

HOUSE OF LORDS.

Friday, March 27, 1914.

(Before the Lord Chancellor (Viscount Haldane), Lords Dunedin, Atkinson, Moulton and Parker.)

WILLIAMS BROTHERS v. E. T. AGIUS, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Contract—Sale of Goods—Breach of Contract—Non-Delivery—Measure of Damages—Arbitration—Jurisdiction—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 51, sub-sec. 2.

A sold a shipload of coal to B for delivery in November at 16s. 3d. per ton. In October B sold to C, in Italy, a corresponding shipload of coals at 19s. per ton. In November C sold to A for 20s. per ton the coal he had bought from B, and "ceded the original usual contract of the sellers." A failed to give delivery of the coal in November, but in virtue of the contract with C tendered the difference between 16s. 3d. and 19s. per ton as damages to B. B claimed the difference between 16s. 3d. and 23s. 6d. per ton—the market price at the time of the breach. The arbiter, appointed under a clause in the original contract found that as B was bound to appropriate the shipment if delivered to the satisfaction of the contract with C, the amount of the damages was the difference between 16s. 3d. and 19s.

Held that the arbiter had no jurisdiction to consider a counter-claim under a foreign law, and that under the contract that he was interpreting the measure of damages was the difference between the contract and market prices at the date of breach.

Observed that the law as laid down in *Rodocanachi v. Milburn*, 18 Q.B.D. 67, is unaffected by the Sale of Goods Act 1893, section 51, sub-section 2. *Wertheim v. Chicoutimi Pulp Company*, 1911 A.C. 301, 48 S.L.R. 1090, distinguished.

Decision of the Court of Appeal reversed.

The facts are fully set out in their Lordships' considered opinion, which was delivered by

LORD CHANCELLOR — The facts out of which this appeal arises may be stated shortly. The respondents sold to the appellants six cargoes of a certain coal to be shipped every two months in 1911. It is as to one of these cargoes, which was to be shipped in November, that the dispute arises. The price was to be 16s. 3d. per ton net, c.i.f., Genoa or Savona, or Spezzia or Leghorn, orders to be given on signing bill of lading, or 17s., c.i.f., Venice, on certain terms. The point to be decided relates to the cargo in question, which the respondents failed to ship, and is, what damages are payable by the respondents to the appellants on the facts

as stated by the umpire in his award in an arbitration? The umpire having found the breach of contract, found further the following among other facts:—That at the date of the breach the market price of the coal in question was 23s. 6d.; that about the 28th October 1911 the appellants sold through one Colonna, their agent at Genoa, a cargo of coal to one Ghiron, on the terms of a sale note of that date, which I shall call the broker's note, at the price of 19s. per ton, and that the intention of the appellants was to re-sell to Ghiron the November cargo to be delivered to them by the respondents, and that they appropriated this cargo to their contract with Ghiron. That about the 31st October 1911 the appellants sent to Ghiron a sold note dated the 28th October 1911. That about the 28th November in the same year Ghiron sold to the respondents the cargo referred to in the broker's and sold notes at 20s. a ton, and by indorsement on the sold note ceded all his rights and liabilities under the contract with the appellants for £225, being 20s. per ton, or 1s. per ton above the price which the appellants had agreed to pay to the respondents. That by certain letters which the umpire referred to Ghiron had given notice to the appellants that he cancelled the contract of the appellants with the respondents so far as it related to the November cargo, but that the appellants immediately repudiated Ghiron's right to so cancel. It was not found by the umpire, but was agreed between counsel at the hearing before the learned Judge who heard the case, Bailhache, J., that Ghiron signed and returned to the appellants a bought note, dated the 28th October, corresponding to the sold note referred to.

The contention of the appellants before the umpire was that the true measure of damages was 7s. 3d. per ton, being the difference in price between 16s. 3d., the contract price, and 23s. 6d., the market price at the date of the breach—4500 tons at 7s. 3d. amounts to £1631, 5s. The contention of the respondents was that the true measure of damages was 2s. 9d. per ton, being the difference between 16s. 3d., the contract price, and 19s., the price of the coals sold by the appellants to Ghiron—4500 tons at 2s. 9d. amounts to £618, 15s.

The umpire stated his award in the form of a Special Case under the provisions of the Arbitration Act 1889. He appended among other documents those to which I have referred. He also in his award expressed the opinion that "it is in accordance with trade equity and fair dealing that" the respondents "should be entitled to purchase the said P. Ghiron's contract with" the appellants "and cancel the whole transaction, paying the difference in prices as was purported to be done."

Bailhache, J., decided in favour of the appellants. He pointed out that although the broker's note was silent on this point, the sold note which was signed and returned by Ghiron, the purchaser, contained an additional term. It stipulated that the "sellers have no obligation to deliver this cargo unless they get delivery of a similar cargo due to them" from the respondents. He

would but for this term have held that the respondents had the right to say to the appellants that the latter, who had not delivered to them the cargo which they had resold to Ghiron, the assignor of the respondents, were liable to the respondents for the difference between 19s. and 23s. 6d. as the umpire had found. But he thought that under the additional term incorporated in the sold note the appellants had no obligation to deliver unless they had first got delivery from the respondents, and that as they had not got such delivery the cross-claim of the respondents failed. For the rest he thought that in ascertaining the measure of damages he ought to follow the judgment in *Rodocanachi v. Milburn*, 18 Q.B.D. 67.

The majority in the Court of Appeal (Vaughan Williams, L.J., and Bray, J.) took a different view. Following the finding of the umpire, they considered that the sold note given by the broker, Colonna, governed the contract, and that as it did not contain the additional term which Bailhache, J., had thought decisive, making the obligation of the appellants to deliver to Ghiron conditional on their getting delivery under their contract with the respondents, the latter had by their assignment from Ghiron become assignees of an unqualified contract of sale and delivery by the appellants. They held that it was open to them to decide that, on the principle of avoiding circuity of action, the amount which the respondents were thus entitled to recover from the appellants, being damages representing the difference between 19s., Ghiron's contract price, and 23s. 6d., the market price, must be deducted from the difference between 16s. 3d. and 23s. 6d. They therefore gave judgment to the effect that the amount due to the appellants was the sum of £618, 15s. only instead of £1631, 5s. which they had claimed.

Hamilton, L.J., dissented. He agreed that Bailhache, J., was wrong in departing from the finding of the umpire that the broker's note given by Colonna governed the transaction of the 28th October. But he was unable to agree with his colleagues that the respondents so stood in the shoes of Ghiron that if the appellants failed to deliver to them the respondents could claim against them the excess over the 19s. per ton at which Ghiron had bought. He considered that as no coals had been shipped by the respondents and appropriated to their contract no property of any kind passed, but the right remained a contractual one in respect of unascertained goods. He pointed out the divergences between the terms of Colonna's contract note and those of the original contract between the appellants and the respondents, and further, that there was no finding in the award of an assignment of the original contract to the respondents. He went on to add that no such case appeared to have been either raised before the umpire or established by his award. All that the umpire had really decided was a question as to the measure of the damages payable by the respondents to the appel-

lants for the breach of their original contract, and as to this it appeared on the face of the Special Case that he had suggested an opinion as to the proper measure of damages which is inconsistent with the law as laid down in *Rodocanachi v. Milburn*.

I have arrived at the conclusion that the view taken by Hamilton, L.J., was the true one. It may be that we are precluded by the terms of the award from looking beyond its finding that the contract between the appellants and Ghiron was contained in the Colonna sold note. But the result is carried no further by the statement in the award that the appellants "appropriated" the cargo they had the right to claim to their contract with Ghiron. No doubt it must be taken that they intended to re-sell it to the latter. But what difference can this make? No property in the cargo had passed to them. Their right remained in contract, and was a right to damages. It appears to me to have *prima facie* remained intact, and if *Rodocanachi v. Milburn* was correctly decided it was quite clear what they were entitled to claim. No doubt if they had assigned their contract to Ghiron, and Ghiron had in his turn assigned it to the respondents, the appellants' right would have been extinguished. But there is no finding to this effect in the award, and if I were at liberty to look for such a result outside the award I should be of opinion that on the materials before us it was impossible to hold that such an assignment had been made.

What really appears is that there are two separate contracts, on one of which the appellants were entitled to sue the respondents, and on the other of which the respondents could claim against the appellants. But the difference is that while as regards the first contract the respondents, who have been found to be in breach, have no answer, on the second there may or may not be a defence on the ground that this contract was to be satisfied out of the coal which the respondents failed to deliver. On this point I express no opinion. It was not before us, and it was not before the umpire. Nor would he have had jurisdiction to deal with it. What was referable to him under the original contract was any dispute as to "the meaning of any of the conditions thereof, or as to any matter arising out of this contract."

Indeed, his award purports to deal with the obligation of the respondents to deliver, and the measure of damages alone. If it is argued that he could have dealt with a question of the effect of any assignment which he had found as a fact in extinguishing *pro tanto* the title of the appellants to sue for a breach, the obvious comment is, first, that he found no such assignment, and, secondly, that in the absence of such an assignment the question is not one of reduction of the amount of damages but one of a cross-action or counter-claim. Now he deals with nothing of this kind, nor in my opinion would he have had jurisdiction to deal with it. What right, if any, the respondents may have, they must there-

fore assert in other proceedings. For these reasons I have arrived at the same result on this point as Hamilton, L.J.

But a wholly distinct point was taken in addition to the one I have now discussed. It was argued for the respondents that, even assuming the appellants to be entitled to claim full damages from the respondents without deduction, the principle laid down by the Court of Appeal in *Rodocanachi v. Milburn*, which was accepted by the Courts below as binding them, was wrong. In that case it was held that in estimating the damages for non-delivery of goods under a contract the market value at the date of the breach was the decisive element. In the judgment delivered by Lord Esher he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance a contract entered into by the plaintiff with a third party. He said that if the plaintiff had sold the goods before the breach for more than the market price at that date he could not recover on that footing, and that it would therefore be unjust if the market price did not govern when he had sold for less.

This decision is quite in harmony with what was recently said in this House in *British Westinghouse Electric and Manufacturing Company v. United Underground Electric Railways Company*, 1912 A. C. 673, 50 S.L.R. 617, where it was pointed out that a subsequent transaction, if it is to be taken into account in mitigating damages, must be one which arises out of transactions naturally attributable to the consequence of the breach, and must not be of an independent character. I agree with the statement of the law in *Rodocanachi v. Milburn*, and with the view of this part of the present case taken by all the learned Judges in the Courts below.

I will only add on this point that I do not think that the law so laid down has been affected by section 51 of the Sale of Goods Act 1893. By sub-section 3 of the section the general principle is recognised as the rule which obtains *prima facie*, and I do not find in sub-section 2 anything inconsistent with this recognition.

For the reasons I have given I move that the judgment of the Court of Appeal be reversed and that of Bailhache, J., restored. The respondents must pay the costs in this House and in the Courts below.

LORD DUNEDIN—This is an appeal arising upon an award put in the form of a Special Case.

Messrs Agius, the respondents in the appeal, merchants in London and Hull, entered, in June 1910, into a contract with Messrs Williams, the appellants, for the sale of six cargoes of 4000 to 5000 tons of a certain class of gas coal, viz., New Pelton or Holmside, at their option, at a price of 16s. 3d. per ton, c.i.f., to certain specified ports in the Mediterranean, cargoes to be shipped every alternate month, beginning with January in 1911. There was an arbitration clause as to all matters arising out of the contract.

The November shipment was admittedly not delivered, whereupon the appellants claimed damages before the arbitrators and umpire.

The Special Case sets forth that on the date of the breach of contract the market price of coal the same as contracted for was 23s. 6d. per ton. The respondents accordingly claimed the difference between 16s. 3d. and 23s. 6d. per ton.

During the month of October 1911 the appellants had in contemplation to re-sell the coal which they would receive under the November shipment, and through an agent, Conti, in Genoa, and a broker, Colonna, they entered into negotiations with a Mr Ghiron, of Turin. The negotiations resulted in the handing by Colonna to Ghiron of a sale note in the Italian language, of date the 28th October 1911, which states that there has been sold to Ghiron, by Messrs Williams, a cargo of 4000 to 5000 tons of New Pelton or Holmside coal to be shipped in November at the price of 19s. per ton, c.i.f. at Genoa. There is a right given to the seller to delay delivery in case of war, but otherwise the obligation is absolute. The original of this document is not produced, but there is a translation, which includes a sentence as follows—“Messrs Williams cede the usual original contract of Messrs Agius, who are the sellers to Messrs Williams.”

The fact of a sale having been effected was communicated by telegrams passing between Conti and Messrs Williams, and following thereon Messrs Williams sent from Hull to Ghiron of same date, the 28th October, a formal sold note. This note set forth the subject of sale and the price in the same terms as the Colonna note, but contained the following clause—“Sellers have no obligation to deliver this cargo unless they get delivery of a similar cargo due to them by Messrs Agius of London.” This note was signed by Messrs Williams. This was followed by a formal purchase note in identical terms, being signed by Ghiron as of even date and forwarded to Williams.

On or about the 28th November Messrs Agius approached Ghiron, and for a payment of £225 acquired his rights under the three documents just mentioned.

In these circumstances the respondents contended before the arbitrators that the damages must be limited to the difference between 16s. 3d. and 19s. per ton.

The umpire, upon whom the matter, on failure of the arbitrators to agree, came to devolve, in the Special Case, after setting forth the facts above mentioned, found the following findings:—“(a) It was the intention of the above-named Messrs Williams Brothers throughout to re-sell to the said P. Ghiron the November cargo which the above-named Messrs E. T. Agius, Limited, were under contract to deliver as aforesaid, and the above-named Messrs Williams Brothers appropriated the November cargo they were entitled to receive from the above-mentioned Messrs E. T. Agius, Limited, as aforesaid to their said contract with the said

P. Ghiron. (b) The said contract between the above-named Messrs Williams Brothers and the said P. Ghiron was made by the said Conti as agent to the above-named Messrs Williams Brothers through the mediation of the said Ferdinando Colonna in Italy, on the 28th October 1911, and in the terms of the said sale-note of that date from the said Colonna to the said P. Ghiron, and that the said sale-note, dated the 28th October 1911, from the above-named Messrs Williams Brothers to the said P. Ghiron was not sent out by the said Messrs Williams Brothers until the 31st October 1911. (c) The said P. Ghiron, as far as he lawfully might, cancelled the said contract of the 25th June 1910, so far as it related to the November cargo contracted to be delivered by the above-named Messrs E. T. Agius, Limited, to the above-named Messrs Williams Brothers. (d) On the date of the breach of their contract with the above-named Messrs Williams Brothers by the above-named Messrs E. T. Agius, Limited, the market price of the said coal was 23s. 6d. per ton. (e) There was no tender by the above-named Messrs E. T. Agius, Limited, to the above-mentioned Messrs Williams Brothers of the said sum of £618, 15s., or any sum. (f) In my opinion it is in accordance with trade equity and fair dealing that the above-named Messrs E. T. Agius, Limited, should be entitled to purchase the said P. Ghiron's contract with the above-mentioned Messrs Williams Brothers and cancel the whole transaction, paying the differences in prices as was purported to be done.

The Special Case came before Bailhache, J., who found in favour of the appellants. In his view the contract between Ghiron was embodied in the formal documents of the sale and purchase note signed by the principals, which superseded any prior informal documents, such as the sale-note of Colonna. Under the formal note there was in terms of the claim of exemption no contract with Ghiron at all. Ghiron had nothing to convey to the respondents, and the respondents must therefore pay damages for non-delivery on the basis of market price at the time delivery ought to have been made.

On appeal, the majority of the Court of Appeal, Hamilton, J., dissenting, held that the umpire had decided as fact that the contract with Ghiron was contained in the note of Colonna, that it was therefore a binding contract, and that the respondents, as assignees of Ghiron, can plead his contract, and thereby reduce the damage to the difference between 16s. 3d. and 19s.

I will assume that the contract between Ghiron and Messrs Williams is contained in the Colonna note above. I am not satisfied of that. I am inclined to the view that though the umpire stated that as a question of fact he was in reality deciding a question of law, viz., that the Colonna note was not superseded by the formal bought and sold notes, and if so, that he may be corrected. But as there is difference of opinion on this point I will pass it by, and assume that the Colonna note rules. I dismiss at once all

argument founded on the expression "cede the original contract" and the affected cancellation by Ghiron of Agius' contract with Messrs Williams. Not only do I entirely agree with Hamilton, L.J., that we should require to know a great deal more as to the true legal significance of the Italian word which is represented by "cede," but what is conclusive is that if there was assignment of the original contract, then Messrs Williams had nothing left on which they could sue. Such a plea was never taken before the arbitrators, and the whole course of the arbitration is negative of its existence. What, then, is the position? Messrs Williams have an action for breach of contract against Agius. Ghiron has an action for breach of contract against Messrs Williams. Now if the case of *Rodocanachi v. Milburn*, 18 Q.B.D. 67, be good law, then Williams' damages as against Agius are to be measured by the difference of market price, unaffected by the fact that Williams had contracted to re-sell. But then it is said that even if that be so, yet inasmuch as Agius is in right as assignee of Ghiron's contract, he is entitled to make good his position without circuity of action as defence to the action brought against him. It is obvious that this is counter claim and nothing else. Now how far counter-claim is available as defence is truly a matter of pleading. Different systems of law vary as to this power, and the same system of law will be found to vary at different dates of its development. But this at least is certain, that no counter-claim can be given effect to as a defence unless the court dealing with the original action has also jurisdiction in the matter of the counter-claim. Now here the Court, dealing with the original action, viz., the arbitrators and umpire, only derives its jurisdiction from consent, and that consent is limited to matters arising out of the Agius-Williams contract. It has no jurisdiction whatever in the matter of the contract between Williams and Ghiron, and Agius can have no higher rights in respect of that contract than those possessed by his assignor Ghiron. This consideration is in my opinion fatal to the conclusion reached by the majority of the Appeal Court.

It was, however, argued at your Lordships' Bar that the case of *Rodocanachi v. Milburn* was wrongly decided, and it was said to be in conflict with the principles laid down in the recent case before the Privy Council of *Wertheim v. Chicoutimi Pulp Company*, 1911 A.C. 301, 48 S.L.R. 1090. It is certain that Lord Atkinson, who delivered the judgment in that case, did not think that he was going against *Rodocanachi v. Milburn*, for he says so in terms. Nor in my mind is there any discrepancy between the two judgments. *Wertheim v. Chicoutimi Pulp Company* was a case, not of delivery withheld, but of delivery delayed. The buyer therefore got the goods, and the only damage he had suffered was in delay. Now delay might have prejudiced him. The amount of prejudice was no longer a matter of speculation; it had been put to the test by the goods being actually sold, and he was rightly, as I think,

only held entitled to recover the difference between the market price at the date of due delivery and the price he actually got. But when there is no delivery of the goods the position is quite a different one. The buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day, and, barring special circumstances, the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward re-sale at over the market price—*Great Western Railway Company v. Redmayne*, L.R., 1 C.P. 329—nor can he take benefit of the fact that the buyer has made a forward re-sale at under the market price.

The general principle is expressed by the learned Judges in both cases in identical words. Erle, C.J., Willes Keating and Montague Smith, J.J., in *Great Western Railway v. Redmayne* say—"The market value of the goods was the value in the market, independently of any circumstances peculiar to the plaintiff (the buyer);" and the very same phrase is used in the counter case of *Rodocanachi v. Milburn* by Esher, M.R., and Lopes, L.J. Lindley, L.J., says that there is no difference between the two cases.

The truth is that the respondent's argument leaves him in a dilemma. Either the sub-sale was for the identical article which was the subject of the principal sale, or it was not. If it was not, it is absurd to suppose that a contract with a third party as to something else, just because it is the same kind of thing, can reduce the damages which the unsatisfied buyer is entitled to recover under the original contract. If, on the other hand, the sub-sale is of the self-same thing or things as is or are the subject of the principal sale, then *ex hypothesi* the default of the seller in the original sale is going to bring about an enforced default on the part of the original buyer and subsequent seller. And how can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract. All that will depend upon what the sub-buyer will be able to make out. The only safe plan is therefore in the original contract to take the difference of market price as the measure of damages and to leave the sub-contract, and the breach therefor to be worked out by those whom it directly concerns.

I am therefore of opinion that the appeal should be allowed, and the judgment of Bailhache, J., restored.

LORD ATKINSON—In this case the appellants on the 25th June 1910 entered into a contract as of that date with the respondents to sell to them six cargoes of New Pelton or Holmside unscreened gas coal of 4500 tons each, to be shipped every two months, the last in the month of November in that year, at the price of 16s. 3d. per ton c.i.f., to be carried to and delivered at Genoa, Savona,

Spezia, or Leghorn according to orders, the payments to be made in net cash on presentation of the shipping documents by the vendors' bankers at Genoa, &c. For convenience sake this contract may be styled the principal contract.

By the seventh clause of this contract it is provided that "in the event of any dispute between the parties as to the meaning of any condition thereof, or as to any matter arising out of this contract, such dispute shall be referred to two arbitrators and an umpire."

The cargo which should have been shipped in November was never shipped. Thereupon the two following disputes arose between the parties—(1) Whether the vendors were bound to deliver this cargo in November 1910; and (2) if so bound, what was the measure of the damages which the respondents ought to pay to the appellants in respect of the former's breach of contract in failing to deliver the cargo.

These disputes obviously touched and were conversant with matters arising out of this contract. They were accordingly referred to arbitration. The arbitrators failed to agree, and a gentleman named J. H. Beckingham was duly appointed umpire. He found, as he must have found, that the respondents were by their contract bound to deliver the cargo in November 1910, and no question arises as to the propriety of that finding. A controversy arose, however, before the arbitrator as to the measure of the damages which the respondents were liable to pay. It was found, and not disputed, that the market price of coal of the kind contracted for was at the time of the breach of contract 23s. 6d. per ton. And if nothing further had occurred in the case it is well established that the measure of damages would have been the difference between the contract price and this market price, that is, 7s. 3d. per ton on 4500 tons, or £1631, 5s. in all—*Williams v. Reynolds*, 6 B. & S. 495; *Rodocwnachi v. Milburn*, 18 Q.B.D. 67; *Wertheim v. Chicoutimi Pulp Company*, 1911 A.C. 301, 48 S.L.R. 1090.

Something more, however, did occur. The appellants on the 28th October 1911, entered into a contract in writing with one Ghiron, an Italian residing or carrying on business in Turin, to sell to him, at 19s. per ton, the cargo of coal which the respondent had contracted to ship in the month of November. This contract may for convenience be styled the sub-contract. The respondents had no notice or knowledge of its existence, or of that of any other contract made by the appellants to re-sell the coals until they received the appellants' letter written from Hull dated the 1st November 1911.

Some controversy arose as to whether this latter contract was contained in a certain sold note written in Turin, dated the 28th October 1911, signed by one Ferdinando Colonna, acting on the instructions of one Conti, the appellants' broker, and sent by Colonna to Ghiron, or in a sale note of the same date sent from Hull by the appellants

to Ghiron, and returned by the latter signed by him, or in the two documents taken together.

The substantial difference between the two documents consists in this, that the first, unlike the second, contains a provision to the effect that the Messrs Williams cede the original contract of the respondents with the appellants to Mr Ghiron, and that he should have the right to cancel the contract thus made with him if "the steamer" should not be loaded within 100 days from the 27th October 1911, whereas in the second several matters not alluded to in the first, such as strikes, &c., are dealt with, no mention is made of the ceding of the original contract, and a new clause is introduced expressly providing that the sellers, *i.e.*, the appellants, are not under any obligation to deliver the cargo sold unless they themselves get the delivery of a similar cargo from the respondents, and further that if the appellants have not chartered a boat within 100 days from the 28th October 1911, Ghiron should have the option of cancelling "the purchase."

The respondents having apparently come to the conclusion that they could not or would not perform their part of the original contract, conceived the idea that if they could procure a virtual assignment from Ghiron to themselves of the benefit of the sub-contract, they could, in Ghiron's name, take advantage of the clause giving the latter power to cancel the sub-contract. They may in addition, possibly, have thought that if by reason of the clause as to "ceding" contained in the sale note signed by Colonna, Ghiron could be treated as the assignee of the benefit of the first contract, the subsequent assignment from Ghiron to themselves would not only vest in them the benefit of the sub-contract, but also place them towards themselves under the principal contract in the same position as that in which the appellants stood to them under that contract.

Accordingly one finds indorsed on both the sale notes the following indorsement:—"In consideration of having received from Messrs Ed. T. Agius, Limited, through Mr Spreafico, £225, I cede to them from the date I receive the sum all my rights under this contract."

Acting under this belief the respondents wrote to the appellants on the 9th December 1911 the letter following:—"Dear Sirs—We have your favour of the 8th inst., and doubtless this letter has been written under a misapprehension. We return your debit note as we have nothing to do with same. If you will be good enough to refer to Genoa you will find that we have arranged through their and our agents' medium to cancel this cargo, and all we are now waiting for is a debit note for the difference between the price at which we sold to your Genoa firm and the price which they sold to Mr Ghiron. On receipt of this we shall have pleasure to have your cheque."

This is followed by a letter dated the 18th December from Ghiron to the appellants, stating in effect that at the respondents'

request the sub-contract had been cancelled directly with the respondents.

The difference between the price at which the appellants bought this cargo from the respondents and sold it to Ghiron amounts altogether to £618, 15s.

The umpire made his award on the 24th June 1912 in the form of a Special Case. In the 4th paragraph he refers to the sale notes dealing with the sale by the appellants to Ghiron, and in reference to them finds that both the notes referred to the same transaction and the same cargo of coals. He also finds as a fact that the sum of £225 mentioned in the indorsements already referred to was paid on or about the 19th December 1911. In par. 7 he sets out the contention of the appellants that their contract with Ghiron was contained in the second sale note alone; that this contract was in no way relevant to the matters in dispute; that circumstances were proved which were sufficient to relieve the respondents from any obligation to deliver the November cargo, and that the proper measure of damages was the difference between the contract price of 16s. 3d. per ton and 23s. 6d. per ton.

In the 8th paragraph he sets out the contention of the respondents to the effect that the appellants having re-sold the cargo to Ghiron at 19s. per ton, the measure of damages was the difference between 16s. 3d. per ton and this sum.

In par. 9 he sets forth what purports to be his findings of fact. He says he found as a fact it was the intention of the appellants to re-sell the November cargo to Ghiron, and that they had appropriated this cargo to their contract with Ghiron. This latter finding involves a misuse of language. It is admitted there was no appropriation of this cargo to Ghiron's contract in the legal sense of the term.

He further finds as a fact that the contract between the appellants and Ghiron was contained in the first sale note—that signed by Colonna and dated the 28th October 1911—apparently because the second sale note, bearing the same date and signed by both the contracting parties, was not sent out till the 31st of that month.

The contract between the parties being contained in written documents the construction of those documents is a matter of law, not of fact; and the principle of law in reference to such matters is precisely the reverse of the principle upon which the arbitrator proceeded, namely, this, that when the parties to a contract subsequently enter into a new contract dealing with the same subject-matter, the second contract either supersedes the first, or so far as it is inconsistent with the first, impliedly rescinds it—*Hunt v. South-Eastern Railway Company*, 45 L.J., Q.B. 87; *Patmore v. Colburn*, 1 C.M. & R. 65; *Thornhill v. Neats*, 8 C.B.N.S. 831. I have great difficulty in coming to the conclusion that the statement of the arbitrator that the first of these two documents contains the contract of the parties simply because of its priority is a finding of fact, properly so called, at all. There was no evidence whatever before him

to show that the second document was not treated as an operative instrument. The very fact that it had indorsed upon it a memorandum identical in terms with that indorsed upon the note signed by Colonna suggests the contrary; and if it was intended to be, and treated as an operative instrument, then the contract of the parties is to be found either in this second document itself or in both documents taken together. He further finds as a matter of fact that Ghiron cancelled the sub-contract as far as he lawfully might, whatever that may mean, and, lastly, expresses the opinion that in accordance with trade equity and fair dealing the respondents were entitled to purchase Ghiron's contract with the appellants and cancel the whole transaction, paying the difference in prices as was purported to be done. He then awards that the respondents do pay to the appellants the sum of £618, 15s., if the former contention as to the measure of damages be right, or £1631, 5s. if appellants' contention as to the measure of damages be right.

Upon the face of this award it would appear to me that the umpire has dealt with several matters not covered by the reference to arbitration.

I do not think the construction of these sale notes or of the memoranda indorsed upon them, involving the meaning of the word "cede," according to the Italian law, could possibly be described as "matters arising out of the original contract."

If the respondents were in law the assignees of Ghiron's rights under the sub-contract, it may well be that in an action brought in a court of law by the appellants against the respondents on the original contract, if the latter as the assignees of Ghiron had counter-claimed for damages for breach of the sub-contract as embodied in the sale note signed by Colonna, the sums recovered on the claim and counter-claim respectively being set off the one against the other, the sum of £618, 15s. would have been the balance to which the appellants would have been entitled, but neither the arbitrators nor the umpire had, in my view, any jurisdiction to embark on any investigation of that kind. It is not covered by the reference to arbitration, nor could any damages be awarded to the respondents on such a counter-claim if the provision to be found in the second sale note to the effect that the sellers (the appellants) were not under any obligation to deliver the cargo to Ghiron unless they got delivery of a similar cargo from the respondents, formed, as in my opinion it certainly did, part of the contract between the parties.

I am not in a position to form any opinion as to what the term "cede" means in the Italian law. No evidence was given on the point. The umpire has not found, as a matter of fact, what it means. His finding of fact in paragraph 9 (*f*) does not, I think, amount to anything of the kind. I do not think he had any jurisdiction to decide the point. Bray, J., says, as I understand, that when used in the body of the first sale note the word is not equivalent to the word "assign," while he seems to hold that where

the same word is used in the indorsement it is effectual to work out a good equitable assignment of Ghiron's interest under the sub-contract of the respondents. Again, Bray, J., is apparently of opinion that the umpire's statement in paragraph 9 that Ghiron ceded to the respondents all his rights under the sub-contract is a finding of fact; with all respect I beg to differ. It is, in truth, a decision on a point of law—the construction of a written document. It can be no more, as the only evidence before the umpire on the point was the indorsement upon the sale notes themselves.

Bailhache, J., was of opinion that the contention of the appellants was right, and that the sum of £1631, 5s., with the interest mentioned, should be awarded to the appellants. Hamilton, L.J., as he then was, concurred in that result. I agree with them. I think there is nothing in the case to make the principle of the decision in *Rodocanachi v. Milburn* inapplicable to it, and that it is governed by that authority, the soundness of which has been many times recognised and never questioned. The case has, of course, no reference whatever to cases of late delivery of goods purchased as distinguished from their non-delivery.

On the whole, therefore, I am of opinion that the decision of the Court of Appeal was erroneous and should be reversed, and the decision of Bailhache, J., restored, and that this appeal should be allowed with costs.

LORD MOULTON—The question for the decision of your Lordships in this appeal is set out very plainly in the award, in the form of a Special Case, which forms the basis of this litigation. It is whether the appellants are right in their contention that the measure of damages put forward by them in respect of admitted breach by the respondents of the contract to deliver a cargo of coals in November 1910 is correct. That contention is that the proper measure of damages is the difference between the contract price of 16s. 3d. per ton and the market price on the date of the breach of contract, which the arbitrator finds to be 23s. 6d. per ton.

Inasmuch as this is a plain case of a failure to deliver a specified quantity of an article obtainable in the market, the measure of damages is well established. The case comes under the rule laid down in the case of *Rodocanachi v. Milburn*, and regularly and repeatedly followed ever since, and ultimately embodied in the Sale of Goods Act 1893, sec. 51, sub-sec. 3. The contention of the appellants is in accordance with that rule, and the question put to the Court in the Special Case must accordingly be answered in their favour.

This consideration is, in my opinion, sufficient to decide this appeal, but in deference to the opinions expressed by the majority of the Court of Appeal I propose to examine the matters which it is suggested make the measure of damages in the present case other than that given by the recognised rule to which I have already referred.

From the facts of the case as found in the award and the documents therein referred to we learn that the appellants made a contract to sell a cargo of coal to the Italian firm of Ghiron, and that they intended to fulfil that contract by the cargo to be delivered by the respondents in November. The price to be paid by the said Ghiron was 19s. per ton, and the respondents contend that it is the difference between 19s. per ton and the contract price of 16s. 3d. per ton which is the true measure of damages.

If these were the only facts of the case the contention of the respondents would be precisely that view of the damages in the case of an article purchasable in the market which was negated by the decision in *Rodocanachi v. Milburn*. The case rests on the sound ground that it is immaterial what the buyer is intending to do with the purchased goods. He is entitled to recover the expenses of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market price. To do so he must pay a sum which is larger than that which he would have had to pay under the contract by the difference between the two prices. This difference is therefore the true measure of his loss from the breach, for it is that which it will cost him to put himself in the same position as if the contract had been fulfilled. But the respondents contend that there are certain further facts which are relevant to the dispute before the arbitrator, and which afford an answer to the above reasoning. To appreciate them it will be necessary to give in a little detail the circumstances attending and subsequent to the sale to Ghiron.

The sale was negotiated by a coal agent of the name of Colonna in Turin, who gave what is called a sale note. He appears to have been employed by Signor Conti of Genoa, who acted as agent for the appellants under instructions contained in certain letters annexed to the case. The so-called sale note bears date the 28th October 1911. There is to be found in it an almost unintelligible passage on which the respondents greatly rely, which reads as follows in the translation — “Messrs Williams cede the usual original contract of Messrs Agius, who are the sellers to Messrs Williams.”

The respondents contend that this is an assignment of the contract between the appellants and the respondents. There is no evidence whatever of any authority in Colonna to make any such assignment, or that the parties at the time intended any such assignment. On the contrary, it is perfectly clear that the contract between the parties was contained in a formal bought note signed by Ghiron and an identical sold note signed by the appellants, and those bought and sold notes contain no reference to any assignment of the contract between the appellants and the respondents, but contain the following stipulation:—“Sellers have no obligation to deliver this cargo unless they get delivery of a similar cargo due to them by Messrs Ed. T. Agius Limited, of London, but if sellers have not chartered a boat within one hundred days of date,

buyers have the option to cancel purchase.”

These bought and sold notes show conclusively that the sale was not a sale of a specific cargo, but of a cargo of such a character as could be satisfied by the delivery of the cargo due in November under the contract between the appellants and the respondents. The appellants had no doubt the intention of using the cargo which the respondents were under contract to deliver to fulfil their contract with Ghiron, but were not bound so to do.

If these two identical notes signed by the parties constitute the contract between them, the respondents are forced to admit that their case cannot be supported. But they rely on a finding in the Special Case by the arbitrator to the effect that the contract between the appellants and Ghiron was in the terms of the earlier sale notes. The award goes on to say that the sale note signed by the principal Ghiron was not sent out by the appellants until three days later. The respondents contend that this finding that the contract between the parties is contained in the earlier sale note is a finding of fact by the arbitrator which must be accepted by the Courts. In my opinion this is not so. Quite apart from the authority of Colonna to make the contract alleged to have been made in the earlier sale note, we find the principals subsequently drawing up and signing a formal written contract setting out the transaction. Under such circumstances the effective contract between the parties is the document which the principals have signed. The arbitrator therefore was guilty of an error in law in deciding that the contract was not contained in this formal contract. The cause of his error is easy to see. He was of opinion that because the formal contract was later than the original sale note it was overridden by it, whereas it is precisely because the principals subsequently to the original negotiations elected to draw up and sign the formal contract that it is conclusive as to the nature of the transaction.

The subsequent events can be told very shortly. In December the respondents, learning of the negotiations between the appellants and Ghiron, purported to buy from Ghiron the cargo of coal at the price of 20s., and accordingly Ghiron for the sum of £225 made over to them all his rights and obligations under the contract. On the basis of this assignment the respondents, purporting to be the assignees of their own contract with the appellants, proceeded formally to cancel it. They based on these facts a claim that the measure of damages is the difference between 16s. 3d. and 19s., instead of the difference between 16s. 3d. and the market price of 23s. 6d.

I have already stated that in my opinion there was no assignment of the original contract to Ghiron, so that this reasoning has no basis of fact. But there is one overriding consideration which makes it immaterial to consider what would have been the position of the parties if there had been any such assignment. The tribunal before whom the parties appeared derived its

authority from the arbitration clause contained in the original contract of sale between the appellants and the respondents and it had no authority to decide any matters other than those "arising out of" that contract. The question whether subsequently to the making of that contract there was in fact any assignment of any portion of the rights under that contract to Ghiron is a matter entirely outside the scope of the arbitration, and the arbitrator had no jurisdiction to deal with it. Moreover, the claim of the respondents to diminish the damages legally due under the contract is of the nature of a counter claim based on rights acquired subsequently to the contract by transactions with third parties. Whether or no in the Courts of the realm such matters could be brought in as an answer *pro tanto* to the appellants' claim with a view to avoid circuity of action is immaterial. No such course is permissible to a domestic tribunal of limited authority. The arbitrator ought therefore to have refused to go into any of the matters relating to the transactions between the respondents and Ghiron and to have confined himself to deciding the measure of damages under the contract independently of all such questions. I am of opinion, therefore, that this appeal should be allowed and that the appellants should have the costs here and in the Court below.

LORD PARKER concurred.

Their Lordships allowed the appeal.

Counsel for Appellants—Adair Roche, K.C.—Cuthbertson. Agents—Ince, Colt, Ince, & Roscoe, Solicitors.

Counsel for Respondents—Leck, K.C.—W. Norman Raeburn. Agents—Lowless & Company, Solicitors.

HOUSE OF LORDS.

Monday, April 6, 1914.

(Before the Lord Chancellor (Viscount Haldane), Earl Loreburn, Lords Dunedin, Atkinson, Shaw, Parker, and Reading.)

BOARD OF MANAGEMENT OF TRIM JOINT DISTRICT SCHOOL *v.* KELLY.

(ON APPEAL FROM THE COURT OF APPEAL IN IRELAND.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Educ. VII*, c. 58), *sec. 1, sub-sec. 1*—"Accident"—*Culpable Homicide*—"Arising out of."

A schoolmaster at an industrial school, while performing his duties, was assaulted and killed by two of his pupils (who had formed a conspiracy for that purpose, and were afterwards tried and found guilty of manslaughter). A defendant having claimed compensation, the County Court Judge found that the deceased met his death by accident arising out of and in the course of his

employment. *Held* (1) that his death was due to an accident, and (2) that there was evidence to support the finding of the arbitrator that the accident arose out of his employment.

Lords Dunedin, Atkinson, and Parker *dissented*.

Nisbet v. Rayne & Burn, [1910] 2 K.B. 689, and *Anderson v. Balfour*, [1910] 2 Ir. R. 497, *approved*.

Murray v. Denholm & Company, 1911 S.C. 1087, 48 S.L.R. 896, *overruled*.

The appeal was argued on the 24th and 25th November 1913 before Earl Loreburn and Lords Dunedin, Atkinson, and Shaw, but their Lordships required further argument, and the case was re-argued on the 23rd and 14th February 1914, the Lord Chancellor and Lords Parker and Reading being also present.

The *facts* are stated by their Lordships in their considered judgment, which was delivered as follows:—

LORD CHANCELLOR—This appeal raises a question of considerable importance as to the interpretation of the expression "accident arising out of and in the course of the employment" in the Workmen's Compensation Act 1906.

The circumstances in which the question has arisen are shortly as follows:—The respondent is the mother of one John Kelly, who was an assistant in the industrial school at Trim, and whose death was caused by injury sustained by him while superintending the scholars under his charge. It is not in dispute that the respondent was partially dependent on her son, or that if she was entitled to compensation for his death the amount awarded, £100, was a proper amount.

The proceedings out of which the appeal arises were taken under the Act referred to, and assumed the form of an application for arbitration which was heard by the County Court Judge of the county of Meath.

The deceased John Kelly, who was employed by the appellants, was on the 12th February 1912 superintending the boys in the school at exercise in the school yard when he was assaulted by several of them, and was struck with heavy wooden mallets. He died as the result of his injuries. The assault was premeditated and the outcome of a conspiracy among some of the boys to injure Kelly, who had punished or threatened to punish them, and who on the occasion in question was remonstrating with them.

The learned County Court Judge found that the occurrence was unforeseen, so far as the deceased was concerned, and that when he was assaulted he was doing his duty in remonstrating with the boys who had disobeyed him, and further that in what he did he was acting within the scope of his authority and in the course of his employment. There had been at least two previous assaults of a less serious kind on masters in this school, and the learned County Court Judge came to the conclusion that some of the boys were unruly and badly disposed, so that although what Kelly did was his