time, is relevant, but not conclusive, to shew a mutual agreement to rescind the contract, so far as it applies to the instalment undelivered:" ib. If this was a correct view of the law, the buyers lost their right to require delivery to be made of the instalments which they failed to order in due time, unless from the dealings between the parties it could be properly inferred that there was either an agreement to postpone these deliveries or a waiver by the sellers of their rights under the contract; and there was nothing in the course of the dealings to warrant the drawing of either of these inferences—a perusal of the correspondence led to a contrary conclusion.

The first part of the qualifying proposition quoted from the Laws of England is not supported by the two cases cited: Higgin v. Pumpherston Oil Co. (1893), 20 R. (Ct. of Sess.) 532; Tyers v. Rosedale and Ferryhill Iron Co. (1875), L.R. 10 Ex. 195.

Apart from the question of there having been no proper demand for the delivery of the undelivered flour, the buyers were not entitled to call for delivery in a subsequent month of any instalment or part of an instalment in respect of which no order to ship was given in due time.

The buyers were entitled to the delivery of the 410 bags of flour for which the order of the 28th February, 1916, was given; and the onus was upon the sellers to shew that that right had been lost or waived by the buyers; but there was nothing in the evidence which would justify that conclusion. The fact that the order had been given and that the flour had not been shipped seemed to have been lost sight of by both parties; but that could not affect the buyers' right to damages for non-delivery; and the appellants were entitled to recover the difference between the contract-prices and the market-prices of the 410 bags which were ordered. The time for delivery having been by mutual consent extended until the 4th April, 1916—the date at which the damages should be ascertained was the 6th day of that month. The evidence did not shew what the market-prices were on that day.

The appeal should be allowed, and judgment should be entered for the appellants for damages for non-delivery of the 410 bags—the damages to be ascertained by a reference unless the parties should agree upon a sum.

The appellants having failed in their main contention, there should be no costs to or against them of the litigation throughout.

MACLAREN, MAGEE, and FERGUSON, JJ.A., agreed with the Chief Justice.

HODGINS, J.A., read a short judgment. He agreed in the result, but not in all the reasons of the Chief Justice.

Appeal allowed.