O'CONNOR J. concurred.

ISAACS J. concurred.

HIGGINS J. I cordially concur in giving leave to the applicant to appeal, but I think the form of the order, giving leave to appeal on behalf of all other members of the company, even those who oppose him, may lead to complications and expense.

Leave given accordingly.

Solicitors, *Flower & Hart.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CAMPBELL . . . . . APPELLANT;

AND

KITCHEN & SONS LIMITED AND BRISBANE SOAP COMPANY LIMITED } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Agreement—Del credere Agent—Indemnity—Trade Usage—Discount—Mistake of Fact—Mistake of Law—Settled Account—Leave to Appeal.

An action was brought by Kitchen & Sons Limited against The Brisbane Soap Company Limited for a declaration of rights, for the return of moneys alleged to have been paid under a mistake of fact and for accounts to ascertain the amount recoverable. The plaintiff company was formed in 1901 to acquire the business of a company called J. Kitchen & Sons and Apollo Candle Company. By an agreement made on 30th of June 1891 between J.

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Kitchen & Sons and Apollo Candle Company (afterwards called the Apollo Company) of the first part, Campbell who by himself or his nominees owned half the shares in a proposed new company of the second part, and one Donaldson representing the proposed new company (afterwards incorporated as The Brisbane Soap Company Limited, the defendants), of the third part, it was agreed *inter alia*: "7. The said Apollo Company shall be the sole agents in Queensland for the sale of the New Company's soap and other manufactures and they shall guarantee that on or before the fourteenth day of the month after that in which the goods shall have been delivered payment shall be made of the respective amounts due in respect of such goods so delivered in consideration whereof they shall be paid or allowed by the New Company a total commission at the rate of seven pounds ten shillings per cent. on the amount of such sales . . . ."

On 11th September 1908 it was formally agreed by indenture between the parties that the agreement of 1891 should be carried out as if the plaintiffs instead of the "Apollo" Company had been originally parties to it. Transactions between the "Apollo" Company and the defendants and between the plaintiffs and the defendants had always been governed by this agreement. From 1891 to 1908, in accordance with the usage of the trade a discount for cash on payment within certain periods was allowed to purchasers, but the full invoice price, less seven and a half per cent., was paid to the defendants. In 1908 the plaintiffs claimed that the defendants and not they as *del credere* agents should bear the loss of the trade discount, since that time only five per cent. was claimed where the sales were for cash on delivery.

Held, that the plaintiffs were entitled to a declaration (1) That under the contract of the 30th of June 1891, and the indenture of 11th September 1908, they were entitled to a commission of seven and a half per cent. on the net amounts received by the defendants in payment for goods sold by the plaintiffs as their agents, other than goods sold for cash on delivery; and (2) That they were entitled on the fourteenth day of every month to discharge the debt then due by any purchaser to the defendants by payment to the defendants of the amount on payment of which by the purchaser on that day he would according to the terms of his contract of purchase discharge his liability to the defendants.

Held also that, as to the payments made between 1891 and 1908, the accounts must be treated as settled and could not be re-opened.

Rogers v. *Ingham*, 3 Ch. D., 351, followed.

Decision of the Supreme Court: *Kitchen & Sons Ltd.* v. *Brisbane Soap Co. Ltd.*, 1910 St. R. Qd., 301, varied.

APPEAL by leave from the Supreme Court of Queensland.

An action was brought in the Supreme Court of Queensland by J. Kitchen & Sons Ltd. against the Brisbane Soap Co. Ltd., the

nature of which is sufficiently stated in the judgments hereunder. The action was tried before *Chubb* J. who gave judgment for the defendants, but, on appeal to the Full Court, judgment was given for the plaintiffs. (*Kitchen & Sons Ltd.* v. *Brisbane Soap Co. Ltd.* (1).

From this decision an appeal was now brought to the High Court by Peter Morrison Campbell pursuant to leave. (*Campbell* v. *Kitchen & Sons Ltd.* (2).

Stumm (*Henchman* and *Hobbs* with him), for the respondents, Kitchen & Sons Ltd., moved to rescind the leave to appeal. The shares in the defendant company are held equally by the plaintiff company or their nominees and by the appellant or his nominees, and under the articles of association the differences should be referred to arbitration. The Court will not interfere with the internal management of companies except where there is fraud, or where something *ultrâ vires* has been done. [He referred to *Gray* v. *Lewis*; *Parker* v. *Lewis* (3); *Pender* v. *Lushington* (4); *Burland* v. *Earle* (5).]

GRIFFITH C.J. The right of appeal does not depend upon the consent of the respondents. Litigants in the Supreme Court, if the amount at stake is sufficient, are entitled as of right, under the *Constitution Act*, to have recourse to this Court, and if there is any formal defect in the way it can be got rid of by the leave of the Court. We are of opinion that the case comes within the rule stated by Lord *Davey* in *Burland* v. *Earle* (6), and that it would be a substantial denial of justice to refuse leave to appeal.

Woolcock and *Hart*, for the appellant. Even if there were any trade usage to give discount for cash payments or payments within short periods, the parties had no such idea in view when the agreement was made; if trade discount must be given to purchasers the agent must pay it; he is entitled on the terms of the agreement to 7½ per cent. on the amount of the sales and no more. The Full Court has held that the plaintiffs are entitled to

(1) 1910 St. R. Qd., 301.
(2) 12 C.L.R., 513.
(3) L.R. 8 Ch., 1035, at p. 1050.
(4) 6 Ch. D., 70.
(5) (1902) A.C., 83.
(6) (1902) A.C., 83, at pp. 93, 4.

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have an account taken for six years preceding October 1908, when they first made their claim and since when they have deducted the trade discounts from the purchase money handed to the company; they are not entitled to this: *Rogers* v. *Ingham* (1); *Skyring* v. *Greenwood* (2); *Shaw* v. *Picton* (3). *North Eastern Railway Co.* v. *Hastings* (4) is distinguishable from the present case as there the claim was for money due, not to recover money already paid.

This is a case of an account stated, and it cannot be re-opened.

[They referred to *Story's Equity Jurisprudence*, 13th ed., vol. I., p. 544; *Pollock's Principles of Contract*, 6th ed., p. 432; *Seton's Judgments and Orders*, 6th ed., vol. II., p. 1382; and the following cases:—*Shaw* v. *Dartnall* (5); *Padwick* v. *Stanley* (6); *Daniell* v. *Sinclair* (7); *Forbes* v. *Watt* (8); *Marshall* v. *Berridge* (9); *Chapman* v. *Bluck* (10); *Hunter* v. *Belcher* (11); *Willis* v. *Jernegan* (12); *Maund* v. *Allies* (13); *Smith* v. *Leveaux* (14); *Hornsby* v. *Lacy* (15).]

Stumm, *Henchman* and *Hobbs*, for the respondents. The agent has implied authority to act according to mercantile usage, which was then established beyond all doubt: *Juggomohun Ghose* v. *Manickchund* (16). The agreement must be construed according to its language, and the conduct and course of dealing of the parties does not affect it. It is a written instrument, and its words must be construed according to their natural meaning. The plaintiff company was intended to get a full 7½ per cent. commission on the net amount received by them as agents on sales made for the defendants, and not to pay for any usual trade discounts out of it. They were guarantors that the defendants would get their money on the fourteenth of every month; all they were bound to do was to hand over to the defendants the invoice sale price less discount for cash, and from that sum they were entitled to deduct their 7½ per cent. commission.

(1) 3 Ch. D., 351.
(2) 4 B. & C., 281.
(3) 4 B. & C., 715, at p. 724.
(4) (1900) A.C., 260.
(5) 6 B. & C., 56.
(6) 9 Ha., 627.
(7) 6 App. Cas., 181.
(8) L.R. 2 H.L. Sc., 214.
(9) 19 Ch. D., 233.
(10) 4 Bing. N.C., 187.
(11) 2 DeG. J. & S., 194.
(12) 2 Atk., 251.
(13) 5 Jur., 860.
(14) 1 H. & M., 123; 33 L.J. Ch., 167.
(15) 6 M. & S., 166.
(16) 7 Moo. Ind. App., 263, at p. 282.

The payments for eighteen years without deducting the trade discount were made by mistake, and the plaintiffs are entitled to have an account taken and to recover the sum ascertained to be overpaid, at any rate during the period of six years preceding 1908, if not for the whole period. [Counsel referred to *North Eastern Railway Co.* v. *Hastings* (1); *Houlder Bros. & Co. Ltd.* v. *Commissioner of Public Works* (2); *Earl of Beauchamp* v. *Winn* (3); *Daniell* v. *Sinclair* (4); *Williamson* v. *Barbour* (5); *In re Webb*; *Lambert* v. *Still* (6); *Kelly* v. *Solari* (7); *Blyth* v. *Whiffin* (8); *Padwick* v. *Hurst* (9).]

GRIFFITH C.J. This is an action by the respondents, J. Kitchen & Sons Ltd., against the respondents, the Brisbane Soap Co. Ltd., for a declaration of rights, for the return of moneys alleged to have been paid under a mistake of fact, and for accounts to ascertain the amount recoverable. The plaintiff company was formed in 1901 to take over the business of the company called J. Kitchen & Sons and Apollo Candle Co., which I will call the old company. The old company were, and the plaintiff company are, by themselves or their nominees, the holders of one half the shares in the defendant company. The appellant by himself or his nominees is the holder of the other half.

By an agreement of 30th June 1891 made between the old company of the first part, the appellant of the second part, and one J. C. Donaldson representing a proposed new company (the defendants) of the third part, it was agreed, *inter alia*, as as follows:—

"7. The said Apollo Co. shall be the sole agents in Queensland for the sale of the new company's soap and other manufactures and they shall guarantee that on or before the 14th day of the month after that in which the goods shall have been delivered payment shall be made of the respective amounts due in respect of such goods so delivered, in consideration whereof they shall be paid or allowed by the new company a total commission at the

(1) (1900) A.C., 260.
(2) (1908) A.C., 276.
(3) L.R. 6 H.L., 223.
(4) 6 App. Cas., 181.
(5) 9 Ch. D., 529.
(6) (1894) 1 Ch., 73.
(7) 9 M. & W., 54.
(8) 27 L.T., 330.
(9) 18 Beav., 575; 23 L.J. Ch., 657.

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rate of seven pounds ten shillings per cent. on the amount of such sales."

This agreement was adopted by the defendant company when incorporated, and the transactions between the old company and the defendant company, and between the plaintiff company and the defendant company, have ever since been governed by it. By an indenture of 11th September 1908, made between the plaintiff company of the first part, Donaldson of the second part, the appellant of the third part, and the defendant company of the fourth part, after reciting the above facts, it was formally agreed and declared, *inter alia*, that the agreement of 30th June 1891 was confirmed and should be carried into effect as if the plaintiff company had been the original parties to it instead of the old company. The questions for determination arise upon the construction of clause 7 above quoted and the course of dealing between the parties.

Under that clause the relationship between the old company and the defendant company was twofold. The old company were the defendant company's agents for sale of their manufactures, and were also guarantors for the due payment, not later than the fourteenth of each month, of the price of all goods delivered during the preceding month. But, in fact, in addition to this relationship the old company undertook a further duty, namely, to collect for the defendant company the price of all goods sold by them, and to remit the money collected to the defendant company. This relation of agents to collect money was quite distinct from that created by the written agreement of 30th June 1891.

The course of dealing between the parties was as follows:—The old company (and after them the plaintiff company) sold the goods at fixed rates, with an allowance of what is called trade discount to certain purchasers. The amount remaining after deduction of the trade discount is called the invoice price. According to the ordinary course of dealing in the trade, purchasers were entitled, on payment within a specified time, to a further discount, generally, but not always, amounting to $2\frac{1}{2}$ per cent. of the invoice price. The usage to allow a discount for such prompt payment was established by the evidence beyond doubt.

For seventeen years after June 1891 the old company, and after them the plaintiff company were in the habit of sending to the defendant company on or before the fourteenth of each month an account of their sales for the preceding month, in which they debited themselves with the invoice price of the goods sold, whether the price had already been paid or not, and took credit for a commission of $7\frac{1}{2}$ per cent. upon that price.

In October 1908, however, they claimed that they were not bound to debit themselves with the full invoice price, but only with the amounts actually collected by them for the defendant company, that is, the invoice price less the discount for prompt payment. As to payments due by purchasers who had not paid by the 14th they claimed to be entitled to debit themselves with no more than the amounts on payment of which on that day the purchasers could have discharged their debts to the plaintiff company. They further claimed to be entitled to have the accounts for the previous seventeen years re-opened, and to recover the amount which they had overpaid to the defendant company ascertained on this basis, The defendants counter-claimed for a declaration to the effect that the former practice was the correct one. They support this contention (1) on the construction of clause 7 as it stands, and (2) on the interpretation which, they say, had been put upon it by a long course of dealing.

First: As to the construction of the agreement. In my opinion the agreement has nothing to do with determining the amount for which the old company and the plaintiff company were liable to account as collecting agents. It is clear that an agent employed to collect money is not liable to his principal (except by way of damages for default) for any greater sum than he actually receives. So far, therefore, as regards payments made by purchasers before the 14th of the month the plaintiffs were not bound to account for more than they received.

With regard to the price of goods not paid for by the 14th the plaintiffs were bound under their guarantee to put the defendants in the same position as if the price had been paid on that day, but they were not bound to do more. As between the plaintiffs and the defendants the purchasers were to be regarded as having failed to pay; but the amount which any purchaser had (notion-

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ally) failed to pay was not more than the amount by payment of which he would under the terms of his contract have discharged his debt. The plaintiffs were therefore not bound under their guarantee to pay the defendants any greater sum. If they were, the contract would not be one of indemnity or guarantee, but would place the vendors in a better position than if the purchaser had himself paid the price. It is clear that if the plaintiffs had failed to pay any such sum by the 14th the measure of damages in an action by the defendants on the guarantee would have been the amount by which they were damnified, that is, no more and no less than they would have received if the purchaser had himself made the payment. If after the 14th the purchaser paid the plaintiffs, receiving a rebate of discount, they would merely receive what they had paid to the defendants. If the purchaser did not pay at all the plaintiffs would have to bear the loss. If he did not pay soon enough to claim the discount the plaintiffs would be out of pocket until payment. As between the plaintiffs and defendants, however, the transaction with respect to each sale was closed on the 14th, and whatever might happen after that day, and whether to the advantage or disadvantage of the plaintiffs, was no concern of the defendants.

It was suggested that the plaintiffs still retained the fiduciary position of agents, and could not retain a profit for themselves. But, as I have shown, the whole transaction as between them and the defendants was closed on the 14th of the month. In respect of transactions which were not then completed as between the vendor and purchaser they assumed by the payment the position of the vendors, and any money which they received from the purchasers after that date was not received by them as agents for the vendors at all.

For these reasons I am of opinion that the contention of the plaintiff company, which commended itself to all the learned Judges who constituted the Full Court, is sound.

In my judgment the plain construction of the agreement is not affected by the course of dealing between the parties. Even if an ambiguous document may be construed by the light of a course of dealing—a point on which I offer no opinion—I am unable to find any ambiguity in the contract under consideration.

Nor do I think that upon the evidence there is any ground for the contention that it should be inferred from the course of dealing that a new agreement was substituted for the written one.

There was nothing on the face of the accounts rendered by the old company or the plaintiffs to the defendants to show that the amounts with which they debited themselves were (although we are told that they were in fact) the full invoice prices less trade discounts only. The accounts merely represented that the amounts stated had been received. In some cases they probably had been received, and in others not. A correspondence which took place in August 1895 shows that the parties were then in doubt how far the agreement applied to certain contemplated sales for cash on delivery, in which a guarantee was out of question, and it was agreed to charge 5 per cent. only in such cases. For a short time after May 1899 the plaintiffs in their accounts divided the $7\frac{1}{2}$ per cent. between commission 5 per cent. and discount $2\frac{1}{2}$ per cent., and later lumped them together as commission and discount $7\frac{1}{2}$ per cent., but afterwards reverted to the original practice. I do not think that any sure inference can be drawn from these circumstances.

Chubb J., who heard the case without a jury, thought that the evidence offered to show a practice of allowing discount for prompt payment was insufficient to establish it. I am disposed to agree with him in thinking that it did not establish that there was a fixed invariable rate of discount. But, with all respect, that was not the question. In my opinion the contract between the parties was made upon the footing that sales should be made upon such terms of payment as might be usual from time to time in similar mercantile transactions, and the practice to allow discount for prompt payment was, as I have already said, established beyond all doubt.

So far, therefore, the appeal fails.

But with regard to the claim to recover the amounts overpaid other considerations arise. This part of the case is, in substance, an action to recover money paid under a mistake of fact. *Chubb* J. thought that the money was due in law, and that there was therefore no question of mistake in fact, and he did not apply his mind to the question now to be decided. In the Full Court

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Cooper C.J. referred to *North Eastern Railway Co.* v. *Lord Hastings* (1), and thought that as the contract in question is plain and unambiguous the rights of the parties were not affected by a temporary erroneous construction of it. In that case the plaintiffs' claim was not to recover money paid under a mistake, but to enforce a claim for money due and omitted to be collected. The case has therefore no application. The only ground on which an account could be asked by an agent from his principal in Chancery was that the matter was too complicated to be investigated at law, and to such a claim the defence of a settled account would be a bar. In my opinion the circumstances in the present case establish that defence, except, perhaps, as to the accounts for the two or three months immediately before October 1908. Regarding the whole claim as being in substance a claim to recover money paid under a mistake of fact, I am of opinion that upon the evidence no case of mistake of fact was established. There is no ground for even supposing that the plaintiff company and their officers were not fully aware of the relevant facts as to every payment which they made to the defendants.

It is to my mind clear that they made each payment because they thought that upon the facts they owed the money and were bound to pay it. I respectfully adopt the language of *Mellish* L.J. in *Rogers* v. *Ingham* (2):—"There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; and I think it is equally clear that, as a general rule, the Court of Equity did not, in such cases, interfere with the Courts of Law. Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might, years afterwards, be recovered, because perhaps some Court of Justice, upon a similar contract, gave to it a different construction from that which the parties had put on it. I think there is no doubt that the rule at law is in itself an equitable and just rule which is not interfered with by Courts of Equity; but, on the other hand, I think that, no doubt, as was said by Lord

(1) (1900) A.C., 260.

(2) 3 Ch. D., 351, at p. 357.

Justice *Turner* in *Stone* v. *Godfrey* (1), 'This Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact'; that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it."

In the present case, so far from thinking that it is inequitable that the defendants should retain the money which had been paid to them monthly for a period of seventeen years, and which they have no doubt taken into account in estimating and dividing their annual profits, I think that the rule of the common law is an equitable and just rule. I think, therefore, that on this part of the case the appellant must succeed, and the action so far as it relates to the claim to recover money already paid should be dismissed.

I think, however, that the plaintiffs are entitled to a declaration of their rights. They do not claim more than 5 per cent. commission on sales for cash on delivery.

In order to obviate any questions as to the construction of the contract I think it is desirable to alter the wording of the declaration as made by the Full Court so as to read as follows:— Declare (1) that under the contract of 30th June 1891 and the indenture of 11th September 1908 the plaintiffs are entitled to a commission of $7\frac{1}{2}$ per cent. on the net amounts received by the defendants in payment for goods sold by the plaintiffs as their agents other than goods sold for cash on delivery; (2) that the plaintiffs are entitled on the 14th day of every month to discharge the debt then due by any purchaser to the defendants by payment to the defendants of the amount on payment of which by the purchaser on that day he would according to the terms of his contract of purchase discharge his liability to the defendants.

An account of transactions since October 1908 is, of course, unnecessary,

As each party succeeds, and each fails, as to a substantial part of their respective claims I think that there should be no costs on either side, either here or in the Supreme Court.

The judgment appealed from will be varied accordingly.

(1) 5 D.M. & G., 90.

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BARTON J. The first question is as to the true meaning of the stipulation in Article 7 of the agreement of 30th June 1891. The argument is chiefly as to the terms "Amounts due in respect of such goods" and "Amount of such sales." These words are to be accepted in their literal sense unless some strong reason appears to the contrary. I have heard no such reason advanced. Each party alleges that they are clear and unambiguous, but each interprets them differently. What then is their literal meaning? "Amounts due" are surely sums which have become owing under contract express or implied, and "Amount of such sales," as it was generally agreed, means the same thing as "Amounts due in respect of such sales." A sum "due in respect of a sale" cannot ordinarily mean more or less than the price to be paid, and that is the "amount of the sale." Does that mean the figure placed in an invoice? Yes, when it is expressly or impliedly agreed with the seller or his agent to pay that price; No, when it is not so agreed. It all depends on the bargain made, whether expressly or by usage "so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." *Juggomohun Ghose* v. *Manickchund* (1). If there is a bargain for discount at a certain rate, or if discount is allowed at such a rate by usage without actual words, then the price bargained for is equally "the amount due in respect of the goods," and "the amount of such sale." The terms, if they did not occur in a writing to be judicially interpreted, would not cause hesitation as to their meaning on the part of lawyer or layman. What is it the buyer has to pay? That is the amount of the sale to him, whether quoted higher or not before the bargain is finally struck. Owing to the circumstances of this case I own that I have struggled somewhat against this conclusion, but I think there is no escape from it. It follows that the sum the buyer has finally to pay, and no larger sum, is guaranteed by the *del credere* agent. "The commission imports, that if the vendee does not pay, the factor will: it is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency. But it varies not an iota the rights subsisting

(1) 7 Moo. Ind. App., 263, at p. 282.

between vendor and vendee" (Lord *Ellenborough* C.J. in *Hornsby* v. *Lacy* (1)). The stipulation is drawn in obvious conformity with this statement of the law; and when the vendor leaves it, as this vendor did, to the *del credere* agent to fix the price which the latter is to guarantee, it is in that respect the measure of the rights subsisting between vendor and vendee.

It is said, however, that the accounts and course of dealing between the respondents and the soap company can be invoked to effect what, in the absence of an ambiguity, would be, I think, not a construction, but a variation of the written contract.

I do not agree with this contention. There are clear statements of the law to the contrary by the Privy Council and by the House of Lords. First, in *Houlder Bros. & Co. Ltd.* v. *Commissioner of Public Works* (2), Lord *Atkinson*, speaking for the Judicial Committee, said :—" There is no doubt that the construction of the contract cannot be affected by the declarations of the parties made subsequent to its date, as to its nature or effect, or as to their intention in entering into it. But it is equally true that, where the words of the contract are ambiguous, the acts, conduct, and course of dealing of the parties before, and at the time, they entered into it may be looked at to ascertain what was in their contemplation, the sense in which they used the language they employ, and the intention which the words in that sense reveal." Here there is no ambiguity. In *North Eastern Railway Co.* v. *Hastings*, Lord *Halsbury* L.J. said (3):—" The chief argument used to give an unnatural construction of the words is that the parties have so acted during a period of 40 years that the only reasonable inference to be derived from their conduct is that they have understood and acted on their bargain in a sense different from that which the words themselves convey. I am of opinion that if this could be truly asserted it is nothing to the purpose. The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous." And, in the same case, Lord *Brampton* (4) added, speaking of the stipulation there in ques-

(1) 6 M. & S., 166, at p 171.
(2) (1908) A.C., 276, at p. 285.
(3) (1900) A.C., 260, at p. 263.
(4) (1900) A.C., 260, at p. 270.

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tion:—"As it stands, it seems to me to be clear and free from ambiguity, and incapable of any other construction than that assigned to it by the respondents. Certainly there is nothing to be found in the rest of the agreement to suggest any other interpretation. But it is said that it must have been differently understood by the parties themselves, and that the omission by the plaintiff and his predecessor for upwards of 40 years to claim the rents now sought to be recovered is cogent evidence that such was the case. I grant that if the clause were capable of two constructions, one of which would support, the other of which would defeat the claim, the omission would afford irresistible proof that the latter was the interpretation intended by the parties. No such ambiguity, however, exists, and it seems therefore to me that, in the absence of any proof to the contrary, it must be assumed that the parties knew and understood the language they were using, and that in executing the agreement containing that clause they were truly expressing their intentions, and are bound by the writing they have signed."

I am of opinion, having regard to these authorities, that we cannot look to the conduct, the accounts, or the course of dealing of the parties to find in the contract a meaning other than that which its plain terms declare for themselves. There is another aspect of the case in which such matters may be important, but that is an aspect apart from the construction. I think, then, that clause 7, which stands unaffected by the context, must be read according to the view of the respondents. But so far as their claim is concerned, that construction does not of itself necessarily entitle them to succeed.

The next question is that of usage. I much doubt whether there was any necessity for evidence to prove the existence of a mercantile usage to grant discounts for cash or accelerated payments, or to show that the concession is larger as the payment is less delayed. These are everyday facts within the knowledge of everyone who deals in the market. If, indeed, it were alleged to be the practice of traders to exact the full nominal price in cases of prompt payment, one would expect very strong evidence indeed in proof of such an usage. But that would be the converse of the present case. The credit system prevalent in all

civilized countries, and almost invariable in some, has led to the general understanding that prices merely quoted are *primâ facie* credit prices, unless the trade is notoriously conducted upon a cash basis or the parties have themselves stipulated for cash.

The question of the rates of discount generally allowed for payment within 7 days, within 30 days, or at any other length of time is not material. It is sufficient for the purposes of this case that the practice of allowing discounts for payment at earlier dates than those at which full prices were exacted, was a matter of common knowledge.

Are then the respondents entitled to recover the money they have overpaid the Brisbane Soap Co. under this contract? In the present case the position differs from that upon which, in the *North Eastern Railway Co.* v. *Hastings* (1), the claim was held enforceable. There the money claimed had never changed hands. Rent under a deed had been left unclaimed for a number of years, and it was held to be payable nevertheless, for the reasons which appear in the quotations made above. Here the money has been actually paid to the Brisbane Soap Co. during seventeen years on the footing of accounts rendered by the respondents, as agents to their principals, as if they were bound to pay it; and it has been accepted on that footing by the respondent company. It is said that the parties acted under a mistake. The money was paid voluntarily and without the slightest pressure on the part of the Brisbane Soap Co. The account sales were made up from the respondents' books by their own bookkeeper and accepted by the appellant. This gentleman, Mr. Fry, who gave evidence on behalf of the respondents, says that cash deductions were not shown on the face of the account sales which he rendered to the soap company. Probably, he says, he understood the $7\frac{1}{2}$ per cent. to cover cash discounts. The customers were taking the cash discounts which the respondents allowed. He "presumed" he got his original instructions to charge the $7\frac{1}{2}$ per cent. from Mr. Donaldson, and (he "presumed," from instructions), divided it into 5 per cent. commission and $2\frac{1}{2}$ per cent. discount. He would not have done so without instructions. Though Mr. Donaldson very rarely saw the books,

(1) (1900) A.C., 260.

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Mr. Fry "put the account sales before him from the beginning, and he signed them. I naturally took it," he says, "that the 7½ included the cash discounts. After getting my instructions," he says, "Mr. Donaldson left the keeping of the accounts to me." Mr. Fry says, "he knew the respondents were bearing the discounts." Mr. Donaldson, on the other hand, says, "We deducted the 7½ for commission, and I did not know the discounts were not being deducted." It was about October of 1908, he says, that his company first discovered that they had not deducted from the amounts paid to the soap company by them the amounts which the purchasers had taken for cash discounts. Then they began to charge these deductions, and the appellant Campbell, for the company, objected.

As to the account sales themselves, they are signed for the respondents, some by Fry, including the earlier ones, and some by Donaldson. None of those rendered before October 1908 appear to have charged the appellant with more than 7½ per cent. for commission and discount upon prices which, according to the evidence, were the full invoice prices, less of course the trade, as apart from the cash, discounts. Up to May 1899, the charge was made in one line, thus: "Commission, 7½ per cent." The account sales for the month signed by Donaldson charge commission and discount separately—the former at 5 per cent. and the latter at 2½ per cent. Afterwards, commission and discount are both always mentioned, either in one line, thus: "Commission and discount," with one sum opposite representing 7½ per cent. on the sale prices shown, or with commission and discount separately shown. Of these later accounts all that the respondents produced bore Donaldson's signature. There are two Bundaberg account sales, signed by Donaldson, representing transactions in October and November 1908, but not rendered till February 1909. One of them shows "commission and discount" as a combined charge at the rate of 7½ per cent., the other "discount off to customers" deducted from the amount of sales, and a charge of "commission 7½ per cent." on the amount after deduction of discount. There are two Townsville account sales of 31st October and 31st December 1908 rendered by the respondents. They are signed by G. D.

Wilson; the first of them shows "commission 5 per cent." and "discount 2½ per cent." as separate lines, and the second shows "discount 2½ per cent." and "commission 7½ per cent.," also distinguished. The evidence is that the respondents fixed the prices all through, and Fry says, "I kept the books as I intended to keep them."

Now it would, I think, be a waste of time to demonstrate that upon this evidence the respondents, as plaintiffs, have not established a case of mistake of fact. But they say they mistook the law by misconstruing the agreement; and they appear to have done so. That, however, does not in my opinion entitle them to recover in this action the money they have paid during seventeen years.

All the facts have been open to both parties; the balances regularly paid over have appeared to be due on the footing of accounts they have themselves prepared and rendered, and these payments have been accepted and no doubt expended on the faith of the correctness of those accounts. The Brisbane Soap Co. were justified in accounting for these balances to their shareholders, such as the appellant, and must repeatedly have done so, in good faith, and each monthly sum received must have found its way into a large number of hands. The action for money had and received, and that is the gist of this action, depends largely on the question whether it is equitable for the plaintiff to demand or for the defendant to retain the money. Here I think such a demand distinctly inequitable, and I see no moral or equitable duty in the defendants to repay it. *Skyring* v. *Greenwood* (1) and *Shaw* v. *Picton* (2) are strong authorities in favour of the appellant on this, which I take to be the main question in this case. Another, and a strong one, is *Rogers* v. *Ingham* (3), where *James* L.J. said (4):—"No authority whatever has been cited to us in support of the proposition that an action for money had and received would lie against a person who has received money from another, with perfect knowledge of all the facts common to both, merely because it was said that the claim to the money was not well founded in point of law. . . . . And really when it is

(1) 4 B. & C., 281.
(2) 4 B. & C., 715.
(3) 3 Ch. D., 351.
(4) 3 Ch. D., 351, at p. 355.

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treated as the common case of money paid to B. under a mistake, the law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one Court than in the other Court, for the action for money had and received proceeded upon equitable considerations." And *Mellish* L.J. said (1):—"Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might, years afterwards, be recovered, because perhaps some Court of Justice, upon a similar contract, gave to it a different construction from that which the parties had put on it. I think there is no doubt that the rule at law is in itself an equitable and just rule which is not interfered with by Courts of Equity; but, on the other hand, I think that, no doubt, as was said by Lord Justice *Turner*, in *Stone* v. *Godfrey* (2): 'This Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact'; that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it." I may also refer to the case of *In re Webb*; *Lambert* v. *Still* (3) and particularly to the judgment of *Davey* L.J. (4). If this action were by a principal against an agent to re-open a settled account furnished by the latter and to recover moneys paid him under it, a slighter case might suffice to entitle the principal to relief than is necessary in the converse case. It is needless to multiply authorities, for nothing to my mind could more clearly and conclusively elucidate the principles which apply in the present case than the judgments of *James* and *Mellish* L.JJ., from which I have quoted. There is no legal or equitable consideration which, in my opinion, entitles the respondents to demand a re-opening of these accounts of theirs and a repayment of the moneys which they have voluntarily paid upon the footing of them.

As to the counterclaim, I agree that it cannot be sustained, as

(1) 3 Ch. D., 351, at 357.
(2) 5 D.M. & G., 90.
(3) (1894) 1 Ch., 73.
(4) (1894) 1 Ch., 73, at p. 83.

it rests on a reading of the contract which we cannot accept. It must therefore be dismissed.

As a consequence of the opinions above expressed I assent to the declaration proposed by the Chief Justice and to the course proposed with regard to costs.

O'CONNOR J. read the following judgment:—Before the beginning of this litigation J. Kitchen & Sons Ltd. were sole agents for the sale of the Brisbane Soap Co.'s goods, and the action in the Court below was brought by them to obtain a declaration of their rights as agents, and to recover certain moneys alleged to have been overpaid by them to the defendants in respect of sales up to October 1908.

There was a counterclaim by the defendants for moneys retained by the plaintiffs out of the produce of sales since that date. In this Court the parties have been grouped differently for the purpose of securing the prosecution of the appeal. But that circumstance cannot affect the questions that arise for decision.

The rights in controversy depend upon an agreement made in 1891 between the plaintiffs, the defendants, and other persons, which has been adopted and acted upon as regulating the rights of the plaintiff and defendant companies for many years.

The 7th clause constituted the plaintiffs *del credere* agents at a total commission of 7½ per cent. on the amount of all sales. They guaranteed that, on or before the fourteenth day of the month after that in which goods sold were delivered, payment should be made to the defendants of the respective amounts due in respect of such goods. It was conceded on the argument that a discount of 5 per cent. on sale prices was properly allowed to purchasers and deducted on the face of the invoice, the nett amount being the sale price of the goods. The plaintiffs, however, contend that there was another discount, the discount for cash which, by usage of trade, purchasers were entitled to deduct from the sale price, on payments made within a certain period after delivery, 3 per cent., 2½ per cent., or 1½ per cent., according to the length of the period. The evidence clearly establishes this usage, and in my opinion the plaintiffs must be taken to have had authority from the defendants to allow these cash

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discounts. Indeed, it is difficult to see how sales could be successfully conducted in the face of trade competition, if such discounts were not allowed. The controversy between the parties, stating it broadly, is whether the agents or the principals are to be at the loss of the amount allowed for this cash discount. The plaintiffs' case is that the defendants must bear the loss. They contend that as agents they fully discharge their duty by handing over to their principals on the fourteenth day of the month the amount which the purchaser would have to pay on that day if he paid the principals themselves, that is, the invoice sale price, less discount for cash. The defendants' contention is that the agents are bound to pay their principals the invoice sale price in full, and that the amount lost in allowing cash discount must be borne by the agents out of their *del credere* commission. It is common ground that from the beginning of the agency until October 1908—a period of seventeen years—the plaintiffs acted on the latter view, retaining out of the proceeds of sales 5 per cent. only on the amount thereof, they themselves bearing the loss of the discount, which they took as amounting to $2\frac{1}{2}$ per cent. Upon that basis the plaintiffs had accounted to the defendants month by month, and, on the assumption that that basis was correct, both parties had settled their accounts during all those years. The plaintiffs now claim a return of that discount, taking up the position that, in accounting as they did to the defendants, they were acting under a mistake which the Court will relieve against, and that their mistake can give the defendants no right to retain moneys which under the terms of the agreement they had no right to receive. The defendants answer that after a course of dealing, acquiesced in and acted on by both parties for so many years, the Court will regard the moneys claimed as being covered by a settled account, which under the circumstances it will not allow to be re-opened, whatever view it may take of the meaning of the agreement. The rights of the parties will depend, therefore, upon the answers to two questions. First, what is the meaning of the agreement of 1891? Secondly, should the Court permit the accounts up to October 1908 to be re-opened?

Defendants' counsel contended that in the construction of the agreement the sense in which the parties acted on it may be

used as a guide to its meaning. That cannot, in my opinion, be so in this case. There are no doubt instances in which the meaning which the parties themselves have acted on will be adopted by the Court, even though it is not the meaning of the agreement according to its legal interpretation. But those are all cases in which there has been some ambiguity in the language of the document. Lord *Halsbury* L.C. in the *North Eastern Railway Co.* v. Lord *Hastings* (1), concisely sums up the result of the decisions as follows:—"The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.

"So far as I am aware, no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself." The language of this agreement is, to my mind, entirely free from ambiguity. Interpreting the words of Clause 7 in their ordinary meaning, the plaintiffs undertake two sets of duties towards the defendants, correspondingly they become entitled to two sets of rights against them. They are guarantors of payment on or before a stipulated day by defendants' customers; they are also agents to account and pay over the moneys of their principals that come to their hands in the course of the agency. Full effect must be given to both provisions. The plaintiffs do not lose any of these rights as guarantors because they happen also to be agents. "The fourteenth day of the month after that in which the goods shall have been delivered" marks an important boundary line in the working of the agreement. The guarantee has no operation as to sales in which payment is made before that day. In those cases where payment is to the plaintiffs they incur merely the ordinary responsibility of agents. They are bound to hand over to their principals the sum received and no more, that is to say, the invoice sale price, less discount for cash, and from that sum they are entitled to deduct their $7\frac{1}{2}$ per cent. commission. Where payment is not made either to the defendants or to the plaintiffs on or before the fourteenth day

(1) (1900) A.C., 260, at p. 263.

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the plaintiffs' liability as guarantors comes into operation. The contract of guarantee is a contract of indemnity, and payment not having been made on the day fixed, the plaintiffs are bound to put the defendants in the same position financially as if the purchaser had paid the defendants on that day the amount due in respect of the goods delivered. The amount due in respect of the goods delivered is the amonnt which a purchaser paying on the fourteenth day would be bound to pay in accordance with his contract which must be taken to embody generally recognized commercial usages. The purchaser paying on that day would be entitled to deduct the appropriate discount for cash from the amount shown to be due by the invoice. That is the "amount due," payment of which on the fourteenth day the plaintiffs have guranteed. It is always open to the guarantors to indemnify the creditor immediately upon the happening of the default, because he is entitled to protect himself against increasing liability. But, having indemnified the creditor, he becomes at once entitled to stand in the creditor's shoes as to all securities and as to all remedies for recovery of the debt. As to all sales, therefore, in respect of which the plaintiffs under their guarantee paid the defendants the amount due, the right of obtaining payment from the creditor passed to the plaintiffs. And if the latter did not obtain payment until the time for cash discount had passed, and then received from the creditor the full amount of the invoice price, they were entitled to retain the full amount, although they were thereby getting $2\frac{1}{2}$ per cent. more than they had paid over to the defendants. The contention of defendants' counsel that, under the circumstances last stated, the plaintiffs as agents were bound to account to their principals for the money they actually received as the proceeds of sales, entirely loses sight of the plaintiffs' rights as guarantors, which can be given effect to only by construing the contract in the way I have mentioned. In the result, the agreement, taken as a whole, must therefore, in my opinion, be interpreted as entitling the plaintiffs to their full commission of $7\frac{1}{2}$ per cent. on a sum which represents in each month the total amount of sales at the invoice price, less in the case of each sale the discount for cash which the customer was entitled to be allowed on or before the fourteenth day. In

other words, it is the principal and not the *del credere* agent who must be at the loss of the cash discount. Upon that view of their rights the plaintiffs have acted since October 1908. They were therefore justified in declining to pay over to the defendants the moneys representing discounts for cash which the defendants are seeking to recover by the counterclaim. I am of opinion, therefore, that on that issue the defendants must fail.

I propose now to deal with that portion of the plaintiffs' claim the inquiry into which would involve the re-opening of the accounts between the parties, accounts which have been regularly rendered by the plaintiffs, accepted by the defendants and considered by both parties as made out on a proper basis for the last 17 years. I agree that there is nothing in the circumstances of the case to indicate that the plaintiffs acted under a mistake of that kind which a Court of Equity would treat as a ground of interference. I shall, however, assume that in rendering their accounts as they did, the plaintiffs acted under a mistake which under some circumstances equity would relieve against and that they debited themselves with moneys which the agreement entitled them to treat as credits. The defendants are nevertheless in my opinion entitled to resist the claim for return of the moneys on the ground that the whole account must now be treated as a settled account which, under the circumstances proved, the Court will not allow to be re-opened. The plaintiff company's rights were embodied in a written agreement always accessible to them. The accounts of the agency were kept as directed by the plaintiffs' manager. Month after month the plaintiff company sent in their accounts and retained their commission on the view of the agreement which they are now contending is not its meaning. The accounts have been approved of and accepted by both parties for a period of many years during which the defendants conducted their business, distributed their profits, and made up their balance sheets in the belief naturally induced by the plaintiffs' conduct that the plaintiffs' remuneration was being settled month by month in accordance with the agreement. Under these circumstances very strong grounds indeed would be needed to justify the Court in permitting the plaintiffs to undo these closed transactions, and as a result impose upon the defendants this new and

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unexpected liability. There are some observations of Lord Justice *Mellish* in *Rogers* v. *Ingham* (1), which though used with reference to a state of facts somewhat different from those now under consideration, lay down as it seems to me a very sound principle:—"There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; and I think it is equally clear that, as a general rule, the Court of Equity did not, in such cases, interfere with the Courts of Law. Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might, years afterwards, be recovered, because perhaps some Court of Justice, upon a similar contract, gave to it a different construction from that which the parties had put on it. I think there is no doubt that the rule of law is in itself an equitable and just rule which is not interfered with by Courts of Equity; but, on the other hand, I think that, no doubt, as was said by Lord Justice *Turner* in *Stone* v. *Godfrey* (2): 'This Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact'; that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it."

So far from there being anything in this case which would make it inequitable for the defendants to retain the money now claimed, the equity of the matter, using the expression in its broad sense, is all the other way—and certainly on any consideration of common fairness and justice this attempt of the plaintiffs to re-open these transactions, closed and done with so many years ago, must fail. In my opinion the defence of settled account is a complete answer to that part of the plaintiffs' claim which relates to sales before October 1908, and as to that judgment must be entered for the defendants. With respect to sales after that date the plaintiffs are entitled to the declaration they claim as to their rights under the agreement. On the defendants' counterclaim they are therefore entitled to succeed. As to the

(1) 3 Ch. D., 351, at p. 357. (2) 5 D.M. & G., 90.

portion of the claim covered by the settled account, judgment must be entered for the defendants. I agree, therefore, that with these variations the judgment of the Supreme Court should be affirmed, I concur in the form of order suggested by my learned brother the Chief Justice, and in his judgment as to costs.

Judgment varied.

Solicitors, for appellant, *Flower & Hart.*
Solicitors, for respondents, *Foxton, Hobbs & Macnish.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

RICHARD ARMSTRONG CROUCH . . PETITIONER;

AND

ALFRED THOMAS OZANNE . . . . RESPONDENT.

CORIO ELECTION PETITION.

COURT OF DISPUTED RETURNS.

Parliamentary election—Liability of candidate for acts of his agent—Canvassing at entrance to polling booth—Scrutineers—Avoiding election—Evidence that result of election was affected—Commonwealth Electoral Act 1902-1909 (*No.* 19 *of* 1902—*No.* 19 *of* 1909), *secs.* 182A, 198A.

Where a candidate at an election is sought to be made responsible for illegal acts done during the election by his agent, it must be proved that the candidate either countenanced or directed the doing of those acts.

Semble, that canvassing for votes on or at the top of the steps leading to a polling booth, is within the prohibition in sec. 182A of the *Commonwealth Electoral Act* 1902-1909 against canvassing for votes at the entrance to a polling booth, but canvassing between the gate of the land on which the polling booth is and the building itself is not within that prohibition.