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Court, there is nothing to prevent him from commencing a fresh action in this Court and discontinuing the action in the Supreme Court.

For these reasons I hold that this application fails and should be dismissed.

Application dismissed.

Solicitor for the applicant, *W. Lieberman.*

Solicitor for the respondent, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

J. B.

Discd *Bond Media Ltd v John Fairfax Group Pty Ltd* (1988) 16 NSWLR 82

Foll *Trade Practices Commission v TNT Management Pty Ltd* (1984) 56 ALR 647

Cons/Foll *R W Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* (1991) 32 NSWLR 152

Discd *Smith v Joyce* (1954) 89 CLR 529

Cons *Permanent Trustee Aust v FAI General Insurance* (2001) 187 ALR 380

Cons *Permanent Trustee Aust v FAI General Insurance* (2001) 50 NSWLR 679

[HIGH COURT OF AUSTRALIA.]

LUSTRE HOSIERY LIMITED . . . . APPELLANT;
PLAINTIFF,

AND

YORK . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Oct.* 3, 4.

MELBOURNE, *Nov.* 22.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Evidence—Admission—Admissibility—Probative value.

Words or conduct amount to an admission receivable in evidence against a party if they disclose an intention to affirm or acknowledge the existence of a fact whatever be the party's source of information or belief. Although the meaning of his words or conduct may depend upon the state of his knowledge, once that meaning appears and an intention is disclosed to assert or acknowledge the state of facts, its admissibility in evidence as an admission is independent of the party's actual knowledge of the true facts. When admitted in evidence, however, its probative force must be determined by reference to the circumstances in which it is made and may depend altogether upon the party's source of knowledge.

Decision of the Supreme Court of New South Wales (Full Court) affirmed, subject to a variation.

APPEAL from the Supreme Court of New South Wales.

An action brought by Lustre Hosiery Ltd. in the Supreme Court of New South Wales, to recover the sum of £8,500, was upon an agreement by which the defendant, Henry Herbert York, in consideration of the plaintiff company exonerating a *del credere* agent, Henry H. York & Co. Ltd., from certain obligations, agreed to pay the plaintiff the amount due to it in respect of the sale of its goods which would otherwise have been due by the agent, after deducting certain commissions. The plaintiff sought to establish its claim by what it submitted were admissions made by the defendant. It did not have any other evidence. The defendant asserted that the *del credere* risk, when he took it over, was stated by the plaintiff company or its officers to be £3,500, and that there was an offset of a corresponding credit for commissions against this sum. Early in 1932 the plaintiff company resolved that a statement be prepared and checked by its auditors, covering all amounts chargeable to the defendant under the selling agreement, that the amounts so ascertained be transferred to the debit of the defendant, and that commissions due be credited against his account. The with the sales ledgers, and they certified, to the best of their auditors reported that they had compared certain attached lists knowledge, that the total of the same, namely, £10,313 19s. 1d., represented the amount owing by the agent in terms of the agreement, but excluding a certain specified account. The auditors had no personal knowledge of the transactions, and apparently checked a list or statement made up by the plaintiff company with that company's sales ledgers. The defendant was chairman of the plaintiff company and had a controlling interest in the agent company, but he did not keep the books of the plaintiff company. The auditors' report and certificate were considered by the directors of the plaintiff company at a meeting held on 2nd March 1932 at which the defendant was present. During the course of a lengthy discussion the defendant stated that he had entered into the agreement referred to above upon the faith of the correctness of the statement made by the plaintiff's secretary and believing that the total of the bad debts for which he would be responsible was approximately £3,500 and that the *del credere* responsibility would be set off and

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counterbalanced by commissions to that amount which he, the defendant, was entitled to receive on past business. The defendant then stated that "it is now discovered on the report of the . . . auditors . . . that the actual amount of the bad debts is approximately £10,000, with the possible recovery of £3,000, leaving a net figure of about £7,000 to be covered by the *del credere* risk whilst . . . the commissions which were stated by the secretary to be payable actually had been set off against the June balance." At a meeting of the directors, held a week later, the defendant said he could not accept responsibility for the debit shown in the auditors' certificate. In a letter written by him on 14th March, in answer to a letter received from the plaintiff, the defendant referred to the statement alleged to have been made to him by the secretary and added: "It now transpires that the liability of the" (agent) "company exceeded the £3,500, but having acted upon the faith of your company's statements to the contrary, I do not propose to accept as correct anything else than the statements upon which I acted." The plaintiff submitted that the remarks made by the defendant at the meetings and in the letter referred to above were admissions made by him and established its claim. Other statements and conduct, of less weight, attributed to the defendant, were also put forward as admissions on his part. The jury returned a verdict in favour of the plaintiff in the sum of £5,996 1s. 9d., to which amount the amount shown in the auditors' certificate had been reduced by credits in respect of items that ought to have been allowed, or ought not to have been charged, or which had been paid subsequently to the date of the certificate. The Full Court of the Supreme Court ordered a new trial on the ground that there was not any evidence before the jury of any admission on the part of the defendant which entitled them to find the verdict which they gave.

Leave to appeal from that decision was granted by the High Court upon the applicant, the plaintiff, by its counsel, undertaking to submit to an order entering a verdict for the defendant or a nonsuit if the Court should think that that verdict should have been entered or a nonsuit granted.

The appeal now came on for hearing.

Further material facts appear in the judgments hereunder.

Owen K.C. (with him *J. W. Shand* and *J. H. Pilcher*) for the appellant. The evidence as to the respondent's general attitude throughout and the words used by him on the occasions referred to show that he accepted as correct the figures submitted to him. He thus admitted the extent of his indebtedness to the appellant company. Admissions made in these circumstances are admissible in evidence against the person concerned.

[DIXON J. referred to *Shannon* v. *Whiting* (1).]

The verdict of the jury is supported by evidence. The Full Court should not have granted a new trial; it ought to have entered a verdict for nominal damages, or to have entered a verdict for the defendant.

Flannery K.C. (with him *Hardwick* K.C. and *K. A. Ferguson*), for the respondent. Whether alleged admissions are by words or conduct, the mere fact that there is evidence with regard to them does not make the matter necessarily one for the jury. It is for the Judge to determine whether that evidence is sufficient to go to the jury. It is a question of law whether the evidence, notwithstanding it be evidence tending towards an admission, is evidence which would convince a reasonable man (*R.* v. *Christie* (2)). What constitutes an "account stated" was dealt with in *Camillo Tank Steamship Co. Ltd.* v. *Alexandria Engineering Works* (3). The fact that a liability is discussed is not conclusive for the purpose of determining what is an account stated. In order to establish an admission, or an account stated, the evidence must be clear and certain (*Hughes* v. *Thorpe* (4)). Evidence of an admission by a debtor is admissible only where he definitely and clearly admits a specified sum (*Lane* v. *Hill* (5)). There must be evidence from which it can be reasonably and properly concluded that there was an admission as to a definite amount (*Ryder* v. *Wombwell* (6); *Giblin* v. *McMullen* (7)). The extent of the indebtedness alleged against the respondent from time to time was shown to be inaccurate and unreliable. The conduct and utterances of the respondent cannot be construed as an admission

(1) (1900) 26 V.L.R. 392; 22 A.L.T. 186.
(2) (1914) A.C. 545, at p. 554.
(3) (1921) 38 T.L.R. 134.
(4) (1839) 5 M. & W. 656, at pp. 666, 667; 151 E.R. 278, at p. 283.
(5) (1852) 18 Q.B. 252; 118 E.R. 94.
(6) (1868) L.R. 4 Ex. 33, at p. 39.
(7) (1868) L.R. 2 P.C. 317, at p. 335.

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on his part. Even if they do amount to an admission in form, it is not such an admission as enables the appellant to establish its case thereby. The respondent did not adopt the statements made to him from time to time, nor in any way make them his own (*Taylor* on *Evidence*, 12th ed. (1931), vol. 1, par. 815, p. 514.) The respondent is entitled to a verdict, or, alternatively, he is entitled to a new trial on the ground that the summing up as regards the alleged admission was inadequate.

Owen K.C., in reply. As to the admissibility of admissions made upon an imperfect knowledge of the facts or position, see *R.* v. *Turner* (1); *Re Perton*; *Pearson* v. *Attorney-General* (2); *Doe d. Digby* v. *Steel* (3); *Bulley* v. *Bulley* (4).

Cur. adv. vult.

Nov. 22.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. The question raised for decision in this appeal is whether evidence sufficient to be submitted to the jury was given to prove an amount of bad debts written off the books of the plaintiff company, the appellant. The defendant respondent had made himself responsible for book debts so written off as bad. At the trial of the action the plaintiff found itself unable to prove by direct evidence the incurring of the debts, which were very numerous, and the failure of the debtors to pay. It, therefore, relied on statements and conduct attributed to the defendant from which, as the plaintiff contended, an inference arose that he acknowledged the correctness of a given total, which had been arrived at and communicated to him. The defendant himself had no personal knowledge of the amount and, at best, what he said and did could amount only to an indication of a belief as to the correctness of the communication made to him.

No doubt an admission made by a party as to the correctness of a fact is admissible in evidence notwithstanding that the party has

(1) (1910) 1 K.B. 346.
(2) (1885) 53 L.T. 707.
(3) (1811) 3 Camp. 115; 170 E.R. 1324.
(4) (1874) L.R. 9 Ch. 739.

no direct knowledge of the fact and must rely for his belief upon the statements of others, or upon inferences from circumstances which he knows, or which have been reported to him. But such an admission may indicate a state of mind varying from a firm belief based upon a thorough investigation of the existence or occurrence of the fact down to a wavering preference for one of two or more possible hypotheses none of which have been tested or determined. It is apparent that the admissibility of the evidence must be distinguished from its sufficiency to establish or support an affirmative conclusion in favour of the party who tenders it, when the burden of proof lies upon that party. It does not follow that, because such evidence is admissible, it is enough to prove the issue.

The question is not the subject of much judicial authority. In some of the cases a tendency appears to exclude altogether from evidence statements which indicate no more than belief derived from secondary sources, but this tendency cannot be said to be persistent.

In *Roe d. Pellatt* v. *Ferrars* (1) the defendant put in evidence part of an answer made by the plaintiff to a bill in Chancery. The plaintiff then tendered another part of the answer, with a view to qualify the former part. The part so tendered by the plaintiff was received in evidence. It stated that the plaintiff had "heard as truth" certain facts. The plaintiff secured the verdict and the defendant moved for a new trial, but upon other grounds. *Chambre* J. alone dealt with the admissibility of the additional part of the answer. He said:—"The point however which in this case has most embarrassed my mind, is the degree of positive proof drawn from the answer in Chancery of the lessors of the plaintiff in their own favour. It is true that it was introduced into the cause by the defendant, on whose behalf some parts of the answer were read. But in those parts on which the lessors of the plaintiff relied, they speak only to what they 'have heard as truth.' I think that was not admissible evidence, for it appears to me that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may

(1) (1801) 2 Bos. & P. 542; 126 E.R. 1429.

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happen to have been stated by way of hearsay only in the course of the answer to a bill filed for a discovery. This point does not indeed appear to have been contested at the trial" (1).

In *Doe d. Digby* v. *Steel* (2) ejectment was brought by the executor, and not by the devisee or heir-at-law. To establish that the premises were leasehold and therefore descended to the executor, the plaintiff put in evidence the defendant's answer to a bill in equity filed against him for a discovery. In his answer the defendant stated that he believed that the testator was possessed of the leasehold premises in the bill mentioned. Lord *Ellenborough* ruled that, as against the defendant who admitted that he believed the testator to have been in his lifetime possessed of the leasehold premises in question, he would not require the plaintiff to go further.

In *Rees d. Howell* v. *Bowen* (3) the plaintiff, in order to establish title in his lessor, put in evidence an examined copy of an affidavit made by the defendant in a proceeding in Chancery. The affidavit recounted events and documents upon which the title depended. The Court decided that the original affidavit alone was admissible, but *Graham* B. expressed an opinion that, if admitted, it would not have been sufficient evidence of the matters which it imported. "It would imply the existence of that species and degree of knowledge which none but a professional man can be supposed to possess" (4).

In *Hayslep* v. *Gymer* (5) the plaintiff, in compliance with a request of the defendant, who was an executor, handed over to him some bank-notes which had been the deceased's. At the same time, the plaintiff stated facts, not within the defendant's knowledge, which, if true, established a gift by the deceased to her. This statement was admitted in evidence and a new trial refused. But *Parke* J. (as he then was) said:—"A declaration made in the presence of a party to a cause, becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth. Such an acquiescence, indeed, is worth very little, where the party hearing

(1) (1801) 2 Bos. & P., at p. 548; 126 E.R., at pp. 1432, 1433.
(2) (1811) 3 Camp. 115; 170 E.R. 1324.
(3) (1825) M'Cle. & Yo. 383; 148 E.R. 461.
(4) (1825) M'Cle. & Yo., at p. 391; 148 E.R., at p. 465.
(5) (1834) 1 A. & E. 162; 110 E.R. 1169.

has no means of personally knowing the truth or falsehood of the statement." He then went on to refer to other evidence tending to support the verdict (1).

In *Bishop of Meath* v. *Marquis of Winchester* (2) a case submitted in 1695 for the opinion of counsel by a predecessor in office of the Bishop was put in evidence against him to establish events and assurances which it set out. These included a grant of 1635, a presentation of 1642, and an induction in 1660. It was objected "that though it might have been admissible against the Bishop, for whom it was stated, it cannot be so against his successor, because the facts stated in the case took place long before the Bishop had any interest, and before he can be supposed to have had any knowledge of the See." In delivering the opinion of the Judges, which the House of Lords adopted, *Tindall* C.J. said:— "Undoubtedly, if by knowledge is meant a personal knowledge of the facts, it must be held to have been wanting in the present case. But the facts stated were all facts that are evidenced by written documents; the grant itself accompanied the case, being bound up in the same parcel; the presentation and induction are only to be proved by written entries, which were peculiarly within his" (the Bishop's) "reach. With such, the best means of knowledge, therefore, we think the statement by him, or by his attorney, of a fact in the case, directly against his own interest at the time the case was stated, was not only an admission against him, but against his successors, who stood in the same situation" (3).

In *Roe d. Lord Trimlestown* v. *Kemmis* (4) a bill in Chancery had been filed against the defendant's predecessor in title, who stated in his answer that another person had informed him of some facts concerning the title. To prove these facts, the plaintiff relied upon the answer, but it was rejected as evidence. In giving the opinion of the Judges who were summoned to advise the House of Lords, *Tindal* C.J. said that this part of the answer was "open to the objection that it is hearsay evidence only, on a subject upon which

(1) (1834) 1 A. & E., at p. 165; 110 E.R., at p. 1170.
(2) (1836) 4 Cl. & F. 445; 7 E.R. 171; 10 Bligh (N.S.) 330; 6 E.R. 125.
(3) (1836) 4 Cl. & F., at p. 543; 7 E.R., at p. 207; 10 Bligh (N.S.), at p. 466; 6 E.R. at p. 173.
(4) (1843) 9 Cl. & F. 749; 8 E.R. 601.

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that species of evidence is not admitted; and although it is well known that declarations made by a *party* in possession of an estate are admissible against his own interest, yet no case that we are aware of has established that a declaration by a party in possession, of what he heard *another person* say (and in this case he does not even go so far as to say he believed what was told him), is admissible to cut down or defeat his estate" (1). In reference to this part of the opinion of the Judges, Lord *Brougham* said:—"The learned Judges hold that the declaration of a party so in possession would be competent and admissible in evidence against him or his privies, claiming through and under him in that title; yet, that a declaration or statement of a person so circumstanced would not be admissible in evidence if it were only a statement of something which he had heard from some other person, and not of his own opinion of his title. That is the distinction taken by the learned Judges, and it is, no doubt, a very natural distinction, as to the weight rather than the admissibility of the evidence. If it is only a declaration or a statement of what some other person said, a stranger to the title and a stranger to the cause, it might perhaps admit of a doubt whether everything that is said against a man's title, by himself, might not be admissible in evidence, reserving, indeed, a question as to the weight of the evidence, for the consideration of those by whom it shall have to be weighed. I take for granted that the learned Judges have applied their minds, and that they have discussed the question in that view" (2). Lord *Campbell* thereupon said that he heartily concurred in the opinion of the learned Judges upon this question, "because it seems to me, that although you may admit evidence of what a person in possession has said as to matters within his own knowledge, to cut down the title he has, it would lead to mischievous consequences if you could give in evidence against him and those who claim under him, that which he is said to have heard another person say; because that may be utterly false" (3). To this Lord *Brougham* replied:—"The way in which it occurred to me was, that a person stating what he knows or thinks to be against his title, is evidence against him and against those

(1) (1843) 9 Cl. & F., at p. 780; 8 E.R., at p. 613.
(2) (1843) 9 Cl. & F., at p. 784; 8 E.R., at pp. 614, 615.
(3) (1843) 9 Cl. & F., at p. 785; 8 E.R., at p. 615.

claiming under him. A person stating what another person has said against his title, and not at the same time denying it, appears to me to leave a doubt whether he has not, by stating it, shown that he considered that there was something in it" (1). The House gave effect to the opinion of the Judges.

In *Bulley* v. *Bulley* (2) the admission relied upon consisted in a recital contained in a draft deed prepared by the party's solicitor. The recital, which was based upon the solicitor's inferences from documents, stated a root of title against the party's interests. The Court of Appeal considered that no weight was to be attached to the recital as an admission. *Mellish* L.J. distinguished between admissions concerning facts within the party's own knowledge and admissions based upon inferences from materials of which the Court is able to judge as well as or better than the party (3).

This course of authority seems consistent with the view that words or conduct amount to an admission receivable in evidence against the party if they disclose an intention to affirm or acknowledge the existence of a fact whatever be the party's source of information or belief. In determining whether he intends to affirm or acknowledge a state of facts the party's knowledge or source of information may be material. For if he states that another person has told him of it, and it appears that he has additional sources of information to the like effect, it may be right to understand him as implying a belief in what he repeats. Or, again, a person who fails to contradict a statement concerning matters within his own knowledge may be understood as acquiescing in the statement if the circumstances are such as to make it unlikely that he would allow an erroneous statement to pass unchallenged. But, although the meaning of his words or conduct may depend upon the state of his knowledge, once that meaning appears and an intention is disclosed to assert or acknowledge the state of facts, its admissibility in evidence as an admission is independent of the party's actual knowledge of the true facts. When admitted in evidence, however, its probative force must be determined by reference to the circumstances in which it is made and may depend altogether upon the

(1) (1843) 9 Cl. & F., at p. 786; 8 E.R., at p. 615.
(2) (1874) L.R. 9 Ch. 739.
(3) (1874) L.R. 9 Ch., at p. 751.

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party's source of knowledge. If it appears that he had no knowledge, or that, although he had some means of knowledge, he had formed no certain or considered belief and indicated nothing amounting to a personal judgment or conclusion of his own, the probative force of the admission may be so small that a jury ought not to be allowed to act upon it alone, or in preference to opposing evidence.

In order to apply these principles to the present case some examination of the facts is necessary. The defendant was the managing director of the plaintiff company, which he had founded some years ago. It conducted a manufacturing business and until the depression its success had been marked. The defendant also brought into existence another company which he called "Henry H. York & Co. Limited," and this company he completely controlled. It acted as sole agent for the plaintiff company in the distribution of the goods which the latter manufactured and it undertook a *del credere* responsibility. In July 1931 an agreement between the two companies was in force. It contained provisions requiring the agent to transmit orders to the principal and entitling the agent to $6\frac{1}{4}$ per cent commission upon the net invoiced prices of goods ordered through the agent and approved by the principal when paid by the purchasers or by the agent in pursuance of his *del credere* responsibility. It also defined that responsibility. It required the agent to pay the amount owing in respect of goods supplied in execution of any such orders if it remained unpaid after thirty days. If the principal sold goods on its own behalf, the agent undertook no responsibility but was entitled to 5 per cent commission. In practice the two companies did not carry on exactly according to the terms of the agreement. The period of thirty days was ignored and the agent was debited at intervals with the debts which the principal wrote off as bad. In the plaintiff company's balance-sheet for the half-year ended 30th June 1930 the item "Sundry debtors" stood at £62,122 6s. 6d., but the auditors reported that no provision had been made for losses on doubtful accounts because the responsibility for bad debts rested upon Henry H. York & Co. Ltd. The plaintiff's directors, however, called for a list of the accounts showing their currency. Nothing seems to have been done, as a result of the consideration of this list, before the auditors' report upon the

next half-year's trading, which was submitted at the end of March 1931. The item "Sundry debtors" at 31st December 1930 stood at £82,023 19s. 5d. and the auditors reported that of this a substantial sum appeared to be very doubtful. During the next three or four months, the relations between the two companies underwent a good deal of discussion. Figures were submitted to the board and to the defendant showing the liability of Henry H. York & Co. Ltd. On 16th June 1931 the estimated debit for bad debts was put down as £3,000. Later the net liability as at 30th June 1931 of Henry H. York & Co. Ltd. to the plaintiff, after debiting bad debts and other items, and crediting commission, was brought out at £3,162 17s. 6d. Later still, the balance was ascertained by means of the books of the plaintiff company to be £3,333 10s. 10d. With this figure before them, the board of directors of the plaintiff company made a new arrangement with the defendant on behalf of Henry H. York & Co. Ltd. The agreement between the two companies was cancelled as from 31st July 1931. The selling organization of Henry H. York & Co. Ltd. was taken over by the plaintiff company. The *del credere* responsibility of Henry H. York & Co. Ltd. upon all orders already obtained, whether fulfilled or unfilled, at that date continued. Correspondingly it remained entitled to commission upon those orders. This arrangement was made on 3rd August 1931. On 3rd September 1931 the defendant brought before the board a report by the secretary of a discovery that a particular account of some magnitude contained in the sales ledger was unreliable and needed large adjustments. He reported also that the plaintiff company's accountant had resigned. The board requested the auditors to make a report. Before their report was submitted, the defendant made a new proposal to the plaintiff company. It appears that he was advised by those responsible for the preparation of his income tax returns that it would save tax if the benefit of the arrangement recently made with Henry H. York & Co. Ltd. were obtained by him directly and not through the intervention of that company. Accordingly, on 8th October 1931 an agreement was made by way of novation between the defendant and the two companies. The terms of the agreement were as follows:—"1. That the commission on the forward orders in hand

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at 1st August be credited to H. H. York personally " (the defendant). 2. That accounts written off by Lustre Hosiery Ltd. " (the plaintiff) " after 1st July 1931 and including those in respect of the forward orders referred to above, under the *del credere* arrangement existing prior to the cancellation of the agreement be charged to H. H. York personally. 3. That the commission as set forth in the first paragraph and less the bad debts as set forth in the second paragraph be credited to H. H. York personally."

It is evident from the terms of the agreement that the parties supposed that the commission would exceed the amount of the bad debts. Their supposition appears to have been erroneous. So much so indeed that in this action the plaintiff company sued the defendant upon the agreement for a net sum of £8,500, and recovered a verdict for £5,996 1s. 9d. The only proof, however, which the plaintiff adduced that this amount was due under the *del credere* arrangement, to the rights and liabilities of which the defendant had succeeded, consisted in words and conduct on his part alleged to amount to admissions. To make clear the effect of what he is alleged to have said and done, a brief statement is necessary of the course of events after the agreement was made.

On 29th October 1931 the defendant laid before the board of the plaintiff company some figures supplied by the auditors as the result of their investigation into the sales ledger. The figures showed that the books gave too favourable a picture of the company's position. He also placed before the board a list of overdue accounts against which the auditors considered some provision should be made. On 3rd November 1931 the written report of the auditors was placed before the board. The report showed that for a period of at least twelve months the accounting system of the company had been so bad that the liability of the defendant had been altogether understated or underestimated. The report stated that at his request the auditors had investigated the debtors' accounts and had made a list of the amounts appearing in the sales ledger as overdue. The auditors expressed the opinion that a very substantial amount must eventually be written off. The defendant was present when the report was considered by the board; it decided to request the auditors to prepare a list of the debtors' accounts, which, under the

selling agreement, should be transferred to the agent, that is, in effect, paid by the defendant. The list was forthcoming on 11th December 1931. According to it an amount of £12,137 15s. 6d. ought to be debited to the defendant's account. Evidence was given that, at a board meeting when this or a subsequent list was under consideration, the defendant asked the board in the first place to wipe out the liability, claiming that, in view of the services he had given to the company, the liability should be wiped out. This evidence was given by a member of the board of directors. The learned Judge who presided at the trial asked the witness what was probably an inadmissible question, namely, whether, after the report of the auditors, the directors did not all take the view "that there was the liability." The witness answered: "Yes" and his Honor continued: "In his presence that he was liable for the whole amount?" The witness answered: "Yes, and Mr. York accepted that position." Nothing appears to have been done then until 3rd February 1932, when the board resolved—the defendant being present—that a statement be made up and checked by the auditors covering all amounts chargeable to the defendant under the selling agreement and that such amounts be transferred to his debit and that commission due be credited. Lists were prepared accordingly, and, on 2nd March 1932, the auditors certified that a total of £10,313 19s. represented the amount owing excluding a particular account. On the same day, this certificate was considered by the board. In the course of the discussion, the defendant said that he had agreed to the termination of the old agreement only upon the faith of the secretary's then statement that he would be responsible for about £3,500 less commission. He said that it was now discovered upon the report of the company's auditors that the actual amount of the bad debts was approximately £10,000 with the possible recovery of £3,000, leaving a net figure of about £7,000 to be covered by the *del credere* risk, whilst the commissions stated by the secretary to be payable had actually been set off against an earlier balance. He asked that the whole position should be reviewed. He requested that the matter should be brought before an arbitrator.

Evidence was given that about this time, probably in February, the defendant was asked what he could do with respect to payment,

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and that he answered that he could not pay anything that year, because of income tax. On another occasion, it is said that he was asked why he should not sell some of his shares and that he replied that he would do so. The secretary of the company appeared to have taken the auditors' report as a basis and made up a list of accounts for which he considered the defendant's responsibility clear, amounting in all to £6,686 6s., or with the excluded account added together with some further items, £7,321 18s. 10d., an amount to which he deposed at the trial as the plaintiff's total claim. At a board meeting on 9th March 1932, the defendant stated that it was impossible for him to accept responsibility for the debit. Thereupon the secretary was instructed to write requiring payment of the amount due, and asking if he were prepared to accept the auditors' certificate. To this the defendant replied that he had acted upon the faith of the statement that the outstanding book debts were only £3,500 and added: "It now transpires that the liability of the company exceeded the £3,500, but having acted upon the faith of your company's statements to the contrary, I do not propose to accept as correct anything else than the statements upon which I acted."

On 2nd December 1932 the directors resolved to write off as bad debts sums amounting to £6,021 14s. 7d. Apparently the difference between this and the amount deposed to by the secretary had already been written off. But after the secretary's cross-examination, further amounts were deducted from the total certified by the auditors and he gave the final figure as £5,996 1s. 9d., the amount for which the jury found.

It appeared that the defendant did not control the company's books and was not acquainted with their contents.

The Supreme Court was of opinion that upon this material the verdict for the plaintiff could not be supported and ordered a new trial.

The plaintiff applied to this Court for leave to appeal, the order for a new trial being interlocutory. Upon that application the plaintiff's counsel stated that it was unable to adduce further evidence upon a second trial, which it had not sought, and that it was content to submit to a verdict or nonsuit if this Court should

be of opinion that the evidence was insufficient to support a verdict in its favour. Leave to appeal was given upon that condition. Upon the learned counsel's statement it is apparent that, if the Supreme Court is right, the plaintiff company cannot recover whatever amount is due upon the novation, unless by a suit in equity based upon the jurisdiction in matters of account.

In our opinion the conclusion of the Supreme Court is right. The statements and conduct of the defendant warrant no more unfavourable inference against him than that he felt unable to controvert with his fellow directors matters of account of which he knew nothing, but the correctness of which he did not acknowledge.

There is nothing displaying a belief or judgment that the amount recovered, or some greater amount, was due by him. When he said it was now discovered upon the report of the company's auditors that the amount of the bad debts was approximately £10,000, he cannot be understood as meaning more than that such was their finding. In his statements about his inability to pay and the selling of his shares, he, no doubt, implied a belief that he owed some amount, but that is not enough for the plaintiff's purpose. When he wrote that it now transpired that the liability exceeded £3,500, he acknowledged that he owed something, but he did not acknowledge that he owed the amount recovered. We should, perhaps, disregard the statement made by the witness in answer to the learned Judge to the effect that the defendant accepted the position that he was liable for the whole amount. It was not relied upon at the trial, and it is an inadmissible summation by the witness of circumstances in evidence. But, in any case, it does not appear clearly which of the varying figures was so accepted, and the witness speaks as if it were the amount of £12,137 15s. 6d., an amount admittedly wrong. The result is that nothing was proved amounting to an admission possessing sufficient probative force to found the verdict the plaintiff obtained.

In our opinion the plaintiff should be nonsuited.

Pursuant to the order giving leave to appeal, the order for a new trial should be discharged and judgment of nonsuit entered.

The appeal should be dismissed with costs.

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STARKE J. This is an appeal by the leave of this Court from a judgment of the Supreme Court of New South Wales, ordering a new trial of the action. The granting of leave in the case will not, I hope, create a precedent, for the appeal raises no question of any general importance nor any substantial question of law.

The action, said the learned Chief Justice of the Supreme Court, was upon " an agreement by which the defendant "—the respondent here—" in consideration (*inter alia*) of the plaintiff company "—the appellant here—" exonerating a *del credere* agent from certain obligations, agreed to pay the plaintiff company the amount due to it in respect of the sale of its goods which would otherwise have been due by the *del credere* agent, after deducting certain commissions." The plaintiff sought to establish its claim by what it submitted were admissions made by the defendant. Other evidence it had none. The only question is whether there was any evidence to go to the jury of any admission upon which it could reasonably find a verdict for the plaintiff. The Supreme Court resolved this question in favour of the defendant. The facts of the case have been exhaustively examined by the learned Chief Justice, and it would serve no useful purpose to recapitulate them. The case is in a very narrow compass. The defendant asserted that the *del credere* risk, when he took it over, was stated by the plaintiff or its officers to be £3,500, and that there was an offset of a corresponding credit for commissions against this sum. Early in 1932 the plaintiff company resolved that a statement be made up and checked by the company's auditors, covering all amounts chargeable to the defendant under the selling agreement, and that such account be transferred to the debit of the defendant and that commissions due be credited against such account. The auditors reported that they had compared certain attached lists with the sales ledgers, and they certified, to the best of their knowledge, that the totals of the same, namely £10,313 19s. 1d., represented the amount owing by H. H. York & Co. Ltd. in the terms of the sales agreement but excluding a certain specified account. The auditors had no personal knowledge of the transactions, and apparently checked a list or statement made up by the plaintiff with the sales ledgers of the plaintiff. The defendant, it should be stated, was chairman of the plaintiff company, and

held a controlling interest in York & Co. Ltd., but he did not keep the books of the plaintiff company. The auditors' report and certificate were considered by the directors of the plaintiff company at a meeting on 2nd March 1932, at which the defendant was present. The discussion at this meeting was much relied on by the plaintiff as evidence of an admission by the defendant of the accuracy of the account made up by the auditors. Minutes of the meeting were prepared and signed by the defendant. So far as relevant, they are as follows :— "*Re Selling Agreement.*—The certificate of Messrs. Flack and Flack dated 2nd March 1932, covering the indebtedness of H. H. York & Co. in terms of the selling agreement was laid before the meeting. A lengthy discussion took place in the matter of the selling agreement. Mr. York intimated that he had agreed to the termination of his service agreement and of the agency agreement upon the faith of the correctness of the statement made by the secretary and believing that the total bad debts of the company for which he would be responsible were approximately £3,500 and that this *del credere* responsibility would be set off and counterbalanced by commissions to that amount which Mr. York was entitled to receive on past business. Mr. York said that it was now discovered on the report of the company's auditors Messrs. Flack and Flack that the actual amount of the bad debts was approximately £10,000 with the possible recovery of £3,000 leaving a net figure of about £7,000 to be covered by the *del credere* risk, whilst further the commissions which were stated by the secretary to be payable actually had been set off against the June balance. Mr. York suggested that the whole position should be reviewed as he had certainly relied on the correctness of the figures and entered into a fresh service arrangement believing that on the figures there would be no outstanding liability against him in respect of bad debts. The managing director then outlined his association with the company and the value of his services to the company and discussed the steps which led up to the final cancellation of the selling agreement. He stated that the arrangement entered into on February 1st 1929 meant that since that date the company had benefited to the extent of approximately £12,500 and that the profit made by the company for the last two years was proof of the fact that the

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business had been maintained on a sound and profitable basis and that he was of the opinion that this should be taken into consideration. Mr. York was of the opinion that the charging of the total amount certified to by the auditors as outstanding to York and Company would be unfair, and he considered that the basis on which the agreement was terminated was in his opinion incorrect and the matter should be submitted to arbitration. Mr. Forsyth and Mr. Hemphill both stated that they were not in a position to admit Mr. York's statement and in any case disagreed with his views and Mr. Forsyth stated that in his opinion had the information been available it would have made no difference to the decision of himself and Mr. Hemphill. Mr. Forsyth also stated that the agreement had been profitable since its inception in 1924 and the fact that certain losing years have been experienced should be taken in conjunction with the fact that profitable years had also been experienced. Mr. York pointed out that whilst the agreement had been profitable in the years mentioned by Mr. Forsyth for these years the company also had made very large profits. Against this, for the past three years the selling arrangement resulted for York and Company disastrously. Mr. York again informed the board that from the point of view of equity he considered that the matter should be brought before an arbitrator regarding the basis of termination of the agreement, and both Mr. Forsyth and Mr. Hemphill stated that there was nothing to arbitrate about. Mr. Forsyth again gave his opinion as regards the operation of the agreement in the past and after further discussion the matter was adjourned until the next meeting of the board." On 9th March 1932 a further meeting of the directors of the plaintiff company was held, at which the defendant was again present. The discussion at this meeting was also pressed. Minutes of the meeting were prepared and signed by the defendant. So far as material they are as follows :—"*Re Selling Agreement.*—A further discussion took place regarding the selling agreement with Messrs. York and Co. (See minutes of previous meeting.) The minutes as read to the board were not considered by Mr. Forsyth to correctly cover the discussion which took place, and certain alterations were made by him and minutes as altered were signed by the chairman. Mr. W. G. Forsyth again

stated that in his opinion arbitration in connection with the matter of the selling agreement was out of the question as in his opinion there was nothing to arbitrate about. Mr. Forsyth then inquired from Mr. York what the definite position was as regards payment of the bad debts as a *del credere* risk, by York and Co., according to the list of book debts to be debited to York and Co. certified to by the company's auditors. Mr. York stated that it was impossible for him to accept responsibility for this debit. Mr. Forsyth then asked whether any offer could be made and Mr. York stated that he was not willing to make any offer. Mr. Forsyth then stated that in that case he assumed the company would have no alternative but to take the necessary action to establish its claim to the amounts in question. Mr. McIlrath and Mr. Hemphill also stated that they assumed there was no other alternative. After considerable additional discussion in which all the directors took part, in order to finalize the matter it was proposed by Mr. W. G. Forsyth and seconded by Mr. Martin McIlrath: 1. That the secretary be instructed to write to Mr. H. H. York advising him that the company expect payment of the amount due under the selling agreement and that he be asked if he is prepared to accept the certificate of the company's auditors, Messrs. Flack and Flack, as to the amount due; and 2. That the secretary be instructed to furnish to the board the certificate from the company's auditors, Messrs. Flack and Flack, covering the amount due under the selling agreement with York & Co." The following letter was thereupon written by the plaintiff to the defendant on the same day, 9th March 1932: "At a meeting of the board of directors of Lustre Hosiery Limited, held on 9th March 1932 I was instructed to inform you that Lustre Hosiery Limited expect payment from you of the amount due by Messrs. York and Co. under the selling agreement, and to also ask you if you are prepared to accept the certificate of the company's auditors Messrs. Flack and Flack as to the amount due." And the defendant replied on 14th March 1932 as follows:—"Your letter of the 9th instant to hand. I have already intimated that, relying upon the statement of your company made officially through its secretary to the effect that the

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total of the outstanding book debts covered by York and Co.'s *del credere* risk was £3,500, but that this liability was offset by a corresponding credit for commission due in respect of past business, I and York and Co. both agreed to vary our respective relationships with the company by cancelling the old agreement and making a fresh one. It now transpires that the liability of the company exceeded the £3,500, but having acted upon the faith of your company's statements to the contrary, I do not propose to accept as correct anything else than the statements upon which I acted. I have consulted the directors of Henry H. York and Co. and am authorized to disclaim on that company's behalf any liability except upon the basis of the statements made by your company and relied upon by myself and Henry H. York and Co. when the fresh agreements were made."

But there is nothing in all this which in any way admits the accuracy of the auditors' account. The defendant's affirmation, from beginning to end, is that the *del credere* risk was £3,500, which was offset by a corresponding credit for commissions. The auditors' account is not treated as true, but as a claim put forward on the auditors' certificate against the defendant, which he disputes. Indeed, in the letter of the 9th March 1932 the plaintiff specifically requests the defendant to say whether he is prepared to accept the certificate of the auditors, and his answer is that he does not propose to accept anything else than the statements upon which he acted. It would be somewhat remarkable if the defendant did admit the accuracy of the auditors' account, for it was gradually reduced to £5,996 1s. 9d. by credits in respect of items that ought to have been allowed or ought not to have been charged or which had been paid subsequently to the date of the account. Some other evidence, both written and oral, was also relied upon, but none of it is stronger than that already referred to, and it requires no separate treatment.

In my opinion the learned Judges of the Supreme Court were clearly right in their conclusion and the appeal should be dismissed.

The plaintiff admits that it cannot better its case, and, pursuant therefore to the undertaking of the appellant given as a condition

of its obtaining leave to appeal, the order for a new trial should be set aside and a verdict entered for the defendant.

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Pursuant to the order giving leave to appeal the order for a new trial discharged and in lieu thereof judgment of nonsuit entered. Appeal dismissed with costs.

Solicitors for the appellant, *Sly & Russell.*

Solicitors for the respondent, *Campbell, Campbell & Campbell.*

J. B.

[HIGH COURT OF AUSTRALIA.]

DAVIES COOP AND COMPANY PROPRIETARY LIMITED . . . . . } PLAINTIFF;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

Bounty—Cotton yarn—Computation of bounty—Power to withhold bounty where "net profits" exceed ten per cent of capital employed in manufacture—Cotton Industries Bounty Act 1930-1932 (*No.* 13 *of* 1930—*No.* 17 *of* 1932), *sec.* 13.

In ascertaining, for the purposes of sec. 13 of the *Cotton Industries Bounty Act* 1930-1932, whether the "net profits" of any person, firm or company claiming bounty under the Act exceed ten per cent of the capital employed in the manufacture of cotton yarn the amount payable as Federal and State income tax in respect of the profits of manufacture cannot be deducted from the profits.

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MELBOURNE, *Nov.* 21 *Dec.* 12.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

CASE STATED.

In an action in the High Court by Davies Coop & Co. Pty. Ltd. against the Commonwealth of Australia for a declaration that in the computation of its net profits for the purposes of the