H. C. OF A. 1924.

GALL v. MITCHELL.

Defendant to pay costs of suit to date of this judgment and of this appeal. Reserve further consideration of suit and further costs to Supreme Court.

Solicitor for the appellants, *W. C. Moodie*, Moree, by *Villeneuve-Smith & Dawes.*

Solicitor for the respondent, *C. L. Mackenzie*, Guyra, by *Biddulph & Salenger.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE METROPOLITAN KNITTING AND HOSIERY COMPANY LIMITED (IN LIQUIDATION) . . . . . DEFENDANT, } APPELLANT;

AND

THOMAS BURNLEY & SONS LIMITED . . PLAINTIFF, } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1924.

SYDNEY, *Aug.* 14, 15, 18; *Dec.* 1.

Isaacs A.C.J., Gavan Duffy and Starke JJ.

Contract—Sale of goods—Contract not in writing—Part performance—Payment—Direction to jury—Statute of Frauds (29 *Car. II. c.* 3), *sec.* 17—*Sale of Goods Act* 1923 (*N.S.W.*) (*No.* 1 *of* 1923), *sec.* 9.

Held, by *Gavan Duffy* and *Starke* JJ., that, where a plaintiff, suing upon a contract for the sale of goods which is within sec. 17 of the *Statute of Frauds*, seeks to establish acceptance of or payment for the goods so as to satisfy the section, he must prove that the goods were accepted or paid for in pursuance of the contract sued on; and, therefore, that, where the plaintiff sued upon two contracts for the sale of the same description of goods, one of which contracts was admitted and the other denied by the defendant, the jury were properly directed that in order to satisfy the statute

the plaintiff must show that the payment was made or the goods accepted under the contract sought to be enforced by him and denied by the defendant, and not under the contract admitted by the defendant.

Per Isaacs A.C.J. : Although the plaintiff must prove acceptance or payment under the contract sought to be enforced in this action, namely, the second, the direction to the jury was erroneous in directing them that if the defendant honestly thought there were not two contracts, but only the first, then it was open to the jury to say the defendant was really accepting and paying for goods under the first and not recognizing the second.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL to the High Court from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Thomas Burnley & Sons Ltd. against the Metropolitan Knitting and Hosiery Co. Ltd., in which the plaintiff, by the first count of the declaration, alleged (so far as is material) that " it was agreed by and between the plaintiff and the defendant that the plaintiff should sell to the defendant and the defendant should buy from the plaintiff 12,000 lb. of yarn of certain quality and specifications at a price and on certain terms and conditions as to shipment delivery insurance and otherwise then agreed upon between the plaintiff and the defendant and that the plaintiff should deliver the said yarn to the defendant and the defendant should accept the same and pay to the plaintiff the said price as agreed upon as aforesaid And it was a term and condition of the said agreement that the said yarn should be shipped in four equal monthly deliveries of 3,000 lb. each the first delivery being in January 1921 And subsequently by agreement between the plaintiff and the defendant the said term and condition as to delivery was altered And it was agreed that instead of making delivery as originally agreed the plaintiff should deliver the said yarn together with other yarn ordered by the defendant from the plaintiff in five monthly deliveries commencing about October 1920 And in accordance with the said agreement as varied as aforesaid the plaintiff delivered certain of the said yarn to the defendant who accepted the same and paid to the plaintiff the agreed price for the same . . . Yet the defendant after receiving certain of the said yarn refused to accept any further deliveries thereof or to pay

H. C. OF A. 1924.

METROPOLITAN KNITTING AND HOSIERY CO. LTD. (IN LIQUIDATION) v. THOMAS BURNLEY & SONS LTD.

for the same and repudiated the said agreement and refused to be any longer bound by it."

By the second count the plaintiff alleged (so far as is material) that "it was agreed by and between the plaintiff and the defendant that the plaintiff should sell to the defendant and the defendant should buy from the plaintiff 12,000 lb. of yarn of certain quality and specifications at a price and on certain terms and conditions as to shipment delivery insurance and otherwise then agreed upon between the plaintiff and the defendant and that the plaintiff should deliver the said yarn to the defendant and the defendant should accept the same and pay to the plaintiff the said price as agreed upon as aforesaid And it was a term and condition of the said agreement that the said yarn should be shipped in four equal monthly deliveries of 3,000 lb. each the first delivery being on completion of deliveries under another contract made between plaintiff and defendant and known as Order 532 And subsequently by agreement between the plaintiff and the defendant the said term and condition as to delivery was varied and it was agreed that instead of making delivery as originally agreed the plaintiff should deliver the said yarn together with other yarn ordered by the defendant from the plaintiff in five monthly deliveries commencing about October 1920 And in accordance with the said agreement as varied as aforesaid the plaintiff delivered certain of the said yarn to the defendant who accepted the same and paid to the plaintiff the agreed price for the same . . . Yet the defendant after receiving certain of the said yarn refused to accept any further deliveries thereof or to pay for the same and repudiated the said agreement and refused to be any longer bound by it."

The plaintiff claimed £3,000.

The defences raised were, in substance, a denial of the existence of the contract sued on in the first count, it being admitted that the contract sued on in the second count had been made, and an allegation that if there were two contracts the *Statute of Frauds* had not been complied with.

The action was tried before *Ferguson* J. and a jury. The jury having found a general verdict for the defendant, the Full Court on motion by the plaintiff set aside the verdict and directed that a new trial be had.

The other material facts are stated in the judgments hereunder.

From the decision of the Full Court the defendant now, by leave, appealed to the High Court.

Alec Thomson K.C. (with him *Bowie Wilson*), for the appellant. There being a general finding by the jury for the appellant, it may be taken that there is a finding for the appellant on all the issues, and it is sufficient for the appellant to succeed to establish that the jury might properly have found for the appellant on any issue. On the evidence the jury were entitled to find that there was one contract only. In the conflict of evidence this Court should not assume a function which is left by law to the jury (*Gray* v. *Dalgety & Co.* (1)). The direction to the jury on the *Statute of Frauds* was correct. It was necessary for the respondent to show an unqualified acceptance which is referable only to the contract upon which it relies. "It must appear that the acts relied on as acts of part performance were done for the purpose and in the course of performing that agreement and with no other view or design than to perform it" (*Cooney* v. *Burns* (2)).

[ISAACS A.C.J. referred to *Abbott & Co.* v. *Wolsey* (3).]

Holman K.C. (with him *Mason*), for the respondent. The evidence for the respondent is supported by documents which cannot be questioned, and the jury were not entitled to find that there was one contract only (*Hill* v. *Ziymack* (4)). The question of the *Statute of Frauds* only arises if there were two contracts, and, if there were two, the appellant must have known that the deliveries of goods were under both contracts. Any mistake of the appellant as to which contract the delivery was referable to was not conduced to by the respondent. The direction was wrong as to the *Statute of Frauds*. It was not necessary for the respondent to show that the acceptance was attributed by the appellant to the disputed contract, and the belief of the appellant was immaterial.

Alec Thomson K.C., in reply.

Cur. adv. vult.

(1) (1914) 19 C.L.R. 356, at p. 366.
(2) (1922) 30 C.L.R. 216, at p. 222.
(3) (1895) 2 Q.B. 97.
(4) (1906) 3 C.L.R. 726.

H. C. OF A. 1924.

METROPOLITAN KNITTING AND HOSIERY CO. LTD. (IN LIQUIDATION) v. THOMAS BURNLEY & SONS LTD.

Dec. 1.

The following written judgments were delivered :—

ISAACS A.C.J. This was an action, in which the respondent was the plaintiff and the appellant was the defendant, to recover damages for breach of two contracts to purchase goods. The action was tried before *Ferguson* J. and a jury. A general verdict was returned for the defendant. On an application for a new trial the Full Court, by a majority, ordered a new trial on the ground that upon the evidence no jury could, as reasonable men, arrive at a verdict other than one for the plaintiff, or, alternatively, as to one of the issues, that there was misdirection. From this judgment the present appeal is brought.

The first thing is to state the issues. There were three questions before the jury. One was as to whether the present Company was the responsible party. That was settled at the trial and does not concern us. The two others that survive were (1) whether one of the contracts sued on ever existed and (2), if it did, whether there was an acceptance or part payment sufficient to meet the requirements of the *Statute of Frauds*.

The verdict being general, it cannot be predicated whether the jury found both these issues in favour of the defendant or only one, and, if only one, which one that was. If, therefore, the Full Court was right as to either, its judgment cannot be disturbed.

My opinion is that there was error in the direction regarding the issue as to acceptance and part-payment, and that consequently the Supreme Court was right in ordering a new trial. This makes it essential for me to state the position as to the first issue somewhat plainly in order to understand the second, and at the same time to refrain from unnecessary observations with respect to the evidence bearing upon either.

The declaration contained two counts, each setting out a special contract of sale of goods. The contracts as alleged were separate and distinct contracts, each being for 12,000 lb. of yarn of certain quality and specifications, price and conditions. The first contract as alleged provided for shipment in four equal monthly deliveries of 3,000 lb. each, the first delivery being in January 1921. The second contract as alleged provided also for shipment in four equal monthly deliveries of 3,000 lb. each, the first delivery being "on

completion" of the deliveries under another contract, known as "Order 532," that is the one alleged in the first count. It was further alleged in both counts that by subsequent agreement the deliveries under both contracts were to be varied so as to make the total quantity of yarn deliverable in five monthly deliveries commencing about October 1920. In each count it was alleged that part delivery, acceptance and payment had taken place, and that there had been a refusal to complete performance.

The defence, as it has emerged, is twofold: (1) a denial that there were two separate and distinct contracts and an allegation that there was only one, that one being the eventual and single outcome of all prior negotiations; (2) want of compliance with the *Statute of Frauds*. The evidence as to the first defence rested on common ground to some extent. There was no dispute that the negotiations commenced on 4th May 1920, and that on 21st May an order was given which became known as Order 590, being verified by the appellant's signature on 9th June. Order 590 is the subject of the second count, and in the verified document contains this statement:—"Delivery.—To be shipped in four equal monthly deliveries of 3,000 lb. each. First delivery on completion of O/532." On this the respondent greatly relies as documentary confirmation of two contracts. The covering letter, however, says: "this order is a completion of O/532"; and on this the appellant relies as showing there was only one contract. There was, in the interim a letter from the respondent's agents to the appellant, dated 6th May, referring to an order of 5th May, No. 532. This also is relied on by the respondent as evidence of two contracts, the Order No. 532 forming the basis of the first count of the declaration. The fact that the disputed contract was the first in point of date—if it existed at all—is of some importance, because the appellant on the second issue appropriates the whole of the goods delivered and accepted to the second and admitted contract, assuming the first disputed contract really existed. As to whether the jury found that Order 532 did or did not exist as a contract, separate and distinct from Order 590, we cannot tell and cannot definitely assume. They may have found there was only one contract; or they may have found there were two, but no acceptance or payment in respect of

H. C. OF A. 1924.

METROPOLITAN KNITTING AND HOSIERY CO. LTD. (IN LIQUIDATION) v. THOMAS BURNLEY & SONS LTD.

Isaacs A.C.J.

the first. It is only in the latter contingency the second issue arises at all. But in view of the verdict being general, and therefore cryptic as to details, we are forced to test it at all points.

With respect to the first issue then, if the jury had found only one contract, I think upon the whole, and after giving full weight to the able arguments on both sides, that the jury's finding could not be sustained on the facts when due regard is paid to the business communications that passed between the parties and the business records that were made. I am impressed with the fact that business operations would be unsafe if so many and such distinct communications likely to mislead unless given effect to were to be set aside on the slender verbal testimony offered. *Campbell* J. has left so little to be desired in the examination of the facts that I need not further elaborate them. All the Judges of the Supreme Court say it cannot be predicated how the jury found on that issue, and, as I have said, I agree with them.

And, therefore, there still remains a further consideration, namely, the issue as to the *Statute of Frauds*. As to that issue, the question turns in one alternative on the accuracy or inaccuracy of a direction given by the learned trial Judge. The question is whether there was by that direction introduced into the considerations which the jury had to take into account a vitiating element, which may have led to a wrong conclusion. If it may have led to a wrong conclusion the onus rests on the party supporting the verdict to establish that it did not have that effect (*Anthony* v. *Halstead* (1)). The question arises in this way. After the charge to the jury has been completed and they had retired, they were recalled, and further directed that " there is a subsequent invoice for goods under 532 and 590, and that was paid for, and it is a question for you whether, even in the absence of a written memorandum, that was not a part delivery of the goods under 532 and 590, a part payment for those goods." Then, at the request of the learned counsel for the defendant, the learned Judge again recalled the jury and said :—" There is one part of the case that perhaps I ought to make a little more clear to you ; I am still referring to that question of the part delivery and part payment. It is necessary for the plaintiff, in order to succeed, to satisfy you

(1) (1877) 37 L.T. 433.

that there was an acceptance by the defendant of goods *under the disputed order*, and I have pointed out to you that the plaintiff in its invoices described the goods it was delivering as being under Order 532. The object of proof of part delivery and part payment is to supply the want of a complete written memorandum of a contract. In order to do that it must be something that clearly satisfies you that when the defendant accepted those goods it was clearly recognizing the existence of *the order* which it now disputes. I ought to remind you of Mr. *Thomson's* contention on that point; and that is this, that you have to look at it from the defendant's point of view as well as the plaintiff's, that *if the defendant honestly thought that* 532 *and* 590 *were really two numbers which the plaintiff had put on the same contract*, that is to say, there was only one contract on which the plaintiff for some reason or other had put the two numbers, that is, No. 532 on the preliminary order and 590 on the completion of that order, *then* it is for you to say whether in accepting it *the defendant was really accepting for* goods and *paying for* goods *under* 532, whether it was *really* recognizing the existence of some order distinct from the Order 590. In the second invoice the goods are described as delivered under Orders 532-590. Mr. *Thomson's* contention is that while that might mean goods delivered under Orders 532 and 590, it might equally mean goods delivered under a contract represented by the numbers 532-590. It is for you to say, gentlemen, whether on the whole transaction you are satisfied that there was a delivery and an acceptance of goods *under the disputed order*, and, unless you find that, the defendant is entitled to a verdict." It is obvious from the whole of the circumstances that the new direction was likely to have a great effect in guiding the jury to their conclusion. The points to be observed in that portion of the charge are: The jury were told (1) that in determining that question the honest belief—that is, the mere unexpressed belief—of the defendant that there were not two contracts but only one was material in determining the issue in its favour; (2) that "acceptance" meant that the defendant was thereby "clearly recognizing the existence of *the order* which it now disputes." The two points were made to run very much together, and that

H. C. OF A. 1924.

METROPOLITAN KNITTING AND HOSIERY CO. LTD. (IN LIQUIDATION) v. THOMAS BURNLEY & SONS LTD.

Isaacs A.C.J.

was the manifest object of the additional direction, the word "then" makes that clear.

The New South Wales *Sale of Goods Act* 1923 was already passed at the date of the trial, but it was not operative till after the action was commenced and even after the trial. Nevertheless the prior law on the point now under consideration was, in my opinion, not altered by the Act, and so the question to be determined is of very considerable importance and particularly to the mercantile community. The State statute (sec. 9, sub-sec. 3) reproduces the English legislation. It says: "There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not." That exactly, as I think, codifies the law as it previously had to be gathered from the prevailing judicial sources. It eliminates entirely by its final words—just as the prior modern decisions had eliminated—all questions of whether the goods were accepted as a fulfilment of the contract. There can be no doubt that in decisions prior to the Act as well as by the terms of the statute "acceptance" is used in two senses according as it refers to formality or to performance. I am not concerned with defining its exact connotation in the first sense; the other is immaterial. No doubt, in the sense of formality it is something other than receipt, and it indicates the recognition of some contractual relation with respect to the sale and purchase of goods. The facts do not require any exhaustive definition. Closer definition is unnecessary in this case, except that it has never been held to require a recognition of the precise contract relied on.

The two essential points—and I limit my observations to these—are (a) "act," and (b) "recognizes a pre-existing contract of sale." The word "act," in my opinion, excludes secret qualifications and undisclosed error. Lord *Blackburn* in his work on *Contract of Sale* said, in 1845: "The question of acceptance or not is a question as to what was the *intention of the buyer as signified by his outward acts*." This was repeated in the second edition (pp. 16 and 17) and remains in the third edition (p. 18), with the addition, by the learned editors, of a statement that "the test to be applied is whether the

buyer has done any act in relation to the goods which recognizes a pre-existing contract of sale." Mr. *Benjamin* quoted this passage in his work (see 4th ed., at p. 135). In 1858, in the case of *Nicholson* v. *Bower* (1), it was so expressly stated by *Hill* J., and obviously so held by the other Judges. The gist of that case is that what the buyer *does* and not what he *thinks* prevails, even over an express finding of the motive of the act. In *Smith* v. *Hudson* (2) *Mellor* J. uses the expression " any act done by the buyer to bind the contract." In *Agnew on the Statute of Frauds* (1876), at p. 194, " outward acts " are taken as the test. In *Kibble* v. *Gough* (3) *Cotton* L.J. says: " The object of the statute is that, where there was no contract in writing, there must be *some overt act* to render the bargain binding."

There is no case, among the very numerous decisions on the *Statute of Frauds*, in which the silent thought of the buyer has been held to alter the effect of his manifest conduct in relation to the goods. The injustice of prejudicing a vendor who relies for the enforcement of a mercantile contract on the business conduct of his buyer, by an after-expressed belief of the buyer, is self-evident. Acceptance involves the consent not only of the buyer but also of the seller (per *Blackburn* J. in *Smith* v. *Hudson* (4)), and to permit this to have full intended effect so far as depriving the vendor is concerned, but not so far as committing the buyer is concerned, because of his own undisclosed error, however honest, would be most unfair, and is not, in my opinion, the law. One may fairly quote in this connection the words of *Jervis* C.J. in *Tomkinson* v. *Staight* (5). In that case, which I think is still an important case on this branch of the law, the Lord Chief Justice said of an objection raised :—" It is certainly somewhat strange that the question does not appear to have ever occurred before. That of itself would seem to afford a strong argument to show that the construction sought to be put upon the statute by the defendant is not the true construction."

The second point involved in the direction is that the recognition necessary is of *the* contract relied on. I have already intimated my

(1) (1858) 1 E. & E. 172, at p. 179.
(2) (1865) 6 B. & S. 431, at p. 450.
(3) (1878) 38 L.T. 204, at p. 206.
(4) (1865) 6 B. & S., at p. 449.
(5) (1856) 17 C.B. 697, at p. 705.

H. C. OF A. 1924.

METROPOLITAN KNITTING AND HOSIERY CO. LTD. (IN LIQUIDATION) v. THOMAS BURNLEY & SONS LTD.

Isaacs A.C.J.

opinion that this goes beyond the meaning of "acceptance" in the relevant sense. The statute, as observed in the 6th edition of *Benjamin on Sale* (p. 240), "speaks of a recognition, not of 'the,' but of 'a pre-existing contract of sale.'" That is in accord with the prior law. There are many cases, notably *Tomkinson* v. *Staight* (1), which show that the recognition required is not that of all the terms of the contract sought to be enforced. The case just mentioned laid down the principle that the only recognition needed was that the goods were accepted in the character of a vendee, that is, under some contract of sale, leaving the terms of the contract to be established *aliunde*. Coming to more recent times, *Brett* M.R. in *Page* v. *Morgan* (2) said: "All that is necessary is an acceptance which could not have been made except upon admission that there was *a contract*, and that the goods were sent to fulfil that contract." The expression "that contract" obviously refers to whatever turns out on proof to be definitely *the* contract which was admitted indefinitely by acceptance as *a* contract. It is in that sense that the Legislature has understood the words of the learned Judges there, including *Bowen* L.J. The reading of the prior law is confirmed by *Abbott & Co.* v. *Wolsey* (3). The Supreme Court of the United States takes the same view (*Hinchman* v. *Lincoln* (4)).

In the present case the seller delivered goods, approximately 11,000 lb. of yarn, with three invoices stating details of shade, quantities and prices, with amounts worked out in the usual manner. One invoice expressly stated "O/532" and the two others "O/532/590." The dates of the invoices were respectively 30th November 1920, 11th December and 21st December 1920. Obviously the acts of the appellant were referable to some contractual relation of buyer and seller, and were all consistent with the respondent's case of two contracts, with subsequently amalgamated deliveries. Let us, for present purposes, concede that it was open to the jury to find the fact either way. I do not hold that it was so open, because there is great force in the view expressed by the majority of the Supreme Court that the facts were reasonably

(1) (1856) 17 C.B. 697.
(2) (1885) 15 Q.B.D. 228, at p. 230.
(3) (1895) 2 Q.B., at p. 100, per Lord *Esher* M.R.
(4) (1887-88) 124 U.S. 38, at pp. 54-55.

susceptible of but one conclusion, namely, acceptance. No doubt, whether an acceptance has taken place is a question of fact for a jury to determine where the circumstances are in controversy. But facts uncontroverted may be of such a nature or potency that the Court must decide whether or not in law an acceptance has taken place to satisfy the statute. That is involved in the cases on this subject (see *Story on Sales*, par. 278, and *Hinchman* v. *Lincoln* (1)). There is not, in my opinion, any need to carry the matter so far in this instance, because, as I have said, the introduction of the honest belief of the buyer, that an (assumedly) existing contract did not exist, into the determining factors for the jury's consideration on the subject of acceptance vitiates their verdict for the appellant. The internal and unexpressed belief does not accompany the act so as to qualify and become part of it. Words explanatory of an act may have that effect — as in *Nicholson* v. *Bower* (2) and *Abbott & Co.* v. *Wolsey* (3). What the result of an act inconsistent with words might be in such a case, I have not now to consider. But a mental attitude opposed to the apparent meaning of acts affecting others cannot, in my opinion, alter or control them any more than secret instructions to an agent can countervail his apparent authority conferred by his principal's act.

If the appellant's view were sound—and my observations are intended to apply to both branches of the direction—no seller would be safe in relying on an apparently clear unqualified acceptance. The buyer might successfully plead honest belief that there was no contract but mere negotiations, and avoid an agreed price in favour of a lower price on a *quantum meruit*. Suppose two verbal contracts, both unsupported by writing, at different prices: can the buyer by mentally appropriating the goods to the second contract escape the first or vice versa, or perhaps escape both, according to circumstances? And, after all, if actual mental attitude is to be the determining factor, why is honesty necessary? A man's actual intention is his intention, whether that be honest or dishonest; and, though searching for honest belief may sometimes be a step in ascertaining his intention, it is not the ultimate quest. Unless a

(1) (1887-88) 124 U.S. 38.
(2) (1858) 1 E. & E. 172.
(3) (1895) 2 Q.B., at p. 103.

H. C. OF A. 1924.

METROPOLITAN KNITTING AND HOSIERY CO. LTD. (IN LIQUIDATION) v. THOMAS BURNLEY & SONS LTD.

Isaacs A.C.J.

man is to be bound by the natural or necessary result of his acts, as manifested to others whom they are to affect, I see no reason why the buyer's mental intention to appropriate goods to a particular bargain is to be limited to an honest intention. A buyer under a verbal contract, such as we are discussing, is at liberty to repudiate it, however dishonest he may be, if the statute be not complied with. If (dealing with this matter concretely) the appellant believed there were two contracts, what prevented it from mentally appropriating the goods received to the second contract only, or even to some other contract? Nothing, in my opinion, but the stringency of a person being bound by his acts and not sheltered by his secret thoughts. But, if that be so, there must be a new trial, and, therefore, in my opinion the appeal should be dismissed. I would add that, for the same reason, if the direction as to undisclosed belief be taken as applicable to the issue of one contract or two (and it must be applicable to either the first issue or the second), it is equally fatal to the appeal.

GAVAN DUFFY AND STARKE JJ. In this case the jury returned a general verdict, and we cannot say whether they thought that the parties had made two contracts or only one. We are of opinion that the jury would have been justified in finding that there was only one contract between the parties. So far as the oral evidence is concerned the parties do not agree in their recollection of the transaction, and the documentary evidence is not so clear that a jury viewing it reasonably could not have found the existence of only one contract. It has been dealt with very fully in the summing-up and by *Campbell* J. in the Full Court, and nothing is to be gained from a further discussion. But they may have found that there were two contracts, and in that case the alleged misdirection would become of importance. It is said that the direction was wrong in two respects: first, because the jury were told that the payment for, or acceptance of, goods necessary to dispense with a writing under the *Statute of Frauds*, must be a payment for or an acceptance of goods by reason of the contract sought to be enforced, and, secondly, because they were told that they were at liberty to consider the

secret intention of the persons paying or accepting in order to ascertain whether their payment or acceptance was in fact made by reason of such contract.

Sec. 17 of the *Statute of Frauds* is as follows: "And be it further enacted, that no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized." The section enacts that a sale of goods, &c., shall not be allowed to be good unless some one of the prescribed conditions is complied with; and one of these conditions is thus expressed, "except the buyer shall accept part of the goods so sold." The plain meaning of these words is that there must be an acceptance of part of the goods sold under the contract sought to be established. This is the fact to be ascertained, and the method of approaching the inquiry has been stated in various ways by Judges and text-writers. It has been said that, if a plaintiff shows that goods have been paid for or accepted under such circumstances as indicate the existence of a contract of sale, he may then proceed to prove by verbal evidence the exact terms of the contract under which the payment was made or the goods accepted; but unless it appears that the goods were accepted under the contract sued on, that contract cannot be allowed to be good, for in the ultimate result a plaintiff who wishes to dispense with the necessity for writing under the statute must show that the defendant accepted or paid for the goods because of the contract sought to be established, not because of some other contract. In this case the plaintiff alleged the existence of two contracts, one under Order 590, the other under Order 532; the defendant admitted the existence of the first contract but denied the second. The plaintiff sought to establish the existence of the second contract by means of verbal evidence, and its enforceability under the statute by proof of a payment for and acceptance of goods. The learned Judge told the jury, and in our opinion properly told them, that in order to satisfy the statute the

H. C. OF A. 1924.

METROPOLITAN KNITTING AND HOSIERY CO. LTD. (IN LIQUIDATION) v. THOMAS BURNLEY & SONS LTD.

Gavan Duffy J. Starke J.

plaintiff must show that the payment was made or the goods were accepted under the contract sought to be enforced by him and denied by the defendant, and not under the contract admitted by the defendant. The learned Judge further directed the jury as follows :—" I ought to remind you of Mr. *Thomson's* contention on that point ; and that is this, that you have to look at it from the defendant's point of view as well as the plaintiff's, that if the defendant honestly thought that 532 and 590 were really two numbers which the plaintiff had put on the same contract, that is to say, there was only one contract on which the plaintiff for some reason or other had put the two numbers, that is, No. 532 on the preliminary order and 590 on the completion of that order, then it is for you to say whether in accepting it the defendant was really accepting for goods and paying for goods under 532, whether it was really recognizing the existence of some order distinct from the Order 590." It is said that the learned Judge, by these observations, invited the jury to consider what was the honest belief of the defendant with respect to the contract under which it was accepting goods and paying for them and to attribute the acceptance and payment to that contract under which it thought it was acting. The charge as a whole makes it clear that the jury were told to consider whether there were two contracts or only one, and in the passage quoted above the learned Judge does no more than restate and submit for the consideration of the jury the defendant's contention. That contention assumed that if the defendant believed that the goods were being tendered to it under two distinct contracts, it was idle for it to say that it was accepting only under one, but affirmed that if not, then the jury might proceed to consider on the whole of the evidence whether the defendant's acceptance had been under one contract or under two. We think his Honor's further direction makes this sufficiently clear : he continues thus :—" In the second invoice the goods are described as delivered under Orders 532-590. Mr. *Thomson's* contention is that while that might mean goods delivered under Orders 532 and 590, it might equally mean goods delivered under a contract represented by the numbers 532-590. It is for you to say, gentlemen, whether on the whole transaction

you are satisfied that there was a delivery and an acceptance of goods under the disputed order, and, unless you find that, the defendant is entitled to a verdict."

In our opinion the view of the majority of the Supreme Court cannot be maintained, and the appeal should be allowed.

Appeal allowed with costs. Judgment appealed from set aside and verdict of jury restored.

Solicitors for the appellant, *Mark Mitchell & Nelson.*

Solicitor for the respondent, *W. G. Forsyth.*

B. L.

[HIGH COURT OF AUSTRALIA.]

COHEN . . . . . APPELLANT;
DEFENDANT,

AND

LAPIN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Nov.* 20, 21; *Dec.* 15.

Knox C.J., Isaacs and Gavan Duffy JJ.

Landlord and Tenant—Lease—Construction—Provision for re-entry—Conviction for offence under Liquor Act—Action for ejectment—Effect of prior judgment—Estoppel—Practice—High Court—Appeal from Supreme Court of State—Ground of objection not taken until argument in High Court—Liquor Act 1912 (*N.S.W.*) (*No.* 42 *of* 1912), *secs.* 128, 129, 130—*Common Law Procedure Act* 1899 (*N.S.W.*) (*No.* 21 *of* 1899), *secs.* 222, 224, 249.

The appellant was the lessee from the respondent and the licensee of a certain hotel. The lease provided that, if the lessee should be convicted of any offence under the provisions of any Act then or thereafter in force, a conviction whereof might either alone or in conjunction with a conviction