[HIGH COURT OF AUSTRALIA.]

DAVID JONES LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

WILLIS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1934.

SYDNEY, *Aug.* 15, 17.

MELBOURNE, *Oct.* 17.

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

Sale of Goods—Sale of shoes by retailer—"Particular purpose" for which shoes required—Reliance on seller's skill or judgment—Implied condition as to fitness—Sale by description—"Merchantable quality" of shoes—Sale of Goods Act 1923 (*N.S.W.*) (*No.* 1 *of* 1923), *sec.* 19 (1), (2)*.

The plaintiff claimed from the defendant damages for an alleged breach of a warranty of fitness implied under sec. 19 (1) of the *Sale of Goods Act* 1923 (N.S.W.), in relation to the purchase of a pair of shoes from the defendant, who was a retail distributor of footwear not manufactured by it. The plaintiff stated in evidence that she told the defendant's saleswoman who attended her that she wanted walking shoes, that she had a bunion on her foot and wanted a comfortable pair of shoes; that she was shown three pairs, and finally purchased a particular pair which she had tried on, on the recommendation of the

*The *Sale of Goods Act* 1923 (N.S.W.), sec. 19, provides:—"Subject to the provisions of this Act . . . there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—(1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose . . . (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality. Provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed."

saleswoman. On the third occasion of wearing them the heel of one of the shoes came off, and as a result the plaintiff sustained a fractured leg. Evidence was given that the shoes were "a very bad job" and that the heels were not properly fastened on.

Held:—

(1) By the whole Court, that there was evidence fit to be submitted to a jury in respect of a cause of action under sec. 19 (2) of the *Sale of Goods Act* 1923 (N.S.W.) as there was evidence upon which the jury was entitled to find (*a*) that the shoes were bought by description, and (*b*) that the implied condition that they were of merchantable quality had been broken.

(2) By *Rich*, *Starke* and *McTiernan* JJ., that, in respect of any cause of action founded upon sec. 19 (1) of the *Sale of Goods Act* 1923, it was for the jury, upon the evidence, to determine what was the particular purpose made known to the seller for which the buyer required the shoes, and whether the buyer relied upon the seller's judgment in that respect, and whether the shoes were reasonably fit for such purpose.

Australian Knitting Mills Ltd. v. *Grant*, (1933) 50 C.L.R. 387, and *Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.*, (1934) 50 T.L.R. 350, referred to.

Decision of the Supreme Court of New South Wales (Full Court): *Willis* v. *David Jones Ltd.*, (1934) 34 S.R. (N.S.W.) 303; 51 W.N. (N.S.W.) 106, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the District Court of New South Wales by Mrs. May Elizabeth Willis against David Jones Ltd., to recover damages for personal injuries, namely, a broken leg, sustained by the plaintiff as the result of the heel of a shoe which she bought from the defendant becoming detached while she was walking. The particulars of claim, which were not a pleading, did not state a cause of action because they did not state that the plaintiff bought the shoes from the defendant; but they were without objection treated as purporting to state a cause of action under sec. 19 (1) of the *Sale of Goods Act* 1923 (N.S.W.), notwithstanding that there was not any statement that the purpose for which the goods were required was made known so as to show that the buyer relied upon the seller's skill or judgment.

The jury returned a verdict in favour of the plaintiff in the sum of £13 19s. 8d., that is, £5 general damages and the balance in respect of hospital and medical expenses incurred.

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At the request of counsel for the plaintiff the trial Judge granted a new trial limited to the question of damages. An appeal by the defendant against that decision was dismissed by the Full Court of the Supreme Court: *Willis* v. *David Jones Ltd.* (1).

Special leave to appeal from the judgment of the Full Court was granted to the defendant by the High Court on the question whether there was any evidence of implied condition or warranty within the meaning of sec. 19 (1) or (2) of the *Sale of Goods Act* 1923, and the appeal now came on for hearing.

Other material facts appear in the judgments hereunder.

Sir *Thomas Bavin* K.C. (with him *Kitto*), for the appellant. The case was not litigated on the basis of a warranty under sub-sec. 2 of sec. 19 of the *Sale of Goods Act* 1923; therefore the Full Court should not have had regard to the provisions of that sub-section. There is not any evidence of a warranty under sub-sec. 1. The respondent did not suggest that she required "walking" shoes. There was no disclosure of any particular purpose for which the shoes were required, and no indication by the respondent that she relied on the skill or judgment of the appellant for anything except the selection of a pair of shoes which would meet the disability from which she suffered. Merely requiring shoes to walk in is not a "particular purpose" (*Australian Knitting Mills Ltd.* v. *Grant* (2)).

[DIXON J. "Particular" does not mean special or unusual; it only means specific, e.g., for walking.]

The circumstances surrounding the transaction were not different from those surrounding the vast majority of the innumerable transactions which take place in retail establishments. Here there was no positive circumstance which indicated that reliance was placed on the skill or judgment of the seller as in *Preist* v. *Last* (3) (purchase of a hot-water bottle), *Frost* v. *Aylesbury Dairy Co.* (4) (milk supplied by a milk dealer), *Wallis* v. *Russell* (5) (fish of doubtful freshness supplied by a fishmonger), *Bristol Tramways &c. Carriage Co.* v. *Fiat Motors Ltd.* (6) (name relating to a particular manufacturer),

(1) (1934) 34 S.R. (N.S.W.) 303; 51 W.N. (N.S.W.) 106.
(2) (1933) 50 C.L.R. 387.
(3) (1903) 2 K.B. 148.
(4) (1905) 1 K.B. 608.
(5) (1902) 2 I.R. 585.
(6) (1910) 2 K.B. 831.

Manchester Liners Ltd. v. *Rea Ltd.* (1) (purchase of coal for a particular steamship), and *Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (2) (propeller of particular make and materials for a particular ship). Whether there was a particular purpose or not can be ascertained only by an examination of the whole of the transaction (*Medway Oil and Storage Co.* v. *Silica Gel Corporation* (3); *Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (4)). The word "shoes" was not of itself sufficient to indicate the principal purpose for which they were bought.

[STARKE J. referred to *Drummond* v. *Van Ingen* (5).]

The evidence shows that the particular purpose was not communicated by the respondent to the appellant. The purpose disclosed, if at all, was to cover the defect in the respondent's foot. There is no evidence of a warranty that the shoes supplied were "walking" shoes. It was not a sale by description. Whether an indication of the particular purpose can be inferred from the name of the article, and reliance inferred from the fact that the purpose was made known are questions of fact (*Medway Oil and Storage Co.* v. *Silica Gel Corporation* (6)). It is a material circumstance whether the seller was the manufacturer of the goods, or merely a retailer of goods manufactured by another person, as here (*Chaproniere* v. *Mason* (7); *Australian Knitting Mills Ltd.* v. *Grant* (8)). For the reason that the respective suppliers were either the manufacturers of, or specialists in, the commodities concerned, *Frost* v. *Aylesbury Dairy Co.* (9), *Chaproniere* v. *Mason* (7) and *Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (2), are further distinguishable. There was not any warranty that the shoes were fit for any special purpose. The respondent's dominating desire was comfort, having regard to her disability, and she admitted that that desire was fully satisfied. The extreme care exercised by the respondent when selecting the shoes shows that it was not a sale by description.

[DIXON J. referred to *Varley* v. *Whipp* (10), *Wren* v. *Holt* (11), *Boys* v. *Rice* (12), and *Morelli* v. *Fitch and Gibbons* (13).]

(1) (1922) 2 A.C. 74.
(2) (1934) 50 T.L.R. 350.
(3) (1928) 33 Com. Cas. 195, at p. 196.
(4) (1933) 2 K.B. 141, at p. 162.
(5) (1887) 12 App. Cas. 284.
(6) (1928) 33 Com. Cas. 195.
(7) (1905) 21 T.L.R. 633.
(8) (1933) 50 C.L.R., at p. 411.
(9) (1905) 1 K.B. 608.
(10) (1900) 1 Q.B. 513.
(11) (1903) 1 K.B. 610.
(12) (1908) 27 N.Z.L.R. 1038.
(13) (1928) 2 K.B. 636.

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The determining factor in a purchase is the purchaser's selection of a particular article. The shoes were inspected by the respondent prior to the purchase, and there was not any fraud on the part of the appellant (*Jones* v. *Just* (1)). As the transaction was not a sale by description the provisions of sub-sec. 2 do not apply (see *Benjamin* on *Sale*, 7th ed. (1931), p. 640).

[STARKE J. referred to *Barr* v. *Gibson* (2).]

There is not any evidence that the shoes were not of merchantable quality. Here the defect, if any, was a general defect in the method of manufacture. What constitutes "merchantable quality" is shown in *Benjamin* on *Sale*, 7th ed. (1931), at p. 678. In order to succeed under sub-sec. 2 it must be shown that at the time of the sale the defect in the goods was such as would have induced a possible purchaser to reject them (*Manchester Liners Ltd.* v. *Rea Ltd.* (3)).

O'Sullivan (with him *Hidden*), for the respondent. The evidence shows that the respondent expressly made known to the appellant the particular purpose for which she required the shoes, by asking for comfortable "walking" shoes, and that she relied upon the skill or judgment of the appellant. Latent defects do not relieve a vendor of the warranty that goods supplied are reasonably fit for the particular purpose indicated (*Randall* v. *Newson* (4)). Here the warranty was that the shoes were reasonably fit for the purpose of being walked in by the respondent notwithstanding her disability. Warranty that the goods are fit for the particular purpose proceeds from the seller whether he be the manufacturer of the goods, or merely a retailer (*Preist* v. *Last* (5); *Frost* v. *Aylesbury Dairy Co.* (6); *Medway Oil and Storage Co.* v. *Silica Gel Corporation* (7)). Although "walking" shoes, as these were, have only one purpose, it is, nevertheless, a "particular" purpose (*Chaproniere* v. *Mason* (8); *Australian Knitting Mills Ltd.* v. *Grant* (9)).

[STARKE J. referred to *Geddling* v. *Marsh* (10).]

(1) (1868) L.R. 3 Q.B. 197, at p. 202.
(2) (1838) 3 M. & W. 390, at pp. 399, 400; 150 E.R. 1196, at pp. 1200, 1201.
(3) (1922) 2 A.C. 74.
(4) (1877) 2 Q.B.D. 102.
(5) (1903) 2 K.B. 148.
(6) (1905) 1 K.B. 608.
(7) (1928) 33 Com. Cas. 195.
(8) (1905) 21 T.L.R. 633.
(9) (1933) 50 C.L.R., at p. 413.
(10) (1920) 1 K.B. 668, at pp. 672, 673.

That particular purpose obviously must be implied from the very nature of the shoes themselves (*Bristol Tramways &c. Carriage Co.* v. *Fiat Motors Ltd.* (1); *Manchester Liners Ltd.* v. *Rea Ltd.* (2); *Gillespie Brothers & Co.* v. *Cheney, Eggar & Co.* (3)).

[DIXON J. referred to *Jackson* v. *Watson & Sons* (4) and *R.* v. *Manchester Profiteering Committee*; *Ex parte Lancashire and Yorkshire Railway Co.* (5).]

The points there raised were dealt with in *Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (6). The transaction was a "sale by description," and it is clear from the evidence that the shoes were not of merchantable quality; therefore the matter comes within the provisions of sub-sec. 2 (*Morelli* v. *Fitch and Gibbons* (7)).

Sir *Thomas Bavin* K.C., in reply. *Randall* v. *Newson* (8) was decided long before the *Sale of Goods Act* was enacted; it dealt only with the question of the disclosure of the purpose, and not with the question of reliance. In *Frost* v. *Aylesbury Dairy Co.* (9) the Court adduced the particular purpose from the special circumstances in which the commodity concerned was delivered. The question in *Chaproniere* v. *Mason* (10) was one of negligence, not warranty (*Chalmer's Sale of Goods*, 10th ed. (1924), p. 49). In *Geddling* v. *Marsh* (11) it was neither argued nor suggested that there was not a warranty. The distinction between a sale of a specific chattel and a sale by description is shown in *Benjamin* on *Sale*, 7th ed. (1931), at p. 635. In this connection it is important that the selection of the shoes was made by the respondent herself for her own special reasons. The fitness of the shoes for walking might be the subject of a collateral warranty, but not part of the contract, and, if so, there may be an action for breach of that warranty; that, however, is not a breach of warranty implied under sec. 19.

Cur. adv. vult.

(1) (1910) 2 K.B. 831.
(2) (1922) 2 A.C. 74.
(3) (1896) 2 Q.B. 59.
(4) (1909) 2 K.B. 193, at p. 202.
(5) (1920) 36 T.L.R. 593.
(6) (1934) 50 T.L.R., at pp. 353 *et seq.*
(7) (1928) 2 K.B. 636.
(8) (1877) 2 Q.B.D. 102.
(9) (1905) 1 K.B. 608.
(10) (1905) 21 T.L.R. 633.
(11) (1920) 1 K.B. 668.

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The following written judgments were delivered :—

RICH J. This is an appeal by special leave from a decision of the Supreme Court of New South Wales consisting of *Jordan* C.J., *Stephen* J. and *Markell* A.J., affirming an order of the District Court by which a new trial limited to the issue of damages was granted on the plaintiff's application. From this order the defendant had appealed to the Full Court complaining that the entire verdict should have been set aside and entered for the defendant. The action was brought to recover damages for personal injuries sustained by the plaintiff as the result of the heel of a shoe which she bought from the defendant becoming detached while she was walking. The cause of action was not framed in negligence but in breach of warranty. The particulars of claim, which are not a pleading, did not state the elements of the cause of action precisely, but it sufficiently appeared from them that the plaintiff was relying on sec. 19 (1) of the *Sale of Goods Act* 1923 (N.S.W.). Under this well-known provision, if the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose. It appeared from the evidence which the jury must be taken to have accepted that the plaintiff went to the defendant's " shoe department " to which she had been recommended, and said she wished to see a pair of shoes. She explained that she needed a comfortable pair and wanted a walking shoe. After inspecting two or three pairs produced and trying on a pair she bought the latter. On the third occasion of wearing them the heel of one shoe came off as she went down some stone steps. She fell and broke her leg. There was evidence that the heel came off because the shoes were badly made and in an improper condition. The jury found for the plaintiff, but awarded her an entirely inadequate sum. In the Full Court it was pointed out that, upon the facts of the present case, if the heel came off as the jury found owing to the defective and improper condition of the shoe, there would be a breach of a warranty, if one was implied, that the shoes were of merchantable quality as well as

a breach of warranty, if that were implied, that they were reasonably fit for the purpose of walking. After a full and complete statement of the authorities *Jordan* C.J. said (1): "If I go into a shoe shop and ask for a pair of walking shoes, it is a question of fact whether, upon the proper construction of the words used, I should be regarded as asking for one particular species of the genus shoe, as contrasted with other species such as running shoes or court shoes, or whether I should be regarded as asking for the genus shoe, with an intimation that I rely on the shop assistant to give me a pair suitable for ordinary walking. If the former is the proper construction the case is within sec. 19 (2); and there is an implied condition that the shoes shall be reasonably fit for the use for which walking shoes purport to be designed, i.e., for walking. If the latter, the case is within sec. 19 (1), and there is an implied condition that the shoes shall be reasonably fit for walking. In either event, the implied condition is shown to be broken if the shoes fall to pieces, not as the result of wear, but because they were never fit to be worn (*Bristol Tramways &c. Carriage Co.* v. *Fiat Motors Ltd.* (2))." I do not take his Honor to mean that the alternatives he stated are mutually exclusive. There appears to be no reason why in the latter of the two cases he puts the jury should not also find that there was a sale of the goods by description in addition to an intimation by the buyer to the seller that she relied on the seller's skill or judgment in such a way as to raise the implication that the goods would be reasonably fit for the purpose of walking. Adopting the view expressed in the passage I have quoted from the learned Chief Justice's judgment, the Full Court held that there was evidence upon which the jury might find for the plaintiff under either of the implied conditions, as I understand it according to their interpretation of the transaction, and that there had been no substantial misdirection by the learned trial Judge. The Court also decided against the defendant's contentions raised on its behalf as to the exercise of the learned trial Judge's discretion in ordering a new trial limited to damages. Upon the application of the defendant to this Court for leave to appeal from the decision, the Court took the view that the real question of

(1) (1934) 34 S.R., at pp. 314, 315; 51 W.N. (N.S.W.), at p. 109.
(2) (1910) 2 K.B., at p. 841.

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general importance which would make the case proper for special leave was whether, when a retailer sold goods in the ordinary way in his shop, he was liable under either of the conditions described in sec. 19 (1) and (2) of the *Sale of Goods Act* 1923 for the consequences of defects existing in the goods and rendering them improper for use. Accordingly, in granting special leave, the Court limited the defendant to the contentions that no evidence had been given fit to be submitted to a jury of a cause of action under either of the two sub-sections. It is convenient, before discussing whether either of the conditions might be implied, to dispose of the question of breach. Without going into detail it is enough to say that there is abundant evidence which would warrant the jury in finding that the shoe was so defective as not to be of merchantable quality and as to be unfit for the purpose of walking. The real question in the case appears to me to be whether there is evidence to support a finding that the goods were bought by description so that a condition would be implied that they were of merchantable quality, or that the plaintiff in buying them made known to the defendant that she required them for the particular purpose of walking so as to show that she relied on the seller's skill or judgment. I shall deal with these questions in order.

The shoes were ascertained or specific goods, but it is settled that there may be a sale by description of specific goods. Sub-sec. 2 is not limited to unascertained goods. The cases are collected in the recent case in this Court of *Australian Knitting Mills Ltd.* v. *Grant* (1), now under appeal to the Privy Council. Since that decision the report of *Cammell, Laird's Case* (2) has come to hand, which is more important upon sub-sec. 1 than sub-sec. 2, but it tends to support the application of sub-sec. 2. The difficulty is to discover in a particular case how far the description of the goods enters into the bargain and how far on the other hand the actual identity of the goods is the governing element in the sale. In very many cases in which goods are bought over the counter the description or classification of the goods is the first essential of the transaction, but from the buyer's point of view the selection of a particular example of those goods and the purchase by him of the identical

(1) (1933) 50 C.L.R. 387.

(2) (1934) 50 T.L.R. 350.

goods so selected is another essential of no less weight and importance. I think the result of the authorities which are collected not only in *Grant's Case* (1) but also in the judgment appealed from now is that, whenever the description of the goods enters into the transaction, so that the buyer must be taken to rely upon it to a substantial degree as well as upon the identity of the goods, it is a sale by description. In the present case the plaintiff called for shoes—walking shoes. Both these descriptions are wide and general, and the correspondence of the goods to the description at once appeared on the production of the articles. Nevertheless the description of the articles was a prerequisite to their selection, and, in my opinion, a jury would be at liberty to find that it entered into the transaction so as to be part of the bargain. The case is not one in which the buyer asks for a specific article which he sees, such as a china ornament, and then is told, in answer to his inquiries, that it is dresden china. He does not buy under the description of dresden china, although he may, perhaps, have an express warranty that the china is dresden. The case is one in which a dealer in articles of a description is asked to supply goods of that description for the inspection and selection of the buyer. For these reasons I think the appeal fails upon the ground that there was evidence of a cause of action under the second sub-section. The question whether there is evidence of a cause of action under the first sub-section in the present state of the authorities presents no difficulty except as to one element. The goods (shoes) were of a description which it was in the course of the seller's business to supply. It is decided that a particular purpose may be constituted by the only purpose for which the goods are useful, or by the purpose for which in general they are used (see, in particular, *Preist* v. *Last* (2)). Upon the facts there is no doubt that it was open to the jury to find that the buyer expressly made known to the seller the fact that she required the shoes for the ordinary purpose of walking out of doors. The question of difficulty is whether they were at liberty to find that she did so so as to show that the buyer relied on the seller's skill or judgment. This fact must be found as a reality (see per Lord *Sumner* in *Medway Oil and Storage Co.* v. *Silica Gel Corporation* (3)). But it is enough " that the reliance in question must

(1) (1933) 50 C.L.R. 387.
(2) (1903) 2 K.B. 148.
(3) (1928) 33 Com. Cas. 195, at p. 196.

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be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity " (1). It is everyday knowledge that the proprietors of " departmental stores " who retail shoes such as the plaintiff bought are rarely the manufacturers. It is difficult to suppose that a buyer relies on their skill or judgment as to the condition of each and every article which they buy and sell as intermediaries. But it may well be that a buyer does rely upon the judgment of the shopkeeper in laying in a stock of goods manufactured by factories with a reputation for honest and careful work and the use of sound materials, and for their general skill or judgment in supervising and checking the goods which go through their hands. On the whole I am not prepared to disagree with the Supreme Court in the view that, upon the account of the transaction given by the plaintiff, the jury were at liberty to find that she did make known to the defendant's saleswoman that she required the goods for the purpose of outdoor walking so as to show that she relied on the defendant's skill or judgment. In *Australian Knitting Mills Ltd.* v. *Grant* (2), my brother *Evatt* adopted the view that, in the sale over the counter of underwear, the buyer calling for garments by description and selecting and buying examples produced, there was an implied condition of fitness for ordinary wear and an implied condition of merchantable quality. My brother *Dixon* did not decide whether the condition of fitness was to be implied, but did decide that the condition of merchantable quality was implied—my brother *Starke* appears to have assumed that this was so. The facts closely resemble, but are by no means identical, with those of the present case. The decision at any rate narrows the issue and confines it to a very fine compass. The authorities upon which it depends may be reconsidered in the Privy Council, but I think we ought in this case to act upon them as was done in *Grant's Case* (2). In the meantime I find in *Grant's Case* confirmation for the conclusions I have reached.

For these reasons the appeal should be dismissed.

STARKE J. The appellant, David Jones Ltd., conducts a large retail emporium in the city of Sydney. The respondent, Mrs. Willis, desired to purchase a pair of shoes, and visited the emporium. She

(1) (1928) 33 Com. Cas., at p. 196.

(2) (1933) 50 C.L.R. 387.

said to the saleswoman that she would like a pair of shoes, that she wished to see a pair of shoes, walking shoes. She explained that she had a bunion on her foot, and would like a comfortable pair. The saleswoman showed her two or three pairs, and recommended one pair which she said would come well up over the bunion and would be a most comfortable shoe. The respondent looked at the shoes presented to her, and tried them on her feet. She finally purchased the pair recommended by the saleswoman. The respondent only wore them three times in nine months, but she found they were nice comfortable shoes to walk in. On the third time of wearing them, the respondent was walking down some steps in a street leading down to another street, and had proceeded down a few steps when she felt the heel of one of the shoes give, and saw it on the next step, as she slipped and fell. The result of the fall was a broken leg. An action was brought by the respondent against the appellant, founded upon the provisions of sec. 19 (1) of the *Sale of Goods Act* 1923 of New South Wales: "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose." A particular purpose is "a definite purpose, expressly or impliedly communicated to the seller, for which the buyer buys the goods" (*Benjamin* on *Sale*, 6th ed. (1920), p. 715; 7th ed. (1931), p. 653; *Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (1)). It is not necessarily distinct from a general purpose. And it may appear from the contract or from evidence *dehors* the contract or from the description of the article itself (*Ibid.*). It has been held in Scotland that an averment that the buyer had made known to the seller that the buyer required boots for his own wear amounted to a disclosure of a particular purpose for which the goods were required (*Thomson* v. *Sears & Co.* (*Trueform Boot Co.*) (2)). But whether the buyer relied on the seller's skill or judgment is "a question of fact to be answered by examining all that was said or done with regard to the proposed transaction on either side, from its

(1) (1934) 50 T.L.R. 350; 39 Com. Cas. 194.

(2) (1926) Sc. L.T. 221.

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first inception to the conclusion of the agreement to purchase." It need not be an exclusive reliance (*Medway Oil and Storage Co.* v. *Silica Gel Corporation* (1); *Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (2)).

The jury in the action now before this Court found a verdict for the respondent, Mrs. Willis, but the learned trial Judge ordered a new trial on the question of damages, on the ground of its inadequacy. The charge to the jury, however, was far from satisfactory: it gave them no instruction in law upon what constituted a particular purpose, it suggested no particular purpose in fact for their consideration. The fact was communicated to the seller that the shoes required were walking shoes and for the buyer's own wear. That seems rather a description of the shoe required than a statement of the particular purpose for which it was required. But, in addition, the buyer informed the seller that she wanted a shoe which would come up over her bunion and be comfortable to wear. It was in relation to this purpose, if at all, that she relied upon the skill and judgment of the seller, and not, I should think, in selecting a shoe for her own wear that was reasonably and properly made. And it was admitted that the shoes did come over the bunion and were quite comfortable to walk in. In my opinion it was for the jury to say, on the evidence, what was the definite and particular purpose made known to the seller for which the buyer required the shoes. It was also for the jury to say, on the evidence, whether such purpose was made known to the seller so as to show that the buyer relied upon the seller's skill or judgment in that respect. And it was for the jury, too, to say whether the shoes were reasonably fit for such purpose.

In the Supreme Court, the order of the learned trial Judge directing a new trial on the question of damages was affirmed, but in my opinion the charge did not present to the jury the matters relevant for their consideration, and a new trial of the whole case should have been ordered. Special leave to appeal from the decision of the Supreme Court was granted by this Court, but limited to the question whether there was any evidence of breach of implied warranty

(1) (1928) 33 Com. Cas., at p. 196.
(2) (1934) 50 T.L.R., at p. 357; 39 Com. Cas., at p. 214.

within the meaning of sec. 19 (1) and (2) of the *Sale of Goods Act* 1923. In my opinion, as I have already indicated, there was evidence fit to be submitted to the jury in respect of a cause of action founded upon sub-sec. 1. But sub-sec. 2 raises an entirely new case. It provides : " Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality." The goods must not only be described but contracted for under that description. They may be unascertained or specific goods. But the question in this case was whether the sale was of a specific pair of shoes selected by the buyer on her judgment without any description being relied upon, or whether the sale was by description. In my opinion, that question was one of fact for the jury, and there is evidence fit to be submitted to the jury that the sale was by description. A jury might conclude that the buyer asked for and contracted to buy walking shoes, and merely selected a pair out of several shown to her of that description. And so too the question is one of fact for a jury whether the shoes, if they were bought by description, were of merchantable quality. The buyer has " a right to expect, not a perfect article, but an article which would be saleable in the market " under that description. Goods are not of " merchantable quality " if, in the form in which they are tendered, they are of no use for any purpose for which such goods are normally used, and hence are not saleable under that description (*Weiler* v. *Schilizzi* (1) ; *Canada Atlantic Grain Export Co.* v. *Eilers* (2) ; *Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (3)). Consequently, there is evidence fit to be submitted to a jury in respect of a cause of action founded upon sub-sec. 2. It is quite possible that a cause of action can be founded upon both sub-secs. 1 and 2, for they overlap to some extent. *Jones* v. *Padgett* (4) illustrates, however, the distinction between them.

The appeal should be allowed, and the case should, if the appellant so elects, go down for a new trial generally, and not be limited to damages.

(1) (1856) 17 C.B. 619 ; 139 E.R. 1219.
(2) (1929) 35 Com. Cas. 90.
(3) (1934) 50 T.L.R., at p. 358 ; 39 Com. Cas., at p. 217.
(4) (1890) 24 Q.B.D. 650.

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DIXON J. The respondent recovered a verdict against the appellant in an action of damages for personal injuries sustained by reason of the state or condition of some walking shoes which she had bought in the appellant's shop. As she was descending some stone steps, the heel came off one of the shoes and she fell and broke her leg. Evidence was given, which the jury must be taken to have accepted, to the effect that the heel came off on the third occasion on which the shoes were worn and without any wrench or other violence, and that it did so because it was fastened on with an insufficient number of nails, which, moreover, were attached where there was compressed paper and not solid leather. The respondent sued upon a condition, that the shoe was reasonably fit for walking, said to be implied under sec. 19 (1) of the *Sale of Goods Act* 1923 (N.S.W.) (sec. 14 (1) of the English Act). If a condition of reasonable fitness for walking is implied, the evidence supports a finding that the condition was broken. It appeared to the Full Court that, in the circumstances of the case, such a finding necessarily involved the conclusion that the shoes were not of merchantable quality, and that, if a condition that they were of merchantable quality should be implied under sub-sec. 2 of sec. 19, the respondent would be entitled to recover for breach of that condition. The Full Court upheld the verdict of the jury except upon the issue of damages. This Court granted the appellant special leave to appeal from the decision, but subject to the condition that the appeal should be limited to the grounds that there was no evidence fit to be submitted to the jury of a cause of action under, either sub-sec. 1, or sub-sec. 2 of sec. 19.

The respondent gave evidence that she went to the appellant's shop because she was recommended to go there to buy shoes, that she asked for a pair of shoes and said that she wanted walking shoes, that she explained that she had a bunion, that the saleswoman recommended a particular pair as coming up over the bunion and as comfortable, and that she decided to take them. In my opinion, this amounts to evidence upon which a jury would be entitled to find that the shoes were bought by description so that a condition was implied that they were of merchantable quality. In *Australian Knitting Mills Ltd.* v. *Grant* (1), it became necessary to examine the

(1) (1933) 50 C.L.R. 387.

question what constitutes a sale by description of ascertained goods. The conclusion, which I drew from the authorities there considered, was expressed as follows:— "Apparently the distinction is between sales of things sought or chosen by the buyer because of their description and of things of which the physical identity is all important. When the ground upon which the goods are selected or identified is their correspondence to a description and when, therefore, it may be said that the buyer primarily relies upon their classification or possession of attributes, then, notwithstanding that they are bought as specific goods ascertained and identified, the goods are bought by description. In the ordinary case of a sale over the counter by the shopkeeper to a customer, who calls for an article of given description, inspects the specimens produced, and buys one, the transaction is a sale by description. There is in such a case a condition that the goods are of merchantable quality but a condition which, because of the examination, is qualified by the proviso to the sub-section and extends only to defects not reasonably discoverable by such an examination" (1).

The argument of the present appeal has not caused me to modify or alter this opinion. Its application to the facts of the present case, however, is not free from doubt. A buyer attaches more importance to the identity of a pair of shoes than of most articles of apparel bought over the counter. He treats fit and comfort as characteristics of the examples he selects rather than as belonging to them by virtue of their kind or description.

The respondent, at any rate, seems to have been concerned about the choice of a specific pair. But her demand for a walking shoe implied a primary insistence upon the description of the goods. Simple as that description was, it constituted an indispensable requirement. Her selection amounted to an attempt to satisfy another requirement, comfort.

I think the jury was at liberty to find that she primarily relied upon the description of the goods.

The question whether the condition of merchantable quality was broken depends upon what is required by that condition. This

(1) (1933) 50 C.L.R., at pp. 417, 418,

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question is also considered in the case of *Australian Knitting Mills Ltd.* v. *Grant* (1). I adhere to the opinion I there expressed, viz.:— "The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms" (2). Since that case was decided, Lord *Wright* has described a breach of the condition as meaning that the goods were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description (*Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (3)). I do not think this statement involves a different criterion. But, in any case, having regard to the evidence we must take the state or condition of the shoe to have been such as to render it altogether unfit for reasonable use. I, therefore, think that there was evidence of a cause of action under sub-sec. 2 of sec. 19. It is unnecessary to consider whether there was also evidence of a cause of action under sub-sec. 1.

In my opinion the appeal should be dismissed with costs.

The Chief Justice agrees in this judgment.

McTIERNAN J. The appellant, by one of its shop assistants, sold a pair of shoes to the respondent in its shoe department. The sequel to this transaction was that one of the respondent's legs was broken by a fall caused by the heel of one of the shoes coming off. The question for decision in this appeal is whether the evidence given in the action in the District Court at Sydney, which she brought against the appellant for damages and in which the jury returned a verdict in her favour, is sufficient to establish the liability of the appellant as for a breach of the condition implied by either sec. 19 (1) or sec. 19 (2) of the *Sale of Goods Act* 1923 of New South Wales, in a contract for the sale of goods. These sub-sections are similar in terms to sec. 14 (1) and sec. 14 (2) of the *Sale of Goods Act* 1893 (56 & 57 Vict. c. 71). The evidence upon which the question falls

(1) (1933) 50 C.L.R. 387. (2) (1933) 50 C.L.R., at p. 418.
(3) (1934) 50 T.L.R. 350, at p. 358.

for decision is collected in the judgment of the learned Chief Justice of New South Wales given in the Full Court of the Supreme Court (1), to which the appellant unsuccessfully appealed, one of the grounds of the appeal being that the trial Judge was in error in refusing to non-suit the respondent. "The plaintiff gave the following evidence :—'I went in and saw the sales lady and said "I wish to see a pair of shoes." I explained to her about having a bunion, and wanted a comfortable pair, being on my feet such a lot. She brought me three pairs of shoes. One pair I fancied, it was a dressy shoe. I think the price of that shoe I fancied was 35s. She said "I would recommend this pair—I advise you to take this pair, as they come well up over the bunion, and you will find they are a most comfortable shoe." I then decided on taking the shoes. That is the pair of shoes I took. That pair of shoes cost £2 5s.' After saying that she said she wanted a walking shoe, she proceeded as follows : 'I fitted the shoes on and I said to her about the bunion, which you see on that shoe is the same—I complained of that, and I said I wanted something to go well over that, and that shoe came well over it, and that is why she said "I would advise you to take them." It is the width she gave me. The other shoes had a shorter vamp she said. This comes up over that bunion, and some shoes only come up about there (indicating on foot). . . . She said "I advise you to take that pair." When I put them on she said "Are they comfortable" and I said "Yes," and she said "I would advise you to take them. They go well up over there."' The plaintiff said that she wore the shoes on only three occasions, and on the third occasion, when walking down some steps, she felt the heel of one shoe go, and she slipped and saw that the heel had come off. The fall caused a broken leg, as the result of which she was in hospital from 15th November until 4th December 1933, and suffered considerable pain and discomfort. The shoes were not manufactured by the defendant company, but were purchased by them from the manufacturers. Evidence was given on behalf of the plaintiff that the shoes were 'a very bad job'; and that the heels were not properly fastened on."

(1) (1934) 34 S.R., at pp. 304, 305; 51 W.N. (N.S.W.), at pp. 106, 107.

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In deciding whether the buyer expressly or by implication made known to the seller the particular purpose for which the goods were required, it is permissible to consider the terms of the contract and matters *ab extra* the contract, including the conversations and conduct of the parties and circumstances known to them, which involved the inference that at or before the time of the contract the particular purpose was made known to the seller (*Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (1)). There was evidence upon which the jury could find that the respondent required the shoes either for ordinary wear or for walking. The latter purpose may be less general than the former, but either purpose is an ordinary one such as that for which a pair of shoes are required by a person who buys them in a shop after having tried on one or more pairs. Either purpose could be a particular purpose within sec. 19 (1). It is settled that the purpose for which goods are supplied may be "particular" within the meaning of this provision, although it is the sole use for which goods of that kind are adapted. The purpose need not be some special use or requirement (*Preist* v. *Last* (2), per *Walton* J.; *Wallis* v. *Russell* (3); *Australian Knitting Mills Ltd.* v. *Grant* (4), per *Dixon* J.). In *Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (1), which was decided since *Australian Knitting Mills Ltd.* v. *Grant* (5), Lord *Wright*, with whose judgment Lord *Warrington of Clyffe* and Lord *Russell of Killowen* agreed, said (at p. 356): "Nor is it necessary here to hold as in *Preist* v. *Last* (6), that a particular purpose may be sufficiently established even where the thing bought is intended only for its ordinary use, though I am far from differing from the opinions expressed by Lord *Collins*." It is conceivable that a pair of shoes may be required for some purpose other than for general wear or for walking. But it would be drawing a strange distinction to hold that a buyer, who presumably has less knowledge of the goods than a seller who supplies goods of the description ordered in the course of his business, is entitled to the benefit of the condition implied by the sub-section if he says that he

(1) (1934) 50 T.L.R. 350.
(2) (1903) 2 K.B. 148, C.A.; 89 L.T. 33.
(3) (1902) 2 I.R. 585.
(4) (1933) 50 C.L.R., at p. 413.
(5) (1933) 50 C.L.R. 387.
(6) (1903) 2 K.B. 148; 19 T.L.R. 527.

requires the goods for some special or odd purpose but not if he discloses that his particular purpose is their ordinary use.

The next question is whether it was open to the jury to find that the respondent made known to the appellant's employee that she required the shoes for her own wear or for walking, so as to show that she relied on the seller's skill or judgment. There is evidence that the respondent inspected the shoes before buying them. But this does not exclude the statutory condition. The sub-section applies whether the goods are specific or unascertained. The statutory condition is not to be implied unless the buyer has made known to the seller the particular purpose for which he requires the goods. But, whenever that has been disclosed, the presumption does not always follow that reliance by the buyer on the seller's skill or judgment has become part of the contractual relationship. In *Manchester Liners Ltd.* v. *Rea, Ltd.* (1) Lord *Sumner*, speaking of sec. 14 (1) of the English *Sale of Goods Act*, said: "The words of sec. 14 (1) are 'so as to show,' not 'and also shows'; " and in *Medway Oil and Storage Co.* v. *Silica Gel Corporation* (2) Lord *Sumner* in explaining the principles which should be observed in applying the sub-section said: —" On a scrutiny of sec. 14 (1) of the *Sale of Goods Act*, I think these propositions may be stated upon it: (*a*) The buyer's reliance is a question of fact to be answered by examining all that was said or done with regard to the proposed transaction on either side from its first inception to the conclusion of the agreement to purchase. (*b*) The section does not say that the reliance on the seller's skill or judgment is to be exclusive of all reliance on anything else, on the advice, for example, of the buyer's own experts, or the use of his own knowledge or common sense. Indeed it would never be possible to be sure that the element of reliance on the seller entered into the matter at all unless the buyer made some statement to that effect. It follows that the reliance in question must be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity. (*c*) This warranty, though no doubt an implied one, is still contractual; and, just as a seller may refuse to contract except upon the terms of an express exclusion of it, so he cannot be supposed to consent to the liability which it

(1) (1922) 2 A.C. 74, at p. 90. (2) (1928) 33 Com. Cas. 195, at pp. 196, 197.

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involves unless the buyer's reliance on him, on which the liability rests, is shown, and shown to him. The tribunal must decide whether the circumstances brought to his knowledge showed this to him as a reasonable man or not; but there must be evidence to bring it home to his mind before the case for the warranty can be launched against him. My Lords, I would like to add a few commonplace observations. One naturally asks, why should any buyer ever be supposed not to rely on the seller's skill or judgment? It can do him no harm to do so, and may do him some good. Till the seller refuses to deal at all unless any such reliance is renounced surely a man of sense must be deemed to want to get for himself all that the law allows. . . . In this case I rather think this may have been the view present to the mind of *Rowlatt* J. . . . He would appear to have thought that reliance on the buyer's part follows almost as a matter of course from the communication of his purpose whenever he knows less than the seller does about the substance which he is minded to buy. My Lords, I think this will in most cases be a question of degree. To go into a chemist's shop for something for your toothache, to order milk for your baby from a dairy, to write to a coal merchant that your ship is lying in his port and to ask him to bunker her, are simple cases in which reliance is not indeed presumed in law but is obvious in fact. But reliance on another and not on yourself is not a course which is always either obvious or probable; it may be so far from what prudence would dictate as to be neither."

In some cases, where a person is buying things for his own wear, it may not be brought home to the seller that the buyer is relying to the requisite degree on the seller's skill or judgment, the circumstances of the sale indicating that the buyer intends to be guided by his own tastes and predilections. In such cases the evidence may show that the determining factor was the buyer's self-induced satisfaction with the style or comfort of the goods or some other quality. But in the present case there is evidence upon which the jury may find that it was the common understanding of the parties that the dominant consideration was that the goods, while possibly possessing accidental qualities pleasing to the purchaser, should be serviceable as shoes. The circumstances of the sale and the conversations of the parties provide evidence to support the finding

that the respondent exhibited to the seller's assistant that she trusted to the skill or judgment of the respondent, as a seller engaged in the business of supplying goods of the description which she ordered, rather than to her own judgment, to be supplied with a pair of shoes which would be serviceable as shoes, fit and safe to wear especially for walking, and which would not collapse before they had had a reasonable amount of use. No defence was made that it was not in the course of the appellant's business to supply goods of that description. It follows that there was evidence to support findings of fact upon which the condition of fitness mentioned in the sub-section could be implied. The evidence was, in my opinion, ample to sustain a finding that this condition had been broken.

There is a further question whether the evidence is sufficient to establish a cause of action under sec. 19 (2). In *Benjamin* on *Sale*, 7th ed. (1931), at pp. 635, 636, the learned author says:—"At common law, the most usual instance of a contract of sale of goods 'by description' was an agreement to sell unascertained or future goods of a certain description i.e., *kind* or *class* . . . A specific chattel could also be sold by description at common law. Here, however, a distinction existed. Unascertained goods can have no description but what is given them by the contract, but a specific chattel had also a physical identity, either corporeally present in the sight of the buyer, or mentally identified by him. The question then arises whether the buyer bought simply the particular thing which he saw or identified, or whether he bought it only on condition that it conformed to the description given. A buyer might, of course, *expressly* stipulate that he had bought only on such a condition; but otherwise his intention had to be discovered from the circumstances; and, as a general rule, a contract for the sale of a specific article was a contract for that article as it was. The property passed by the contract, and any superadded description was either a mere representation having no legal effect (except where it was fraudulent, or, being material, justified the buyer in repudiating the contract on the ground of misrepresentation) or was at most a warranty or collateral engagement entered into by the seller in consideration of the contract of sale, on breach of which he was liable in damages." The

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proviso to sec. 19 (2) says that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed. Sec. 19 (2) applies to sales of specific or ascertained goods and unascertained or future goods (*Australian Knitting Mills Ltd.* v. *Grant* (1)). The respondent in the present case bought ascertained goods. The considerations upon which it may be decided whether goods are " bought by description " are stated by *Dixon* J. in *Australian Knitting Mills Ltd.* v. *Grant* (2) in these terms :—" Apparently the distinction is between sales of things sought or chosen by the buyer because of their description and of things of which the physical identity is all important. When the ground upon which the goods are selected or identified is their correspondence to a description and when, therefore, it may be said that the buyer primarily relies upon their classification or possession of attributes, then, notwithstanding that they are bought as specific goods ascertained and identified, the goods are bought by description. In the ordinary case of a sale over the counter by a shopkeeper to a customer, who calls for an article of a given description, inspects the specimens produced, and buys one, the transaction is a sale by description. There is in such a case a condition that the goods are of merchantable quality but a condition which, because of the examination, is qualified by the proviso to the sub-section and extends only to defects not reasonably discoverable by such an examination." There is evidence in the present case that the respondent ordered walking shoes, and although the subject of the sale was rendered specific by her selection of a pair to fit and suit her, there was evidence upon which the jury could find that she relied upon those goods having the character expressed by the terms of her order, and her selection amounted to no more than a preference between goods which she was concerned to consider primarily because she relied upon all of them possessing that character.

It was not disputed that the appellant dealt in goods of the description by which the respondent bought the goods which became the subject matter of the sale. In *Benjamin* on *Sale*, 7th ed. (1931), at p. 668, note (*q*), the learned author says that " the difference of

(1) (1933) 50 C.L.R., at p. 417.

(2) (1933) 50 C.L.R., at pp. 417, 418.

language on this point in s. 14 (2) as compared with s. 14 (1) should be noticed. Sec. 14 (1) says, 'and the goods are of a description which it is in the course of the seller's business to supply'; sec. 14 (2) says 'a seller who deals in goods of that description.' But the two expressions no doubt mean the same thing." Referring to sec. 14 (1) at p. 654, the same author says :—"The seller must also deal in the class of goods sold. If he does not, the buyer plainly buys on his own judgment."

There is evidence to support the finding that the goods were not of merchantable quality. In *Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (1), Lord *Wright* said: "What sub-sec. 2 now means by 'merchantable quality' is that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description." Although the respondent examined the goods, the defects in the shoes were not such as ought to have been revealed by the examination. Hence the condition that the shoes were of merchantable quality could not have been excluded by the proviso to sub-sec. 2.

In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Norton Smith & Co.*

Solicitors for the respondent, *K. O'Malley Jones & Co.*

J. B.

(1) (1934) 50 T.L.R., at p. 358.