the defendant. In it the plaintiff asks why his lorry was sent back on July 7 without the 5,000 chests called for by his order of June 11, 1941. The plaintiff also stated he was prepared to give the defendant time until September 5, 1941, for the delivery of the 8,000 chests. In the light of the facts relating to the delivery of the chests it is now relevant to consider the position which has been taken up by the defendant. His Counsel has contended that whether the plaintiff failed to take delivery or the defendant to make delivery the contract must be regarded as cancelled at some date in July and damages assessed as if cancellation took place at such date. Section 50 of the Sale of Goods Ordinance is as follows:—

'' 50. (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.''

Mr. Thiagalingam maintains that the words '' immediate delivery '' in the contract introduce a mercantile custom that the goods must be delivered within a week or 10 days of the contract. Hence, delivery should have

been made in the case of the first contract by about June 18 and in the case of the second contract by July 7. Delivery not having been so made the breach of the contract took place on those days and having regard to section 50 (3) of the Ordinance the damages must be ascertained by reference to the market or current prices on those days. It may be said at this stage that the prices had risen very considerably in September. I do not think that the defendant has proved the existence of any mercantile custom by which "immediate delivery" meant delivery within 7 or 10 days. In support of this contention he called Mr. England of the Commercial Company who stated that, as far as his Company was concerned, 5,000 chests would generally be delivered within a week. But he also stated that to a certain extent the period of delivery would depend on the number of lorries available and the buyer's requirements. If keeping a buyer's chests did not inconvenience the Company and they wanted to oblige the client, they would keep the chests for two weeks but not beyond that.

Even if it is assumed that strict compliance with the terms of the contract necessitated the use of the term "immediate delivery" being translated into an obligation to deliver within a week or ten days, it is necessary to consider what was the effect of the conduct of the parties to this contract on this obligation. No demand was made by the defendant that the plaintiff should take delivery nor until August 15, 1941, did the plaintiff call the defendant to account for non-delivery of the balance. In this connection section 12 (1) of the Ordinance is worded as follows:—

> "Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive any condition, or may elect to treat the breach of such condition as a breach of warranty and not as a ground for treating the contract as repudiated."

If the defendant was under an obligation to deliver in July, the plaintiff in my opinion waived that obligation and did not treat the contract as repudiated until his Proctor wrote "P 14" of September 16, 1941. It is, however, contended by Mr. Thiagalingam that this waiver amounted to a variation of the written contracts of June 11 and 30, and such variation could only be evidenced by a written agreement. In this connection he refers to section 5 (1) of the Ordinance which is worded as follows:—

> "A contract for the sale of any goods shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receives the same, or pay the price or a part thereof, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

In support of this contention the case of *Harrisons & Crosfield, Ltd. v. Adamally & Co.*[1] was cited. In this case it was held that where there is default in delivery of the goods within the contract period and no subsequent requests on the part of the vendor to extend the time for delivery, the measure of damages is the difference between the contract

[1] *5 C. W. R. 232.*

price and the market price when the goods ought to have been delivered. In his judgment at page 235, Shaw J. stated as follows:—

> "There is no evidence from which any new contract, subsequent to the breach, can properly be inferred for the delivery of the balance of the chests at a subsequent date nor indeed could any such contract be enforced in the absence of a note or memorandum in writing signed by the defendants or their agents."

Mr. Thiagalingam in regard to the present case maintains there is no note signed by the defendant from which any new contract subsequent to the breach can be inferred. Shaw J. in coming to this conclusion differentiated the case before him from the cases of *Ogle v. Earl Vane* [1] and *Hickman v. Haynes* [2]. In *Ogle v. Earl Vane* the defendant by bought and sold notes contracted to sell to the plaintiff 500 tons of iron, delivery to extend to July 25. Owing to an accident to his furnaces the defendant delivered none of the iron by that date nor up to February following when the plaintiff went into the market. At the trial, from correspondence between the parties, it appeared that the defendant repudiated his liability on the ground that non-delivery was due to inevitable accident, but proposed that the plaintiff should take iron of a different quality. This offer was declined by the plaintiff. It was held that there was evidence from which the Jury might infer that the plaintiff's delay was at the defendant's request; that, as the evidence went to show, not a new contract, but simply a forbearance by the plaintiff at the request of the defendant, the Statute of Frauds did not apply; and that the plaintiff was entitled to a verdict for the full measure of damages, that is to say the difference between the contract price and the market price in February when he repudiated the contract. In his judgment at page 279, Kelly C.B. stated as follows:—

> "But the case does not stop there; there is the letter of December 29, pointed out by my brother Keating, which shows that a personal communication had taken place between the brokers, or one of them, and Shaw, the defendant's agent, and the broker had been informed that it would take three months to put the furnaces in repair, and that this information had been communicated to 'all' the brokers' 'friends', of whom the plaintiff was one, and they had waited for the three months and more. Surely, again, this communication from the defendant implied a request to the plaintiff and the other parties to forbear, and the plaintiff's waiting was an acquiescence in this request. Can it reasonably be contended that that which has been called a rule of law as to the measure of damages, but which is rather a mere rule of practice, is to prevail under all circumstances? It would be contrary to common sense and justice, when there has been a series of proposals by the defendant involving delay for his own benefit, and acquiescence on the part of the plaintiff, that because there may be no binding contract, varying the terms of the former contract, the plaintiff is to be tied down to the strict letter of the rule as to the measure of damages for the non-delivery of goods, and not be entitled to the damages consequent upon the delay. I think, without entering into the question

[1] *1868 L. R. 32. Q. B. 272.*

[2] *L. R. 10. C. P. 598.*

whether there is such a positive rule of law or not, we cannot do otherwise, under the circumstances of the present case, than hold the plaintiff to be entitled to the larger measure of damages."

The same principle was applied by the Judges in *Hickman v. Haynes* (*supra*) in which Lindley J. at page 603 stated as follows:—

"The proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance, is, to say the least, very startling, and if well founded will enable the defendants in this case to make use of the Statute of Frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff. It need hardly be said that there must be some very plain enactment or strong authority to force the Court to countenance such a doctrine.

The Statute of Frauds contains no enactment to the effect contended for. The utmost effect of the 17th section is to invalidate any verbal agreement for the sale of goods in certain cases; and, even if a verbal agreement for extending the time for the delivery of goods already agreed to be sold is within the statute—as to which see per Martin B., in *Tyers v. Rosedale and Ferryhill Iron Co.* (*L. R. 8. Ex 305* in error, *L. R. 10 Ex. 195*) and *Leather Cloth Co. v. Hieronimus*[1] the plaintiff in this case is not attempting to enforce any such verbal agreement, but is suing on the original agreement which was in writing."

The following passage at page 605 from the said judgment is also relevant:—

"The result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds. But so far as this principle has any application to the present case, it appears to us rather to preclude the defendant from setting up an agreement to enlarge the time for delivery in answer to the plaintiff's demand, than to prevent the plaintiff from suing on the original contract for a breach of it. There was, in truth, in this case no binding agreement to enlarge the time for delivery. The county court judge finds that the plaintiff permitted the defendants to postpone, for their own convenience, the acceptance of the iron in dispute, and that the voluntary withholding delivery at the request of the defendants was usual in the ordinary course of dealings of a similar kind in the iron trade. This finding, in fact, shows that at any time in June either party could have changed his mind, and required the other to perform the contract according to its original terms; see *Tyers v. Rosedale and Ferryhill Iron Co.* as decided in error, reversing the decision below. (*L. R. 8 Ex. 305.*)"

It is interesting to note that in *Ogle v. Earl Vane* (*supra*) the request for forbearance was made by the vendor after the contract had been broken, whilst in *Hickman v. Haynes* (*supra*) the request was made by the

[1] *L. R. 10. Q. B. 140.* [2] *L. R. 10 Ex. 195.*

purchasers both before and after the time for completing the contract had expired. Lindley J., in his judgment, at page 606, states that this distinction does not appear to the Court to be material.

A number of cases on this matter were reviewed in exhaustive manner by McCardie J. in *Hartley v. Hymans*[1]. In this case, it was held as follows:—

> "Where, after the expiration of the period of delivery fixed by a contract for the sale of goods, the buyer by his letters and conduct leads the seller to entertain the belief that the contract still subsists and to act upon that belief at serious expense to himself, a new agreement may be implied that the period for delivery is extended and that delivery may take place within a reasonable time of which notice is to be given by the buyer to the seller."

The facts were as follows:—

> "By a contract coming within section 4 of the Sale of Goods Act, 1893, and duly made in writing, the plaintiff agreed to sell to the defendant 11,000 lbs. of cotton yarn, delivery to begin in September, 1918, and to be at the rate of 1,100 lbs. per week, failure to deliver within the stipulated time to render the contract liable to cancellation by the defendant, and incomplete deliveries not to be taken into account. Delivery should have been completed by November 15, 1918. The plaintiff delivered no yarn till October 26, 1918, when he delivered 550 lbs., and thereafter on various dates from the end of November, 1918, to the end of February, 1919, he delivered seven further quantities averaging upward of 500 lbs. each. During all this period and the early part of March, 1919, the defendant by his letters complained of the delay and asked for better deliveries, but thereby led the plaintiff to entertain the belief that the contract still subsisted, and to act upon that belief at expense to himself. On March 13, 1919, the defendant, having given no previous notice requiring delivery in any reasonable time, wrote to the plaintiff cancelling the order, and he thereupon refused to take any further quantity of the yarn. The plaintiff brought an action against the defendant for damages for refusing to take the remainder of the yarn."

After reviewing a number of cases McCardie J. held as follows:—

> "(1) That the defendant waived his right to insist that the contract period terminated on November 15, 1918. The waiver is evidenced by writing, even though it took place after November 15. Waiver is not a cause of action but a man may be debarred by the doctrine of waiver for asserting that an original condition precedent is still operative and binding. In view, moreover, of the fact that the plaintiff acted (at great expense to himself) upon the footing that the waiver had taken place, it would, I conceive, be wrong to allow the defendant to insist on the terms of the original contract as to time.
>
> (2) I hold that (in so far as estoppel differs from waiver) the defendant is estopped from saying that the period for delivery expired on November 15, 1918, or from asserting that the contract ceased to

[1] *(1920) 3 K. B. 475.*

be valid on that date. Inasmuch as the defendant led the plaintiff to believe by letter, as well as conduct, that the contract was still subsisting, and inasmuch as the plaintiff acted on that belief at serious expense to himself, it would be unjust to allow the defendant to assert that the delivery period ended on November 15. I shall apply to this case the principle asserted by the Court of Appeal in *Bentsen's Case*[1] and approved by the Court of appeal in *Panoutsos Case*[2].

(3) I hold that upon the letters passing between the parties I can, and ought to, imply a new agreement that the contract period should be extended beyond November 15, 1918—*i.e.*, until the defendant had given a notice to the plaintiff requiring delivery within a reasonable period. I here imply such agreement."

The position that has arisen in this case is, I need hardly say, different from that in *Hartley v. Hymans* (*supra*). In both cases it is the seller who was in default in making delivery on the contract date. In both cases the buyer failed on such default to repudiate the contract and continued business on the assumption that the contract was still alive. On the other hand in this case it is not, as in *Hartley v. Hymans* (*supra*) the buyer who is seeking to maintain that the breach of the contract took place at the earlier date, but the seller who is in default. In this case the defendant, the seller, showed by his conduct and his letters that the contract was still subsisting. Hence it would be unjust to allow him to assert that the delivery period ended in July. In my opinion *Hartley v. Hymans*, *Ogle v. Earl Vane* and *Hickman v. Haynes* (*supra*) are all authorities that lend support to the contentions put forward on behalf of the plaintiff.

The principle laid down by McCardie J. also receives support from two cases duly considered by him in the course of his judgment. The first of these cases was *Bentsen v. Taylor Sons & Co.* (*supra*). This was a charter party case in which the ship sailed a month later than the contract date. The defendants, the charterers, therefore, had the right to repudiate. They did not do so. It was held that the conduct of the defendants amounted to a waiver of such right to repudiate and that they were liable for freight under the charter party, but were entitled as against the plaintiff to such damages as they could prove they had sustained by reason of the breach of the condition. In the course of his judgment Bowen L.J. stated the law as to waiver thus:—

"Did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent?"

The second of these cases is *Panoutsos v. Raymond Hadley Corporation of New York* (*supra*) in which the dictum of Bowen L.J. in *Bentsen v. Taylor Sons & Co.* (*supra*) was cited with approval by Lord Reading C.J.

[1] *(1893) 2 Q. B. 274, 283.* [2] *(1917) 2 K. B. 473.*

In support of his contention Mr. Thiagalingam also cited the case of *Plevins v. Downing* [1]. The plaintiffs in this case were the vendors, and failing to deliver pig-iron in July were in default. In October a verbal arrangement was made by the parties for delivery after this date. The plaintiffs, thereupon, forwarded iron which the defendant refused to accept. The plaintiffs failed in their action because they were unable to show that they were ready and willing to fulfil the original contract and because the incident in October consisted of a verbal arrangement only. In the opinion of McCardie J. *Plevins v. Downing* (*supra*) decides that a new binding agreement cannot, when the Statute of Frauds applies, be made by mere conduct or by word of mouth either before or after the contract has expired. In order to show that there is nothing in *Plevins v. Downing* (*supra*) contrary to the contention put forward by the Counsel for the plaintiff I need only cite the following passage from the judgment of Brett J.:—

> " Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract. He shews that he was so, but that he did not offer to deliver within the agreed time because he was within such time requested by the vendee not to do so. In such case it is said that the original contract is unaltered, and that the arrangement has reference only to the mode of performing it. But, if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract. The statement shows that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do so as to enforce his claim. This seems to be the result of the cases which are summed up in *Hickman v. Haynes* (*supra*)."

In this case the plaintiff has proved that he was willing to accept delivery within the period of the contract. In fact his lorry CE 1643 was sent on July 7 accompanied by a delivery order for 5,000 chests. The defendant has asked for an enlargement of time for delivery. The plaintiff in these circumstances agreed to a postponement of the time for delivery. In such a case the original contract is unaltered and the new arrangement has only reference to the mode of performing it. In *Hartley v. Hymans* (*supra*), McCardie J. also stated that in coming to a conclusion he felt he was acting in consonance with *Plevins v. Downing* (*supra*). He

[1] (*1875-76*) *1 C. P. D. 220.*

also cited with approval the dictum of Bailhache J. in *Dudley, Clarke & Hall v. Cooper, Ewing & Co.* (unreported). This dictum which, in my opinion, is relevant so far as the present case is concerned, is as follows:—

> "It is quite open to a buyer to say when deliveries are late and he has been extending the time that he will not take further delivery unless they are made within some reasonable time which he is entitled to designate."

This is precisely the position taken up by the plaintiff in this case.
For the reasons I have given the appeal is dismissed with costs.

WIJEYEWARDENE J.—I agree.

Appeal dismissed.