[HIGH COURT OF AUSTRALIA.]

R. W. CAMERON AND COMPANY . . . APPELLANT;
PLAINTIFF,

AND

L. SLUTZKIN PROPRIETARY LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 13, 14, 19; *May* 24.

Knox C.J., Isaacs and Rich JJ.

Contract—Sale of goods—Sale by sample—Sale by description—Words not having common trade meaning—Evidence to explain meaning.

By a contract in writing the appellant agreed to sell, and the respondent to buy, goods described in the writing by a term which was until then unknown to the respondent. That term in its ordinary sense was not descriptive of any particular goods or quality of goods, and had no common trade meaning, but to persons who had previously bought goods from the appellant by that description would have given an accurate description of the quality of the goods to which it was applied. Certain goods which were of the quality described by the term were tendered to the respondent, who rejected them as not being of the quality contracted for. An action having been brought by the appellant for breach of the contract in not accepting the goods tendered,

Held, that evidence was properly admitted to show that, before the contract was made, a sample was submitted by the appellant to the respondent as representing the goods intended to be described by the term; and, therefore, that, as the goods tendered were inferior in quality to the sample, judgment was properly given for the respondent.

Decision of the Supreme Court of Victoria (*Irvine* C.J.) affirmed.

APPEALS from the Supreme Court of Victoria.

Two actions were brought in the Supreme Court by R. W. Cameron & Co. against L. Slutzkin Proprietary Ltd., upon two contracts in

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writing for the sale by the plaintiff to the defendant of, in the one case, 200 pieces, and, in the other case, 800 pieces, of " matchless white voile " ; the plaintiff alleging in each case that the defendant refused to accept the draft drawn by the plaintiff in pursuance of the contract or, alternatively, refused to accept or pay for the goods. By its defence (par. 7b) the defendant alleged (*inter alia*) that prior to and at the time of making the contract the plaintiff by its agent produced to the defendant's agent a piece of voile and represented it to be a piece of " matchless 2475 white voile " ; that the defendant believed such representation and was induced by it to enter into the contract ; that such representation was not true, and therefore the defendant was not bound by the contract. The defendant also alleged in each case that the contract was void on the ground of mutual mistake. The goods were in each case to be sent from America to Melbourne by parcels post, and the defendant in one action counterclaimed for the postal and customs charges, amounting to £156 19s. 6d., that it was compelled to pay in order to obtain inspection of the goods which were sent. The defendant also counterclaimed in each action for the difference between the contract price and the value of the goods which were sent.

The other material facts are stated in the judgments hereunder.

The actions were heard by *Irvine* C.J., who, upon the claim in each case, gave judgment for the defendant, and upon the counterclaim in one case gave judgment for the defendant for £156 19s. 6d. and in the other for the plaintiff.

From those decisions the plaintiff now appealed to the High Court, and the appeals were heard together.

H. I. Cohen K.C. and *Lowe*, for the appellant. This was a sale by description and not a sale by sample or by sample and description. The words used in the contract as a description of the goods sold have an accepted trade meaning. The showing of the sample was an innocent misrepresentation inducing the contract ; and that is not an answer to an action on the contract (*W. & J. Sharp* v. *Thomson* (1) ; *Meyer* v. *Everth* (2)). The parties were content to contract in terms which have only one meaning, and, that being so, the

(1) (1915) 20 C.L.R., 137, at p. 143.

(2) (1814) 4 Camp., 22.

contract cannot be avoided because the respondent made a mistake as to the meaning, for the mistake does not go to the whole substance of the contract. (See *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (1); *Mackay* v. *Dick* (2); *Hynes* v. *Byrne* (3); *Riddiford* v. *Warren* (4); *Picturesque Atlas Publishing Co.* v. *Phillipson* (5); *In re Terry and White's Contract* (6); *Lecky* v. *Walter* (7); *Goods Act* 1915 (Vict.), sec. 4 (2).)

[RICH J. referred to *Derry* v. *Peek* (8); *T. & J. Harrison* v. *Knowles & Foster* (9); *Whurr* v. *Devenish* (10).]

As to the judgment on the counterclaim for £156 19s. 6d., it cannot be sustained if it is held that there was no contract. It was a voluntary payment, and cannot be said to have been made under compulsion (*In re National Motor Mail-Coach Co.* (11)); nor can it be said to have been a payment made at the appellant's request.

Latham K.C. (with him *Ham*), for the respondent. Either the contract was a good contract for the sale of voile of the same quality as the sample which was shown, and that contract has not been performed; or there was a mutual mistake as to the substance of the contract, the mistake of both parties being the same, namely, that the sample shown was "matchless 2475"; or there was at least a unilateral mistake as to the subject matter of the contract which was induced by the appellant; or there was an innocent misrepresentation in a material particular which induced the contract. In none of those alternatives was the appellant entitled to succeed in his action. *Irvine* C.J. found that the words "matchless 2475" had not a common trade meaning, and there was evidence to support the finding. If there was a contract, the sum of £156 19s. 6d. for which judgment was given for the respondent on the counterclaim was recoverable either as damages for breach of the contract or as part of an order for restoring the parties to their original position (see *Lindsay Petroleum Co.* v. *Hurd* (12)). If there was no contract,

(1) (1867) L.R. 2 Q.B., 580, at p. 587.
(2) (1881) 6 App. Cas., 251, at p. 265.
(3) (1899) 9 Q.L.J., 154.
(4) (1901) 20 N.Z.L.R., 572.
(5) (1890) 16 V.L.R., 675; 12 A.L.T., 103.
(6) (1886) 32 Ch. D., 14, at p. 22.
(7) (1914) 1 I.R., 378, at p. 386.
(8) (1889) 14 App. Cas., 337.
(9) (1918) 1 K.B., 608, at p. 609.
(10) (1904) 20 T.L.R., 385.
(11) (1908) 2 Ch., 515, at p. 525.
(12) (1874) L.R. 5 P.C., 221.

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that sum was recoverable as a payment made at the request of the appellant which is to be implied from the circumstances of the case. (See *Leigh* v. *Dickeson* (1).)

Cur. adv. vult.

May 24.

The following written judgments were delivered :—

KNOX C.J. This was an appeal from the judgments of *Irvine* C.J. in two actions brought by the appellant against the respondent to recover damages for breach of a contract for the sale of certain goods. The contract in the first case, which was in writing, is, so far as material, in the following words, namely :—" Melbourne, 20th July 1920.—Messrs. L. Slutzkin Pty. Ltd., Melbourne, buy and R. W. Cameron & Co., Melbourne, sell the following goods at the prices and on the terms set out hereunder, and subject in all respects to the general conditions of sale on the back hereof, unless expressly negatived or modified by any special conditions stated below. 200 pieces Matchless 2475 39/40 White Voile, at 17¾d. c.i.f. Melbourne, less allowance for ocean freight, figured in quotation plus postage for buyers' a/c." The contract in the second case was substantially in the same terms, but was for 800 pieces. The respondent refused to accept the drafts and rejected the goods tendered to it.

The learned Chief Justice of Victoria found on the evidence: (1) That on 14th July 1920 the appellant's sales manager exhibited to and left with the respondent's manager a specimen of white voile (exhibit 1) to which was attached a label or ticket bearing the words " matchless No. 2475 goods white voile width 39/40 weight— approximately yards to piece 35/40 or 60/60 " ; (2) that the specimen so exhibited was of much superior grade to the quality of voile tendered by the appellant to the respondent in performance of the contract ; (3) that the bulk tendered in performance of the contract was the same in description and quality as that previously supplied by appellant to sundry purchasers as matchless No. 2475 white voile ; (4) that the words " matchless No. 2475 39/40 white voile " are not a term of well known significance throughout the softgoods trade in Melbourne, and are words only conveying to those who had bought

(1) (1884) 15 Q.B.D., 60, at p. 63.

from canvassers voile under this distinguishing number any accurate description of the character or quality of the goods so described; (5) that "matchless" was generally known as designating stuffs sent to Australia by the appellant; (6) that respondent's managers must have been aware that matchless 2475 was one of Cameron's brands of voile, the proper meaning of which could be determinable in the usual way by trade evidence; (7) that the specimen (exhibit No. 1) was shown by appellant's sales manager to respondent's managers as being a sample of what appellant was selling to respondent; (8) that the representatives of both the appellant and the respondent believed that the specimen of voile so shown was matchless 2475, whereas in fact it was not; (9) that the respondent's managers did not know matchless 2475 and would not have purchased it at the price mentioned in the contract, if at all, if they had not been induced to believe it to be of the quality of exhibit 1, which was produced for the very purpose of inducing this belief; (10) that the misrepresentation so made by appellant's representative was not fraudulent. On these findings of fact *Irvine* C.J. entered judgment for the respondent on the claim in each action; for the respondent for £156 19s. 6d. on the counterclaim in the first action and for the appellant on the counterclaim in the second action, on the ground that the respondent was entitled to succeed on the defence of misrepresentation raised by par. 7 (b) of the statement of defence. The amount of £156 19s. 6d. represented customs duty and other charges paid by respondent in order to obtain inspection of the goods. The counterclaim for damages representing the difference between the contract price and the value of the goods tendered was admitted by respondent's counsel to be maintainable only if the respondent were compelled to take the goods.

The grounds of appeal are (1) that the judgment was wrong in law; (2) that the findings of fact were against evidence; (3) that the fact that the respondent was induced to enter into the contract by the innocent misrepresentation of the appellant was not a good defence; (4) that evidence was wrongly admitted.

Dealing first with the second ground of appeal, in my opinion there was ample evidence to support all the findings of fact. Taking them in their order as set out above, the first, seventh, eighth and ninth

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depended to a great extent, if not wholly, on the credibility of witnesses called at the trial, the oral evidence of the respondent's managers being accepted. There was no real dispute as to the second or third. As to the fourth there was evidence both ways, and there was no reason why that led by the appellant should have been preferred. As to the fifth and sixth there was substantially no dispute. The tenth was common ground. This being so, I accept the findings of fact as correct, assuming the evidence in support of them was rightly admitted.

The only ground of objection to admissibility of evidence which was pressed before us was that the learned Chief Justice was in error in admitting evidence of the production to the respondent on 14th July 1920 of the specimen (exhibit 1) and of the conversation between the representatives of the appellant and the respondent on that day. In my opinion this evidence was admissible for the purpose of identifying the subject matter of the contract sued on. The words " matchless No. 2475 39/40 white voile " in their ordinary sense convey no definite meaning as a description of goods unless explained by evidence. It was clearly open to either party to prove, if it could, that the words had a common trade meaning, and what that meaning was. The appellant endeavoured to prove this and failed—see finding No. 4. If the words used to describe the subject matter of a contract have no common trade meaning, and taken in their ordinary meaning are not significant or descriptive of any particular goods or quality of goods, the only way in which the subject of the contract can be ascertained is by inquiring whether the parties to the contract used them in a conventional sense, and, if so, what that sense was. In the present case, it having been found that the words in question had no common trade meaning, and it being apparent that apart from a trade or conventional meaning they are not significant of any particular goods or quality of goods, it became necessary, if any effect were to be given to the contract, to determine from the relevant acts and statements of the parties to the contract what meaning they attached to them. The only alternative is to treat the contract as void for uncertainty. The evidence admitted was evidence of surrounding circumstances contemporaneous with the making of the contract sued on. That such

evidence is admissible when necessary to identify the subject matter of a contract is clear from many decisions—e.g., *Ogilvie* v. *Foljambe* (1); *Plant* v. *Bourne* (2). And the rule extends to evidence to show the meaning attached by the parties to particular words, phrases or symbols appearing in the document (see *Bank of New Zealand* v. *Simpson* (3); *Bruner* v. *Moore* (4); *Sarl* v. *Bourdillon* (5); *Cameron* v. *Wiggins* (6)). The evidence accepted by the learned Chief Justice, on which he based the findings of fact above referred to as Nos. 7, 8 and 9, in my opinion establishes that the subject matter of the contract was voile corresponding to the specimen exhibited to and left with the respondent on 14th July 1920.

It follows that the respondent was not bound to accept the voile of inferior grade or quality tendered to it in performance of the contract, and that judgment was properly entered for the respondent on the claim in each action.

The only remaining question is whether the respondent is entitled to retain the judgment for £156 19s. 6d. entered fo .t on the counterclaim in the first action. Mr. *Cohen* for the a pellants did not, and in my opinion could not successfully, argue that if the true meaning of the contract was that which I have placed on it, the respondent was not entitled to hold the judgment entered for it on the counterclaim.

In my opinion the appeal should be dismissed.

ISAACS J. The appeal concerns a written agreement of sale by appellant to respondent of goods described in the agreement as "200 pieces Matchless 2475 39/40 White Voile." The contentions raised various questions, those material now being (1) whether there was any binding contract at all; (2) if there was a contract, was it for "matchless 2475" as usually sold by the appellants, or so as to accord with a certain piece of voile called, "exhibit 1," produced to the buyer by the seller as a specimen of "matchless 2475"; if a contract existed was the respondent ustified in re ecting the

(1) (1817) 3 Mer., 53.
(2) (1897) 2 Ch., 281.
(3) (1900) A.C., 182, at pp. 187-188.
(4) (1904) 1 Ch., 305, at p. 310.
(5) (1856) 1 C.B. (N.S.), 188, at p. 196.
(6) (1901) 1 K.B., 1.

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goods tendered on the ground of misrepresentation by means of exhibit 1 ; (4) to what damages, if any, was the respondent entitled.

The facts were found by the learned Chief Justice of Victoria, and the appellant has failed to disturb the findings. The judgment states :—" I find on the whole of the evidence in this case that the words ' matchless 2475 39/40 white voile ' are not a term of well-known significance throughout the softgoods trade in Melbourne, and are words only conveying to those who had bought from canvassers voile under this distinguishing number any accurate description of the character or quality of the goods so described ; but I find that ' matchless ' was generally known as designating stuffs sent to Australia by the *plaintiffs* ; that it was known to the trade generally, and to the *defendant* in particular, that Cameron & Co. were in the habit, and had been for many years, of putting upon the Australian market various grades of voile under distinguishing numbers, and that the defendant's managers must have been quite aware that matchless 2475, though not bought by them previously, was one of Cameron's brands of voile." I do not include observations which are statements of law or construction of the document. Another passage runs thus : " The representatives of each believed that the specimen of voile produced was ' matchless 2475 ' whereas in fact it was not." His Honor also says :—" The piece of voile produced by Robinson " (the seller's representative) " was admittedly shown as a specimen of ' matchless 2475.' That sample, being, as I have found, identical with exhibit 1, was not at all like ' matchless 2475,' but of a substantially better quality. The representatives of the defendant did not know ' matchless 2475,' and have satisfied me that they would not have purchased it at the price in the contract, if at all, if they had not been induced to believe it to be of the quality of exhibit 1, which was produced for the very purpose of inducing this belief. As soon as they had an opportunity of examining the bulk tendered, they repudiated the sale, alleging this as the ground of repudiation."

The word " matchless," being known to be the appellant's trade mark, presents no difficulty. But, as found, the figures " 2475 " were not a term of well-known significance in the trade, and so it

cannot be presumed prima facie that the respondent attached any definite meaning to them. Again, the finding that in fact the respondent's representatives did not know " matchless 2475 " leaves it necessary to prove what that term meant. It being, however, found as a fact that the appellant had been in the habit of putting particular grades on the Australian market under distinguishing numbers, it is said for the appellant that the expression " matchless 2475 " in the contract must be read as meaning the particular grade that in fact was so put on the market, and that no extrinsic evidence was admissible to alter that construction. The contention was that the well-known doctrine exemplified by *W. & J. Sharp* v. *Thomson* (1) applied, and that the specimen, exhibit 1, could not be looked at for the purpose of interpretation, however it might stand as to misrepresentation. This leads to the necessity of stating the relevant law as to contract and as to extrinsic evidence, where there is a written contract.

The expression " matchless 2475 " not being either the popular name of an article or the general trade name of an article, the matter does not stand in the same position as *Tye* v. *Fynmore* (2), where, said Lord *Ellenborough*, " the question is, whether it was *in the understanding of the trade* ' fair merchantable sassafras wood.' " And so in *Gardiner* v. *Gray* (3) the same learned Judge says of " waste silk " that the intention of both parties must be taken to be that it shall be saleable *in the market under the denomination* mentioned in the contract between them. But the case of *Gardiner* v. *Gray* (4) contains one most important observation by the Lord Chief Justice. He says :—" This was not a sale by sample. *The sample was not produced as a warranty that the bulk corresponded with it*, but to enable the purchaser to form a reasonable judgment of the commodity."

In the present case, the facts as found not only negative a popular sense and a general trade or " market " sense of the expression " matchless 2475," but they negative actual knowledge on the part of the respondent of the nature and quality of the commodity it represented. Adding to those circumstances the fact that the

(1) (1915) 20 C.L.R., 137.
(2) (1813) 3 Camp., 462.
(3) (1815) 4 Camp., 144, at 145.
(4) (1815) 4 Camp., at pp. 144-145.

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specimen produced was, as deposed to by Robinson, the appellant's representative, of the quality sold by them as 2334, and that " 2334 is a superior quality to number 2475 voile," it is evident that it represented in their business a distinct commodity with a distinct appellation. Then, says *Irvine* C.J., the specimen was produced for the very purpose of inducing the belief in the respondent's mind that it was the commodity sold as " matchless 2475," and that belief was thereby created. That raises the very distinction adverted to by Lord *Ellenborough* in *Gardiner* v. *Gray* (1). The situation then is that the respondent thought it was, under the name " matchless 2475," buying a commodity represented by the specimen, which was shown for the purpose of inducing that belief. If, as a first position, the appellant in fact believed the same, there was a consensus, and therefore a contract for the commodity that conveniently had been described as " matchless 2475." If, as a second position, the appellant, notwithstanding what is accepted as an innocent misrepresentation as to the specimen corresponding with what was generally sold as " matchless 2475," believed it was selling, not the commodity represented by the specimen, but only its usual 2475, there would be no contract, " unless," as *Blackburn* J. says in *Smith* v. *Hughes* (2), " the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other." And the same learned Judge says " there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, *not induced by the act of the vendor*."

So much for the substantive law. Now, as to the evidentiary law. Is it permissible to the respondent in the circumstances to prove and rely on the production of the specimen ? I have no hesitation in answering that question affirmatively. I shall content myself with references to the very highest authority. In *Bank of New Zealand* v. *Simpson* (3) Lord *Davey* for the Judicial Committee stated two propositions (*inter alia*) namely :—(1) " Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about " (4). Then he quotes with approval *Taylor on*

(1) (1815) 4 Camp., 144.
(2) (1871) L.R. 6 Q.B., 597, at p. 607.
(3) (1900) A.C., 182.
(4) (1900) A.C., at p. 187.

Evidence, 8th ed., vol. II., sec. 1194, and cites examples. (2) "Of course, if the words in question have a *fixed meaning* not susceptible of explanation, parol evidence is not admissible to show that the parties meant something different from what they have said" (1). The second proposition is equivalent to what Lord *Cranworth* said in *Waterpark* v. *Fennell* (2): "Where, indeed, words have a clear definite meaning, no evidence can be admitted to explain or control them." In *Gordon-Cumming* v. *Houldsworth* (3) the facts were remarkably apposite to the present case. Briefly, by a contract in writing there was sold what was described as "the estate of Dallas," and the contest between the parties was whether that should be construed as "the estate of Dallas" as it actually was, or as it was represented to be by a plan produced during the negotiations. It was contended for the respondent that the written contract could not be varied by reference to the plan (4). But the whole House rejected the contention. Lord *Loreburn* L.C. said (5):—"In my view these negotiations are crucial, and all that passed, either orally or in writing, is admissible in evidence to prove what was in fact the subject of sale; not to alter the contract, but to identify its subject. . . . All through, only one subject was the subject of negotiation, namely, the Dallas estate. Accordingly, anything which will identify that estate is equally important, whether it occurred at the commencement or at any other stage of the negotiations." At p. 542 the Lord Chancellor says: "In the dealings between these parties I think the sale was on the plan." Lord *Halsbury* says (6): "I entirely agree with my noble and learned friend" (Lord *Kinnear*) "that the meaning of a descriptive name in a particular contract cannot be determined by a fixed rule of law without regard to the facts of the case." Lord *Kinnear* says (7):—"This appears to me to be a question as to the identification of the subject matter of an admitted contract, or in other words it is a question of fact to be determined by evidence. But I have found it necessary to consider in the first place the respondent's argument that any appeal to extraneous evidence for the purpose of identification is excluded by

(1) (1900) A.C., at p. 189.
(2) (1859) 7 H.L.C., 650, at p. 680.
(3) (1910) A.C., 537.
(4) (1910) A.C., at p. 539.
(5) (1910) A.C., at p. 541.
(6) (1910) A.C., at p. 544.
(7) (1910) A.C., at p. 545.

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the legal effect of the contract itself." He first proceeds to show that the estate in such a case cannot be defined without some extrinsic evidence. Then he proceeds (1): "It is manifest, therefore, that if a question arises as to the description to be inserted in a disposition, the first thing to be settled is what is the exact subject sold; and that is to be determined, not by the existing titles, but by the *contract of sale*, interpreted, as every document whatsoever must, more or less, be interpreted, by reference to the surrounding circumstances." Lord *Kinnear* states his agreement with the Lord Chancellor, and then adds a valuable passage in these words (2):—"I concede that the letters specified in the summons make a complete and final contract, and it follows that in accordance with the well-known rule of law the terms therein expressed cannot be contradicted, altered, or added to by oral evidence. But it is just as well settled law that evidence may be given not to modify but to apply the contract by identifying any person or thing mentioned in it which requires identification; and I see no difference in this respect between the admissibility of a map or plan of the estate and that of any other item of evidence, so long as the plan is not used for the purpose of importing additional or different terms, but only to prove the external facts to which the contract relates." That passage, I may observe, consolidates the principle which runs through the cases, variously exhibiting terms of fixed and definite meaning, either popular or mercantile, and excluding the variation by sample, or terms not fixed or definite and susceptible of interpretation by the circumstances under which a sample is produced. The present case is of the latter description. Lord *Shaw* condenses the matter by saying (3): "I hold it to be fairly clear that the seller by himself and his agent meant to sell by the plan referred to in the correspondence and used on the ground." He deals with the question of consensus, adverts to the concession that there was consensus, and says (4): "This being so, the question of the extent and boundaries of the subject sold falls to be ascertained from a perusal of the correspondence and the evidence and is a question of fact." The

(1) (1910) A.C., at p. 547.
(2) (1910) A.C., at p. 548.
(3) (1910) A.C., at p. 557.
(4) (1910) A.C., at p. 558.

last case I shall quote is *Charrington & Co.* v. *Wooder* (1). Viscount *Haldane* L.C. said (2) :—" If the language of a written contract has a *definite and unambiguous meaning*, parol evidence is not admissible to show that the parties meant something different from what they have said. But if the description of the subject matter is *susceptible of more than one interpretation*, evidence is admissible to show what were the facts to which the contract relates." And the learned Viscount adds : " If there are circumstances which the parties must be taken to have had in view when entering into the contract, it is necessary that the Court which construes the contract should have these circumstances before it." Lord *Kinnear* (3) in effect reaffirms the principle he had before enunciated. Lord *Dunedin* (4) reaffirms the principle of *Bank of New Zealand* v. *Simpson* (5), and so does Lord *Atkinson* (6).

On these final statements of the law it appears clear to me, on the ascertained facts, that the specimen exhibit 1 must be looked at in order to interpret the expression " matchless 2475 " as intended by the parties to the contract. That being so, whether the first or the second position of the appellant as above predicated be the true one, I am bound to hold the contract to be, either actually, by reason of the first position, or by preclusion, by force of the doctrine of *Smith* v. *Hughes* (7), a contract for sale of voile as represented by the specimen now known as exhibit 1.

Thus the first and second questions stated at the beginning of this judgment are answered, and as the goods tendered admittedly did not correspond with that contract the respondent was justified in rejecting them.

The third question it is unnecessary to consider.

The fourth is equally at rest by reason of the agreement of both parties to regard the sum awarded by the learned trial Judge as the correct measure if any damages were recoverable.

The appeal therefore should be dismissed with costs.

RICH J. The essential points in this case may be briefly stated. The appellant contended that the respondent, being bound by the

(1) (1914) A.C., 71.
(2) (1914) A.C., at p. 77.
(3) (1914) A.C., at p. 80.
(4) (1914) A.C., at p. 82.
(5) (1900) A.C., 182.
(6) (1914) A.C., at p. 93.
(7) (1871) L.R. 6 Q.B., 597.

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actual words of the contract, was compellable to accept "Matchless 2475 White Voile" as that commodity was manufactured by the appellant. In effect, the appellant said there was no other commodity answering that description, and therefore the contract of sale so describing the goods was satisfied by the goods actually delivered. Alternatively, the appellant contended that, if that were not so, there was no consensus, and, therefore, no contract. From the facts in evidence before the learned Chief Justice of Victoria and from his Honor's findings, it appears that the expression "matchless 2475 white voile" has no fixed commercial meaning in the sense that it is generally recognizable by that name in the trade, though it is known by that name to those members of the trade who happen to be customers of the appellant. The authorities are clear that in such a case evidence of the negotiations is admissible for the purpose of identifying the goods by showing the sense which the parties themselves attached to the name they used.

The specimen produced on this occasion seems to me the very best evidence on that point; and, as it is established that the goods delivered were inferior to that sample, it is plain that, if there was a contract for goods corresponding with that sample, the appeal must fail.

The appellant contends that it did not intend to sell goods corresponding with that sample. I think that the facts show that the intention was to sell goods corresponding with the sample, whatever misapprehension existed with reference to the correspondence between that sample and the goods actually manufactured by the appellant, but I also think that in any case the appellant led the respondent to believe that the goods it was selling as described in the written contract were goods corresponding with the sample.

In those circumstances it must be held, in my opinion, that there was a binding contract for voile as per specimen produced.

The result is the appellant fails, and the judgment on the action and counterclaim stands.

Appeal dismissed with costs.

Solicitors for the appellant, *Home & Wilkinson.*

Solicitors for the respondent, *Derham, Robertson & Derham.*

B. L.