[HIGH COURT OF AUSTRALIA.]

EX PARTE RICHARDS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1934.

SYDNEY, *April* 4.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Practice—Goods rejected by purchaser—Action by vendor—Goods sold and delivered, and goods bargained and sold—Payment into Court with denial of liability—Acceptance by vendor—Goods not returned to purchaser—Action in detinue by purchaser—Effect of payment in and acceptance—District Courts Act 1912 (*N.S.W.*) (*No.* 23 *of* 1912), *sec.* 72*—*District Court Rules* 1914 (*N.S.W.*), *r.* 132*, *Form* 93.

High Court—Appeal—Special leave—Small amount involved.

In an action brought in the District Court of New South Wales, the plaintiff, a company, claimed the sum of £71 5s. 9d. for goods sold and delivered and goods bargained and sold, being £50 19s. 4d. for certain items of furniture, including a three-piece suite, and £20 6s. 5d. for general items. As to the sum of £50 19s. 4d., the defendant pleaded never indebted. As regards the suite, he stated that he had rejected it because it did not comply with his order, and that the rejection had been accepted by the plaintiff. He paid into Court the amount claimed for the general items, and, with denial of liability, a further sum of £35

* Sec. 72 of the *District Courts Act* 1912 (N.S.W.) provides:—"(1) A defendant may, within the prescribed time, pay into Court such sum of money as he may think a full satisfaction of the claim of the plaintiff, together with the costs incurred by the plaintiff up to the time of such payment . . . (3) Every such payment shall be taken to admit the claim in respect of which the payment is made, unless the defendant, at the time of paying the money into Court, files with the registrar a notice . . . stating that, notwithstanding such payment, the defendant denies his liability. (4) If the plaintiff elects to accept the sum paid in in full satisfaction as aforesaid, and gives notice of such acceptance in the prescribed manner, the registrar shall pay over the same to the plaintiff or his attorney, but if such notice is not given, such sum of money shall remain in Court to abide the order of the Judge." Rule 132 of the *District Court Rules* 1914 (N.S.W.), provides:—(1) "If the plaintiff elects to accept, in satisfaction of his claim, such money as shall have been paid into Court by the defendant, whether . . . with or without a notice of denial of liability, he shall send to the registrar and to the defendant . . . a written notice . . . stating such acceptance . . . (2) Thereupon the action shall abate, except as herein provided . . . (5) In default of such notice of acceptance by the plaintiff the action shall proceed."

"in satisfaction of the whole of the claim other than" that for the general items. Both sums were accepted by the plaintiff "in satisfaction of the claims in respect of which they are paid in." The defendant subsequently sued the plaintiff in the District Court, in detinue, claiming the return of the suite or its value, £19 15s. A judgment in his favour was set aside by the Supreme Court. On an application by him to the High Court for special leave to appeal:

Held, although the Court was of opinion that when the company took the money out of Court the acceptance operated as a complete satisfaction of all causes of action in respect of which it had been paid in, and therefore the applicant, the defendant in that action, was entitled to the suite or its value, that, as the amount involved was so small, special leave to appeal should not be granted.

APPLICATION for special leave to appeal from the Supreme Court of New South Wales.

Robert Lewis Richards sued the Associated Traders Ltd., trading as Stuart Low Furniture Studios, Sydney, in the District Court of New South Wales, on two counts, one in detinue, and the other in conversion, in respect of a three-piece cane lounge suite, claiming the sum of £19 15s. It appeared that Associated Traders Ltd. had previously sued Richards in the District Court on the common money counts, including a count for goods sold and delivered, and one for goods bargained and sold, claiming, in respect of a balance due for furniture supplied, the sum of £71 5s. 9d., which included £19 15s. for a three-piece suite. As to items (including the suite) amounting to £50 19s. 4d., Richards pleaded never indebted, and, as regards the claim relating to the suite, he alleged that it was agreed by and between Associated Traders Ltd. and himself that the former should supply a suite to a certain design to be selected and approved by Richards, that Associated Traders Ltd. made and tendered a suite of a design not selected or approved by him and he rejected the suite, which rejection was accepted by Associated Traders Ltd. Richards grounds of defence then proceeded:—"5. As to £20 6s. 5d. the balance of the money claimed herein the defendant brings into Court the sum of £20 6s. 5d. and says the same is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to. 6. And further take notice that the defendant has paid into Court the sum of £35 in satisfaction of the whole of the claim other than the amount of £20 6s. 5d. pleaded to in the fifth ground of defence herein together with the sum of £2 14s. for

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costs, and further take notice that notwithstanding such payment in the defendant denies his liability." Associated Traders Ltd. thereupon filed a notice in the following terms: "Take notice that the plaintiff accepts the respective sums of £20 6s. 5d., £35, and £2 14s. paid by the defendant into Court, in satisfaction of the claims in respect of which they are paid in." The amounts so paid in were duly paid out to Associated Traders Ltd. A few weeks later Richards commenced the present action against the Associated Traders Ltd. Judge *Curlewis* gave judgment for Richards on the count for detinue for £19 15s., to be reduced to 1s. if the suite were delivered to Richards within one week. The Full Court of the Supreme Court, by a majority, allowed an appeal made to it by Associated Traders Ltd. In the course of his judgment, *Halse Rogers* J. said that the position in the first action "was that the then plaintiff" (Associated Traders Ltd.) "was affirming that it was entitled to the price of certain goods as goods sold and delivered. The defendant" (Richards), "on the other hand, was affirming—and he verified his affirmation on oath—that there never had been an acceptance of the goods, that he had rejected the tender of the goods, and that the property had never passed, and that he was not liable to pay the money. In these circumstances, under the rules of the District Court, he paid a certain sum of money into Court in satisfaction of all claims against him. The view I take of that payment into Court is that it was a tender of a compromise, and that the taking of the money out of Court in full satisfaction of the claim amounts to no more than this, that the then plaintiff said in effect 'Issues have been raised between us in regard to certain matters. You have tendered a certain sum of money, and I am prepared to accept that sum of money, and litigation is at an end between us.' There was nothing in the nature of a judgment which could be regarded as an affirmation as between the plaintiff and defendant of either party's property in the goods . . . There is nothing in the acceptance of the money which was tendered by way of compromise which can be regarded as an affirmation of property in the goods. There was no acceptance on the part of the then defendant of the claim by the vendor that the previous tender was properly made, nor was the payment in made on the footing that the

goods were to be returned to the present plaintiff and that he was to have the property in them. The learned Judge of the District Court acted on the assumption that as soon as this compromise was effected by taking the money out of Court the property in the goods was to be taken to be vested in the present plaintiff. It seems to me that there was no basis for that decision . . . there was no evidence before the learned District Court Judge that the plaintiff in the case had the immediate right to possession, and I think his Honor should have so found. . . . These particular rules as to payment in with denial of liability have this one object, that instead of litigating the matter to a finish, the defendant may tender a compromise and the plaintiff can accept that compromise, so that litigation between them is then at an end." *Markell* A.J. agreed and said:—"The plaintiff" (Richards) "in this case says that he is entitled to immediate possession because he has paid for the goods, and therefore, the property has passed to him. He then proceeds to show that that is so by saying that when he paid that money into Court it had reference to these goods, and therefore that when the company (the defendant) took the money out of Court, the company was accepting payment in respect of these goods, and that therefore the property passed to him . . . It is quite impossible to say, on the evidence . . . whether or not the money which was paid into Court, or any portion of it, had any reference to this lounge suite . . . and, remembering that it is always for the plaintiff to prove his case . . . he must show that the property passed to him, because if it did not, then he has no immediate right to possession and, in those circumstances, could not maintain his action. . . . What has happened . . . is called a compromise; but whether the money which was paid into Court and taken out has any relation to this particular suite, or whether the parties had accepted the position that it was not what was ordered and that it was rejected by the purchaser, who would not have it, and it still remained in the possession of the person who made it . . . it is . . . impossible . . . for anybody to say. . . . Assuming that to be the position, it is impossible for the plaintiff to prove his case." In a dissenting judgment, *Stephen* J. said:—"I quite agree that the exact point for our determination here is: What is the effect of the compromise

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arrived at by taking out a certain sum of money which was paid into Court with denial of liability. . . . In this case . . . an action was brought by the present defendant against the present plaintiff for goods sold and delivered, and amongst the goods so claimed to have been sold and delivered was the . . . suite the subject matter of the action for detinue." Payments were " made into Court in respect of the total of those items, portion of those payments in, namely, the sum of £20 6s. 5d. being without denial of liability, and portion, namely, the sum of £35, being with denial of liability. Now the claim which the then plaintiff brought against the then defendant was for goods bargained and sold, or for goods sold and delivered, and in each instance, therefore . . . the essence of his claim was that the goods were sold. Now the present plaintiff (the defendant in that case) filed a defence in which he denied liability in respect of " the suite, " and he verified that defence, although . . . he had paid into Court these sums of money partly with denial and partly without denial of liability. . . . The payment of money into Court without denial of liability had the effect, under sec. 72 of the *District Courts Act* 1912 (N.S.W.), of admitting the claim of the plaintiff in respect of which the money was paid in . . . When there is a denial of liability, sec. 72 states that every payment in is to be taken to admit the claim with respect to which the payment is made, unless the defendant, at the time of paying the money into Court files with the registrar a notice . . . stating that notwithstanding such payment the defendant denies his liability; and the cases say that the effect of paying money in with a denial of liability, is to offer a compromise. The plaintiff in the action is then entitled to take the money out, and, under rule 132 " (of the *District Court Rules* 1914), " if he elects to accept in satisfaction of his claim such money as shall have been paid into Court by the defendant, whether the same has been paid in in due time or not, or with or without notice of denial of liability he sends a certain notice to the registrar. No distinction is drawn in the rule, as to the way in which the payment out is to be made, between the cases where the money is paid in with a denial of liability and where it is paid in without denial of liability, and the actual notice of acceptance under Form 93 is the same—that is, that the plaintiff accepts the sum of

money paid into Court by the defendant in satisfaction of the claim in respect of which it is paid in. . . . Here the claim of the original plaintiff was in respect of goods sold . . . When the then plaintiff took the whole sum of money out of Court . . . he thereby said that his whole claim then made was fully satisfied, and I think that under those circumstances that amounted to an affirmation on his part as between him and the then defendant of the property of the defendant in the goods. He states that the goods were sold, and I do not think that he can take up any other position now without at the same time approbating and reprobating. For these reasons I am of opinion that the effect of the compromise which has been effected here by the payment into Court and the taking out of Court is that there is an admission on the part of the plaintiff in the original action that the goods were actually sold, and that he cannot now say that they were not. I think, therefore, that the plaintiff in the detinue action is entitled to recover."

From that decision Richards now applied for special leave to appeal to the High Court.

McIntosh, for the applicant.

The following judgments were delivered :—

GAVAN DUFFY C.J. We all think that, as the amount involved is so small, special leave to appeal should not be granted.

RICH J. I think that the conclusion arrived at by *Stephen* J. and Judge *Curlewis* was right.

STARKE J. I feel that the decision under appeal is wrong, but as the amount involved is so small special leave to appeal should not be granted.

DIXON J. I agree that special leave should be refused, notwithstanding that I am unable to agree with the decision appealed from and that the question cannot be said to be without some general importance. The money accepted by the now defendant in the former action in which it was plaintiff was paid in, with a denial of

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liability, in respect of all the causes of action, including that for the price of the articles in question in the present proceedings. When it took the money out of Court, the acceptance operated as a complete satisfaction of all the causes of action in respect of which it had been paid in. (See *Beadon* v. *Capital Syndicate (Ltd.)* (1).) But, although I think the decision of the majority of the Court was erroneous, the intervention of this Court is not justified by the nature of the case. As between the parties, the dispute is trivial. It involves less than £20, and, in mercy to them, I think the litigation should be brought to an end.

EVATT J. I agree that the decisions of *Stephen* J. and of Judge *Curlewis* are correct, but that, for the reasons announced, special leave to appeal should not be granted. It will be little consolation to Mr. *McIntosh's* client, who now finds that after having paid for the suite he cannot get it, to know that he was right in his law; but this pronouncement of the Court will prevent the case being regarded as a precedent.

MCTIERNAN J. I do not think this is a case for special leave. I agree with the conclusion arrived at by *Stephen* J.

Application refused.

Solicitors for the applicant, *Kershaw, Matthews, Lane & Glasgow.*

J. B.

(1) (1912) 28 T.L.R. 427.