of the option must be taken into account in arriving at the value of Mr. Thomas' interest in the partnership assets " (1).

But for an admission made by counsel for the commissioner during the argument, the result would be that the questions before us would have to be answered by saying in effect that although the deceased's interest in the partnership property could not be valued at less than £156,253 11s. 3d. or more than £176,253 11s. 3d., it should be valued at a figure falling short of the latter sum by the amount of any actual detraction from value which might be found to have resulted from the existence of the options. That amount might be less than £20,000 because of the possibility that the optionees might not exercise their options, for some reason such as ignorance of values or difficulty in financing the purchase. And, theoretically at least, the options might be found not to have detracted at all from the value of the interest, for the circumstances at the date of the death could have been such as to make it practically certain that the options would not be exercised; and no doubt it was a recognition of this possibility which led the Privy Council, instead of treating the question as a matter of law which was covered by their general thesis, to speak of the appellant being able " to allege " in this Court that the existence of the options must be taken into account in arriving at the value of the interest. It is now agreed, however, that at the death there was a practical certainty that the options would be exercised; and, that being so, the value of the deceased's interest cannot be assessed at a higher figure than £156,253 11s. 3d. If an analogy be desired, it may be found in *Trustees Executors & Agency Co. Ltd.* v. *Commissioner of Taxes (Vict.)* (2).

For these reasons, question (1) in the case stated should be answered No, and the other two questions do not arise.

TAYLOR J. I agree with the views expressed by *Dixon* C.J. and *Kitto* J. in this matter and I have nothing to add.

Questions in the case stated answered: (1) *No;* (2) *and* (3): *These questions do not arise. Costs of the case stated to be dealt with by judge disposing of the appeal.*

Solicitors for the appellant, *Corr & Corr.*

Solicitor for the respondent, *H. E. Renfree,* Crown Solicitor for the Commonwealth of Australia.

R. D. B.

(1) (1954) A.C. 114, at pp. 133, 134; (1954) 88 C.L.R. 434, at p. 448.

(2) (1941) 65 C.L.R. 33.

[HIGH COURT OF AUSTRALIA.]

J. S. ROBERTSON (AUST.) PTY. LTD. . . APPELLANT;
PLAINTIFF,

AND

MARTIN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1955-1956.

MELBOURNE, 1955, *May* 19, 20, 23;

1956, *Feb.* 22.

Dixon C.J., Williams and Taylor JJ.

Contract—Sale of goods—Condition as to merchantable quality—Whether goods bought from "seller who deals in goods of that description"—Meaning—Insurance of goods—Loss of some by pillage—Claim by buyer on insurer in respect of loss—Payment by insurer of claim—Whether an "act in relation to 'the goods' inconsistent with the ownership of the seller"—Goods Act 1928 (*No.* 3694) (*Vict.*), *ss.* 19 (*ii*), 40.

In an action by the buyer of goods for damages for breach of contract it appeared that the buyer who, after examining the goods, had purported to reject them had made a claim under an insurance policy in respect of the loss by pillage of certain of the goods in the course of transit from England to Australia and that the claim had been met.

Held by *Dixon* C.J. and *Williams* J., *Taylor* J. expressing no opinion, that, in the circumstances, the making of the claim by the purchaser was not an act in relation to the goods which was inconsistent with the ownership of the seller within the meaning of s. 40 of the *Goods Act* 1928 (Vict.).

A firm manufactured metal goods in which the process of manufacture depended on impress stamping. It did not manufacture electrical goods. There was no evidence that it imported goods for sale or indented goods or contracted to sell goods to be imported. One of its members brought specimens of an electric trouser press to Australia with many other things with a view to considering manufacturing them or procuring them to be manufactured. He decided against manufacturing them, but, it was alleged, agreed to sell five thousand of the presses to be manufactured by the English manufacturer of the specimens to a company.

Held by *Dixon* C.J., *Williams* and *Taylor* JJ. expressing no opinion, that, even if the allegation was made out, it was not established that the seller

dealt in goods of the description forming the subject of the contract within the meaning of s. 19 (ii) of the *Goods Act* 1928 (Vict.).

Held further by *Dixon* C.J. and *Taylor* J., *Williams* J. dissenting, that in the circumstances the company had not proved that any concluded contract existed between it and the members of the firm.

The liability of an agent signing a contract without qualification discussed by *Williams* J.

Decision of the Supreme Court of Victoria (*Martin* J.), affirmed.

APPEAL from the Supreme Court of Victoria.

On 29th May 1953 J. S. Robertson (Aust.) Pty. Ltd., a company incorporated in the State of Victoria, commenced an action in the Supreme Court of Victoria against Angela Martin and Arthur William Martin (trading as Arnos Supplies Co.) and W. T. Driver claiming the sum of £7,131 7s. 8d. as damages for breach of contract. The writ was never served on the defendant Driver.

The action was heard before *Martin* J. who, on 10th November 1954, gave judgment for the defendants.

From this decision the plaintiff appealed to the High Court.

The facts and the arguments sufficiently appear in the judgments hereunder.

E. R. Reynolds Q.C. and *E. O. Moodie Heddle*, for the appellant.

L. Voumard Q.C. and *O. J. Gillard* Q.C. and *C. I. Menhennitt*, for the respondents.

Cur adv. vult.

The following written judgments were delivered :— Feb. 22, 1956.

DIXON C.J. This is an appeal by the plaintiff in an action of contract. The judgment against which the appeal is brought was pronounced for the defendants by *Martin* J. at the end of the plaintiff's case. The ground upon which the learned judge took this course was that a concluded agreement between the parties had not been established.

The contract which the plaintiff alleged was one for the sale of goods. The goods forming the subject of the transaction consisted of a novel implement for pressing trousers and other articles of attire in which it is desired to produce a so-called knife-edge crease. The implement possesses two metal blades attached to a wooden handle through which an electric flex runs. The blades are electrically heated and they are passed up and down the creased part of the trouser leg by hand. The implement was called an Empire

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Electric Presser and was in fact manufactured by W. T. Driver of North Road, London.

The plaintiff appellant is a company incorporated in Victoria and carries on business as a manufacturer, general merchant, exporter and importer. In London it has a subsidiary company called J. S. Robertson (London) Ltd. The defendants-respondents who are named Martin are members of a firm called Arnos Supplies Co. who are manufacturers with a factory and office at Cheltenham in Victoria. According to their letter paper they too have a London office. The plaintiff, whose statement of claim was indorsed on its writ, sued the defendants Martin and W. T. Driver in the alternative. It alleged in its pleading that in July 1951 it had made a contract with the defendants Martin, or alternatively with them as agents for the defendant Driver, for the purchase by it from the Martins, or alternatively from Driver, of five thousand new trouser presses at the price of 13s. 0d. sterling (by a variation of the contract increased to 14s. 0d. sterling) f.o.b. London. It pleaded that it was a sale by sample and that it was a condition (a) that the presses should be of a quality equal to the sample, (b) that they should be of merchantable quality, and (c) that they should be reasonably fit for sale to the public by the plaintiff for use as trouser presses.

It may be said at once that the contract was not shown to be a sale by sample and that the foundation for implying or importing a condition as to fitness was not established. The condition upon which the plaintiff's case must depend is that the goods should be of merchantable quality. For this condition the plaintiff relied upon the implication authorized by s. 19 (ii) of the *Goods Act* 1928 (Vict.) (s. 14 (2) of the *Sale of Goods Act* 1893 (Imp.)). The implication depends, of course, on its being a case "where goods are bought by description from a seller who deals in goods of that description". The plaintiff then pleaded that it had paid the price to Driver and had paid port charges, freight, insurance and customs duties and other charges in respect of the trouser presses, which the defendants Martin or the defendant Driver or all the defendants had shipped or caused to be shipped to Australia from London. It was then alleged that the trouser presses were not of quality equal to sample or of merchantable quality or fit for sale or use and that otherwise the defendants did not deliver any trouser presses. Then it was stated that the plaintiff refused to accept the trouser presses and further that by reason of the breaches of contract the plaintiff had been prevented from making a profit on the resale of the articles. The sum claimed was made up of the estimated loss of profit and of the amounts paid by way of price to Driver

and for the charges, freight, etc., already mentioned. The claim amounted to £7,131. After the writ was issued it appeared that Driver had become bankrupt and the writ was not served upon him. The action proceeded against the defendants Martin only. Upon this appeal the judgment pronounced in their favour was supported on their behalf upon five gounds. The first was that upon which the learned judge acted, namely that the documents relied upon by the plaintiff-appellant as establishing a contract with the defendants Martin did not disclose a concluded agreement between those defendants and the plaintiff. The second ground was that in any case no contract was made by the defendants Martin otherwise than as agents only. In the third place it was objected that it was not in performance of the contract alleged and sued upon but of another contract that the acts were done which the plaintiff alleged as done in pursuance of the contract sued upon. This means that the delivery of the trouser presses in London f.o.b. and the payment by or on behalf of the plaintiff of the price, the charges, freight, etc., in connection with the goods was done under and in consequence of another contract for the supply of the goods made in London in which Driver was the vendor. The fourth answer made on behalf of the defendants Martin was that the plaintiff had, whether before or notwithstanding its purported refusal to accept the goods, done acts in relation to them which were inconsistent with the ownership of the seller so that it was deemed to have accepted the goods and could not sue on the footing of being entitled to damages covering the price and other expenditure and loss of profit. It had in fact claimed under the policy of marine insurance covering the transit of the goods in respect of certain trouser presses lost through pillage. Further, if it were open to the defendants Martin on the pleadings to do so, they relied on evidence of attempts made by the plaintiff to sell particular trouser presses. The fifth ground taken for the defendants Martin was that there was no implied condition that the trouser presses must be of merchantable quality because the goods were not of a description in which the defendants Martin dealt. There was no evidence, it was said, that the Martins dealt in electrical goods or appliances or goods of the description in question. Their business, it was said, was to manufacture goods from sheet metal by the use of dies and stamping out patterns.

Although the first three grounds are stated as distinct and separate points, when the facts are examined they appear rather to be three legal aspects of the practical complexion which, according to the case for the defendants Martin, the entire transaction bore that resulted in the landing in Australia of the trouser presses.

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For in truth the real issue covered by those heads is whether the defendants Martin did more than establish agreement with the plaintiff in Australia upon the main points of an f.o.b. purchase in London which required to be duly perfected in London by a proper contract and performance thereof in some such manner as was actually adopted; that is to say agreement in which some points were left vague and uncertain and in which there was no expression of common assent, the parties being aware that the transaction would be effectuated in London.

The problem is one of interpreting a commercial transaction which the parties carried through loosely without any expectation that, through such an event as the bankruptcy of Driver, its precise legal complexion and consequences would become all important. The best approach to the problem is to examine the facts in sequence as they developed.

The first incident appears to be a visit by one R. L. Craig, the hardware wholesale representative of the plaintiff, to the defendants' factory. A. W. Martin, one of the defendants, showed the visitor over the factory and, in response to the latter's statement that his company wished to purchase lines for distribution throughout Australia but on the basis of being the sole Australian distributors, informed him that the factory could produce metal stamping lines without limit. It was arranged that the visitor's father, who was the plaintiff's Australian merchandise manager, should call at Martin's office and this he did two days later. Trouser presses were not mentioned in the discussion but it was arranged that on the following day, Saturday 7th July 1951, the two Craigs should bring the chairman of the plaintiff's board to see Martin. This they did. The visit was occupied with a discussion of the possibility of the Martins manufacturing certain articles in which the plaintiff had an actual or potential interest and with an inspection of the factory. When they had seen the factory Martin remarked that he had just returned from abroad and that he had brought back with him a number of "lines" which might be of interest to them; the articles were at his home. He asked if the three men would like to go to see them. He took them to his house and there in a room he had some fifty or sixty different articles spread out on a table, so-called novelty lines. A discussion followed as to the extent to which the Martins could and would manufacture the various novelties. The plaintiff's chairman asked if Martin would be prepared to let the plaintiff manufacture some of them on the basis of a royalty. He replied that he would if he were not in process of making a particular article himself or having it made for the firm

of Arnos Supplies Co. Then the chairman noticed the trouser press, took it up, pronounced it an interesting item and asked whether Martin's firm was about to make it. Martin was uncertain and the question was put to him whether he would allow the plaintiff to have it manufactured by one of its subsidiaries which produced electrical goods and at all events whether he would give them a sample article to submit to that factory. Martin said that he was not sure that the trouser press could be made in Australia as cheaply and with the same finish as in England. Finally it was arranged that Martin would look further into the question of his firm manufacturing the trouser press, that he would let the plaintiff have a sample article to submit to the factory in which it was interested and that he would submit to the plaintiff a quotation with respect to certain "lines" in which it had expressed interest such as a bottle opener, a vegetable peeler, a kitchen spoon and so on. On the following Tuesday, namely 10th July, R. L. Craig called at Martin's office. In his presence Martin wrote a letter addressed to the plaintiff on a printed form headed "quotation" and opening "Dear Sirs, We have much pleasure in quoting as follows". The letter proceeds to give in handwriting the price and particulars first of the bottle opener, then of the potato peeler, thirdly of the spoon and then goes on: "Empire Presser @ 13/- each sterling f.o.b. London, you put up credit, we cover 1 year guarantee here in 5,000 lots". At the foot there is the printed statement: "This quotation is subject to revision to include increased cost of wages and material ruling at time of delivery". Telephone conversations had taken place between R. L. Craig and Martin in the meantime but the tenor of these and of the interview on 10th July at which the "quotation" was written out is stated very indefinitely in the evidence. What R. L. Craig attempted to say about them as a witness seems to mean that by telephone there was some inquiry and discussion about the prospect mentioned on the Saturday of certain articles being manufactured or of the plaintiff placing orders and about the dates when deliveries might be expected. At this point, so R. L. Craig appeared to mean, Martin said that so far as he was concerned the manufacturer of the trouser press would be W. T. Driver. But in other parts of his evidence the witness said that he first learned that Driver was the manufacturer after 10th July and between that date and 23rd July. Over the telephone Craig had said that if the plaintiff decided to take on the trouser press it would require a year's guarantee from somebody and Martin replied that he would "give one year's guarantee on the trouser press". When Craig took away the

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quotation from Martin's office on 10th July he also took away some specimens of the trouser press as well as a bottle opener and other articles. On 23rd July the plaintiff sent to Arnos Supplies Co. on a printed form, serially numbered 1934, an order. It began in print " Please supply the following goods. Your Delivery Docket must accompany goods and must bear our Order Number ". Then over R. L. Craig's signature and in his writing is the following :—

" 5000 Units Empire Trouser Presser
@ 13/- ea. Sterling
F.O.B. London.
Arnos to cover one year guarantee on Presses.

Payment 60 day draft through McDonald Scales Ltd. Moorgate London.

Delivery As soon as possible
Delivered (*sic*) to be made
2500 JSR/M (Melbourne)
2500 JSR/S (Sydney)

This order is subject to J. S. Robertson receiving (*sic*) sole Aust. Distribution for this line ".

A printed certificate for the purposes of sales tax is crossed out. McDonald Scales & Co. Ltd., to whom this document refers, are a house in London carrying on a business which one witness described as that of financiers and shippers. They had acted for the plaintiff for some time in connection with the purchase of goods in Great Britain or in European countries for importation into Australia, and until the plaintiff formed J. S. Robertson & Co. London Ltd. they provided office accommodation for a representative of the plaintiff. The course of business has been for McDonald Scales & Co. Ltd. to pay the suppliers of the goods, take care of the shipment of the goods, pay the freight, insurance and charges and draw upon the plaintiff in Australia for the total together with three per cent commission, described in their invoice as a buying commission, by bill of exchange payable sixty days after sight and transmit the shipping documents with the draft through a bank. What is meant by the statement in the " order " of 23rd July, " Payment 60 day draft through McDonald Scales Ltd.", it would be difficult enough to say if you were not informed of this course of business and doubtless Martin had no more information than that McDonald Scales & Co. acted as finance house for the plaintiff.

It might be read as meaning that payment must be obtained by drawing upon McDonald Scales & Co. sixty days after sight, although that would be strange. But as a term of an agreement to sell by Arnos Supplies Co. or by Driver it will not fit in at all with the plaintiff's course of dealing with McDonald Scales & Co. Ltd. In fact Craig senior in his evidence said that the statement ought not to have appeared on the original copy of the order but only on the carbon copy, namely that which the plaintiff retained, because it was purely an internal instruction, which had its source with the plaintiff's finance director. What precisely was meant by Arnos covering a one year guarantee on presses is by no means certain. Were they to " service " presses brought in for attention by persons who bought them retail under a twelve month guarantee ? Or were they to meet the cost of fulfilling such a guarantee ? One matter of legal interest is from what point of time the twelve months' cover attached. For unless an assent in writing by the defendants Martin to this term can be spelled out of the subsequent steps in the transaction the fourth section of the *Statute of Frauds* might prove of more significance than the seventeenth, which alone is pleaded.

The condition that the order was subject to the plaintiff receiving the sole Australian distribution for the presses causes not a little difficulty. Driver alone could insure that it became the exclusive distributor. It does not appear, indeed it is not suggested, that he had contracted with Arnos Supplies Co. that they or their appointee should occupy that position. No duration of time is mentioned. Is it meant to cover only the time required for the resale of the five thousand articles ordered ? If not, was it intended that the plaintiff should incur any obligation to give further orders ? It is a condition that seems to require some working out.

Martin replied to this order, together with another order that is irrelevant to this case, on 31st July. This is what he said :— " We would like to thank you for your orders No.'s 1934 and 1839. With reference to the Empire Trouser Pressers we have today cabled London and we anticipate that they will put this order into work immediately and we shall get an indication of delivery date within the next few days. Payment : We understand that Messrs. McDonald Scales Ltd. will meet the account for these pressers upon production of the shipping documents in London ". The reply is signed simply " Arnos Supplies Company A. W. Martin ".

For the plaintiff it is claimed that this amounts to a complete acceptance forming an enforceable contract of sale upon which the defendants Martin are liable as sellers. For the defendants

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Martin it is maintained that it has no more than its literal meaning. It will be seen that their notion of what was to be done about payment was that after delivering the goods f.o.b. the seller, armed with the shipping documents, should present an account to McDonald Scales & Co. Ltd. who would pay it. The parties must have understood that it was Driver who would be expected to do this.

The communications which passed between Arnos Supplies Co. and Driver and between the plaintiff and McDonald Scales & Co. Ltd. are not in evidence. All that we know about them, and it is very little appears from what was afterwards stated by Driver to McDonald Scales & Co. Ltd. in a document put in by the defendants, which must be mentioned later. But clearly enough Driver asked that the price should be increased from thirteen shillings to fourteen shillings and that was agreed to by Craig in a conversation on 6th August with the secretary of Arnos Supplies Co., who wrote a confirmatory letter to the plaintiff on that date saying: "We are amending the price of the goods on this order to read 14/- each sterling f.o.b. London". The letter is headed "Order No. 1934". Again it is claimed for the plaintiff that this amounts to an acceptance forming a contract, if none was already formed. Again for the defendants it is said that it means no more than what it literally says.

It is now necessary to turn to what was done in London. On 24th August McDonald Scales & Co. Ltd. addressed to W. T. Driver an order upon their printed order form. It is headed "Order from" that company, described as "Our Order No." etc. and contains under the head of "instructions" a number of printed requirements. They include shipping instructions which direct the supplier to apply when ready giving certain particulars and not to deliver without instructions. Typed in is the following:—

"'Empire' Trouser Pressers

5,000 Trouser Pressers @ 13.- each F.O.B. London
Delivery: as soon as possible.
2,500 Shipment to Sydney
2,500 Shipment to Melbourne.

Please acknowledge this order promptly by pro forma invoice in triplicate clearly showing prices and delivery".

In the margin is written:—"J.S.R. (over) Melbourne or Sydney."

On 5th September Driver sent his invoice, possibly marked "pro-forma" but that is not certain. It runs "Messrs. McDonald Scales & Co. Ltd. Bought of W. T. Driver". The number of that company's order is given and then "5000 'Empire' Electric Trouser

Pressers (Export Model) @ 14/-d. each F.O.B. London . . . . £3,500.0.0". It proceeds as follows :—

"Price increase from 13/-d, as quoted on your order to 14/-d above authorized by Messrs. J. S. Robertson (Australia) Pty. Ltd., to our Agents, as their letter of 6th August, 1951

Delivery :— 2,500 to Melbourne
2,500 to Sydney

Confirming our Agent's (Arnos Supplies Co.) Purchase Order No : 7808 of 9th August, 1951, as amended by subsequent correspondence."

The invoice goes on to give particulars of the order ready for shipment, five cases for Sydney, four for Melbourne, and then concludes :—

"Payment :—

It is understood that your clients wish to receive this order as soon as possible, and well in time for the Christmas trade. We understand that you have already registered this shipment and trust that you will do everything in your power to obtain the necessary space as quickly as possible."

It is very difficult to resist the conclusion that as between Driver and McDonald Scales & Co. this interchange of documents formed a contract of sale and that it was so intended, at all events by them. Perhaps it may be said that the assent of McDonald Scales & Co. to the alteration of price to fourteen shillings had not yet been expressed, so far as appears from these documents, to Driver. One may conjecture that that assent had otherwise been given, but in any case a little later McDonald Scales & Co. paid Driver the price at that rate. It is plain, of course, that as they were paying the price and recovering it only by a draft on Australia they would wish to acquire immediate property in the goods. Correspondingly Driver would treat the house giving the order and paying the price as his buyer. Not unnaturally the defendants Martin contend that that is the cardinal point of the transaction to which the arrangements in Australia were preliminary and these arrangements should not be understood as amounting to an independent completed contract made by Arnos Supplies Co. as vendors in their own right with the plaintiff as purchaser. One answer attempted on the part of the plaintiff is that it never authorized McDonald Scales & Co. to become the buyers. But in the first place it is not in itself a sufficient answer but only a factor giving some support to an inference that the plaintiff did not intend the transaction to be carried out in this way and in the second place in spite of an attempt on the plaintiff's part to suggest the contrary

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it seems to have been in conformity with the course of business between the plaintiff and McDonald Scales & Co. for the latter to pay the price as direct purchasers and draw for the cost insurance and charges together with buying commission upon the plaintiff in Australia. Driver seems to treat the plaintiff as the "clients" for whom McDonald Scales & Co. are buying and Arnos Supplies Co. as his agent who sent an order to him on 9th August 1951 in consequence of which he is selling the goods to McDonald Scales & Co.

On 4th September Driver completed a formal invoice and declaration for production to the Australian Customs in respect of four cases consigned to Melbourne and on 24th September did the like in respect of five consigned to Sydney and these consignments were duly delivered f.o.b. ships bound for those ports and invoiced to McDonald Scales & Co. who paid the amount. It is not clear whether they or Driver picked up the bill of lading from the ship's agents but the former appear to have booked the shipping space, paid the freight and, on obtaining the bill of lading, declared the insurance under an open policy, paid all other charges and in each case they drew at sixty days' sight upon the plaintiff for the total including buying commission, transmitting the shipping documents with the draft to them, doubtless through a bank or banks. The plaintiff accepted and met the draft. Arnos Supplies Co. informed the plaintiff on 6th November that they had received advice by air mail that "the whole of your order for 5000 units Empire Trouser Presser have been shipped", giving the names of the ships, though owing to some change in London of the ship by which the Melbourne consignment was carried, not correctly. The letter goes on to say that "our principals" await a copy of a report upon the press by the State Electricity Commission, whose approval they assumed had been obtained before the order was placed. In reply the plaintiff speaks of forwarding the report to "your principals". When the cases of trouser presses reached Australia and the plaintiff obtained possession of them, it objected to the articles on the ground that they were not of the quality of the samples it had seen and that certain parts of them were pitted with rust sometimes under the paint or enamel. It wrote to Arnos Supplies Co. with respect to the Sydney shipment stating that it rejected the whole consignment and claiming that the order had been placed with Arnos Supplies Co. as principals and that they should take the goods off the plaintiff's hands. Later the plaintiff claimed similarly to reject the Melbourne shipment. The defendants Martin

denied the claim and denied that they were principals or personally liable.

It appeared in evidence that from the time of the arrival of the shipment in Melbourne, the plaintiff made various attempts to sell them to traders: the articles were taken round to them for the purpose. Attempts were also made to sell trouser presses to Sydney traders. It was said in evidence that this was done so that an indication could be obtained of what the trade thought of them. Another matter relied upon by the defendants Martin was that under the declaration made under the open policy a claim for insurance was put forward and met by the insurer in respect of the loss through pillage of a number of presses. The insurer paid the plaintiff seventy-eight pounds.

The case made for the plaintiff-appellant depends to no small extent upon concentrating on the "quotation" of 10th July, the "order" of 23rd July and the letter of acknowledgment of 31st July at the expense of the circumstances attending the transaction and the subsequent conduct of all parties to it and interpreting these documents so as to give a secure business foundation upon which a merchant obtaining a supply of goods might rest. I have hesitated before rejecting that case but on full consideration I think that it does not take justly into account the difficulties which these documents present if they are to be so interpreted, it neglects the surrounding circumstances as they affected Martin and the plaintiff at the time and it really disregards the actual course taken in carrying the business into effect.

To take first what was done in London. It is not easy to see exactly how the ordering by McDonald Scales & Co. of the goods from Driver and Driver's invoice to them can be treated as anything but a sale of the goods to McDonald Scales & Co., and it is no easier to see how this can be regarded as a mere procedure without significance for carrying into effect a contract of sale made in Melbourne by which Arnos Supplies Co. assumed the liability of a seller and the plaintiffs of buyers. It is true that in the letter of 31st July Martin says that he understands that McDonald Scales & Co. will meet the account on production of shipping documents in London and it is doubtless true that that meant that Driver would present the account. But such an interpretation of the terms of payment so clumsily expressed in the "order" of 23rd July does not indicate an intention on the part of Martin to bind his firm as a party principal. Rather it relegates the transaction to Driver and McDonald Scales & Co. to carry out in London. The property passed to McDonald Scales & Co. in London and the money was paid by

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them to Driver and this took place in virtue of an order and an invoice which passed between them. The despatch of the goods, the transmission of the documents and the recoupment of the expenditure remained a matter entirely between them and the plaintiff as their client. It is hard to see where there is room in this for the due execution of the contract supposed by the plaintiff. To say that it was all accepted as a substituted mode of performance is easy enough. What is difficult is to define the performance for which it is a substitute and to say where the acceptance lies. After all the plaintiff purported to reject the goods.

When you turn back to the commencement of the business, you find many circumstances tending against the conclusion that the defendants Martin made a contract and did so as a party principal. The whole thing was exceptional. Arnos Supplies Co. are manufacturers and received the plaintiff's order only because the plaintiff was interested in the particular novelty; the defendants' firm was in touch with Driver and after considering the matter thought it better not to manufacture the article. Some play was made of the fact, if it be a fact, that the plaintiff did not know of Driver until after 10th July, though it knew before 23rd July. It does not seem to matter; for it knew throughout that a manufacturer in England would supply the article and it was informed of his exact identify before it sent the "order". The quotation was for a price in sterling, a price f.o.b. London. So was the "order" and it added the confused term about a draft through McDonald Scales & Co.

It may be assumed that the parties did not concern themselves about securing complete agreement in Australia; for they treated it all as necessarily determined in London. But the condition introduced by the plaintiff about the sole distribution was left vague and was not pursued. How can the acknowledgment of 31st July be read as accepting it? In what sense is it to be supposed it was accepted? One may be reasonably sure that the thanks for the order imported no such acceptance. If the acknowledgment of 31st July is read with the basal fact in view that all parties knew that it was Driver who must accept and execute an order to manufacture the goods and deliver them f.o.b. for a sterling price and, no doubt, decide the terms, little reason appears for interpreting the expression of thanks for the order as an acceptance by the defendants Martin of an offer to them as parties who would bind themselves as principals by accepting. It is not an unreasonable conjecture that, if the acknowledgment of 31st July was carefully read by an experienced officer of the plaintiff, he would have perceived for himself that to express any assent to the condition

about sole distribution was just what Martin was not doing but on the contrary he was saying no more than that he had cabled Driver and expected him to begin manufacturing the goods and stating how he understood payment was to be made. It is to be observed that this statement would be enough to exclude the idea of an acceptance: for it does not correspond with the "order" forming the supposed offer. The present is a case in which it is sought to reject the goods after the property passed. It is a question perhaps worth asking, in whom, on the plaintiff's present hypothesis, would the goods revest?

To sum the matter up, the better view is that there was no complete *consensus ad idem* between the plaintiff and the defendants Martin, who in fact did not mean to contract but to leave it to Driver to undertake the work and, consistently with this view of the transaction, it was carried out by and between Driver and McDonald Scales & Co.

Further, the burden lay on the plaintiff and it may at least be said that it failed to make out satisfactorily that the defendants Martin contracted with it to supply the goods and that it paid for goods supplied under the contract, goods which it subsequently rejected after an opportunity of examining them, with the consequence that it could recover the price and loss of profit as damages.

This conclusion means that I think the appeal fails. But I think that an additional difficulty confronts the plaintiff appellant. In my opinion it failed to show that the circumstances were such that the condition that the goods should be of merchantable quality was implied in the contract they alleged. It failed to show that Arnos Supplies Co. dealt in goods of the description forming the subject of the contract.

There is very little authority upon the precise application of the expression "who deals in goods of that description" in s. 14 (2) of the *Sale of Goods Act* 1893 (Imp.) or upon the previous law it codifies. Little assistance is given by *Turner* v. *Mucklow* (1) or *Ipswich Gaslight Co.* v. *King & Co.* (2). These cases treat residual products of a manufacturing process as not necessarily goods of a description in which the manufacturer deals. There are more cases upon the words in s. 14 (1) "goods of a description which it is in the course of the seller's business to supply". But the nature of the condition to be implied under s. 14 (1) and the other necessary factors required make cases under that provision of little use as guides under s. 14 (2). The present case is singular and the question

(1) (1862) 6 L.T. (N.S.) 690; 8 Jur. (N.S.) 870.

(2) (1886) 3 T.L.R. 100.

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turns on unusual facts, so far as they are proved. Apparently Arnos Supplies Co. manufactured metal goods in which the process of manufacture depended on impress stamping. It seems that they did not manufacture electrical goods. There is no evidence that they imported goods for sale or indented goods or contracted to sell goods to be imported. So far as appears the transaction now in question was an isolated one springing from the facts that Martin had brought the specimens of the trouser press back to Australia with many other things with a view to considering manufacturing them or procuring them to be manufactured, that the plaintiff's chairman had his interest attracted by the novelty, that Martin decided against attempting its manufacture but agreed, according to the hypothesis demanded by the plaintiff's case, to sell five thousand of the presses of Driver's manufacture to the plaintiff.

It may be that the point depends on want of evidence but on the whole I think that on these facts the plaintiff has failed to establish that an essential part existed of the basis on which the application of s. 14 (2), i.e. s. 19 (ii) of the Victorian Act, rests.

I do not, however, think that the claim on the insurer in respect of the loss of the pillaged goods amounts, within s. 35 of the *Sale of Goods Act* 1893 (Imp.), s. 40 of the Victorian Act, to an act in relation to the goods which is inconsistent with the ownership of the seller. Nor does the receipt of the seventy-eight pounds in respect of the claim. The plaintiff was entitled under the policy to the money. For it was an open policy in the name of McDonald Scales & Co. with a declaration. The particular goods were lost. The money could be applied in their place. There is more difficulty arising from the attempt to sell some of the goods, but the matter was not fully investigated in the evidence, it is not specifically raised by the pleadings and an attempt to sell is not always and in all circumstances necessarily fatal. It is a point not, I think, made out by the defendants.

But for the reasons I have given I think that the appeal should be dismissed.

WILLIAMS J. This is an appeal by the plaintiff company J. S. Robertson (Aust.) Pty. Ltd. from a judgment of the Supreme Court of Victoria (*Martin* J.) given in an action in which the plaintiff sued the defendants Angela Martin and Arthur William Martin, the respondents on this appeal, to recover the sum of £7,212 9s. 3d. in the circumstances hereinafter mentioned. There was another defendant named on the writ, one W. T. Driver, a manufacturer resident in England, but it appears that he had been

made bankrupt prior to the issue of the writ and that he was never served. The defendants Martin counterclaimed in the action for the sum of £1,295 11s. 0d., the price of potato peelers sold by them to the plaintiff. His Honour directed that judgment be entered for the defendants on the claim and counterclaim with costs. There is no appeal from the judgment of his Honour on the counterclaim. The appeal is from his judgment on the claim.

The hearing before his Honour, as will appear, took a somewhat unusual course and it may be convenient briefly to explain the nature of the action before proceeding to discuss the particular contentions argued on the appeal. The plaintiff is a Victorian company engaged in the trade of distributing imports and exports and general merchandizing. In particular it carries on the trade of distributing what are known as household gadgets; that is to say small inexpensive household articles supposed by optimists to assist the housewife in her daily task of running the home. The defendants who trade under the name of Arnos Supplies Co. also specialize in these gadgets both in articles which they manufacture themselves and in articles which are manufactured elsewhere. The particular gadget which is the subject matter of the present action is an electrical trouser press known as the Empire Trouser Presser. Early in July 1951 negotiations took place between representatives of the plaintiff and A. W. Martin with respect to the purchase by the plaintiff of these presses and of certain other articles of which Martin had specimens and in particular of a bottle opener, a potato peeler and a stainless steel serving spoon. It was suggested that the presses, specimens of which were handed to the plaintiff, might be manufactured by a subsidiary company of the plaintiff or by the defendants or in England. The defendants supplied the plaintiff with specimens of all these articles.

On 10th July 1951 the defendants wrote to the plaintiff a letter headed "quotation" in the following terms:—

"Quotation

Arnos Supplies Company
Nepean Highway, Cheltenham, Victoria.

Messrs. J. S. Robertson (Aust.) Pty. Ltd. MU 9637
Address 131 Queen St., C.1. July 10th, 1951.

Attention 61

Dear Sirs,

In reply to your enquiry, we have much pleasure in quoting as follows.

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Folding bottle opener N.P. with name is required cost of name die extra 50,000 lots .. .. 9d. each deliver 60 days from date of order

Right & left hand Potato peeler in heavy tinplate with coloured wood handle, 50,000 lots .. .. .. 1/- each

Stainless steel serving spoon with perforations, with wood handle 50,000 .. .. 1/3 each

Empire Presser @ 13/- each Sterling F.O.B. London, you put up credit, we cover 1 year guarantee here in 5,000 lots.

This quotation is subject to revision to include increased cost of wages and material ruling at time of delivery.

Arnos Supplies Company

Per .....

Please Quote above number when ordering.

Delivery..... "

On 23rd July the plaintiff sent to the defendants an order in writing (No. 1934) in the following terms :—

" Accounts Dept. Telephone MU 9637

J. S. ROBERTSON (AUSTRALIA) PTY. LTD.

131 Queen Street, Melbourne, C.1.

No. 1934

23-7-1951

To Arnos Supplies Co.

Nepean Highway, Cheltenham.

Please supply the following goods.

Your Delivery Docket must accompany goods, *and must bear our Order Number.*

5000 Units Empire Trouser Presser @ 13/- ea. Sterling F.O.B. London.

Arnos to cover one year guarantee on Presses.

Payment 60 day draft through McDonald Scales Ltd., Moorgate, London.

Delivery As soon as possible. Delivered to be made

2500 JSR (Melbourne)

M

2500 JSR (Sydney)

S

This order is subject to J. S. Robertson receiving sole Aust. Distribution for this line."

The plaintiff admits that prior to forwarding this order but after it had received the quotation of 10th July it knew that if the order was accepted the presses would be manufactured in England by W. T. Driver.

On 31st July 1951 the defendants replied in writing to this letter in the following terms :—

" Arnos Supplies Company
1126 Nepean Highway, Cheltenham, Victoria, Australia.
31st July 1951.

J. S. Robertson (Australia) Pty. Ltd.,
131 Queen St., Melbourne.

Dear Sirs,

We would like to thank you for your orders No.'s 1934 and 1839. With reference to the Empire Trouser Pressers we have today cabled London and we anticipate that they will put this order into work immediately and we shall get an indication of delivery date within the next few days.

Payment. We understand that Messrs. McDonald Scales Ltd. will meet the account for these pressers upon Production of the shipping documents in London.

With reference to order No. 1839 we have put the three items mentioned in work and we anticipate making initial deliveries within the next four weeks.

Yours faithfully,
Arnos Supplies Company
A. W. Martin.
A. W. Martin."

Soon afterwards the defendants requested the plaintiff to agree to the price of the presses being increased to fourteen shillings sterling each and to this the plaintiff agreed.

On 6th August 1951 the defendants wrote a letter to the plaintiff in the following terms :—

" Arnos Supplies Company
1126 Nepean Highway, Cheltenham, Victoria, Australia.
6th August 1951.

Messrs. J. S. Robertson (Aust.) Pty. Ltd.
131 Queen Street, Melbourne.

Order No. 1934.

Dear Sirs,

As agreed with your Mr. R. S. Craig by phone this morning, we are amending the price of the goods on this order to read 14/- each

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Sterling f.o.b. London and thank you for your co-operation in this matter.

Yours faithfully,

Arnos Supplies Company

T. Radcliffe.

T. Radcliffe."

In 1951 there existed in London a subsidiary company formed by the plaintiff, J. S. Robertson London Ltd., its function being to buy goods and merchandise for distribution by the plaintiff in Australia and to act as distributor of goods and merchandise sent by the plaintiff from Australia for sale in the United Kingdom. There was also in England a company named McDonald Scales & Co. Ltd. which carried on the business of shippers and financiers. This company acted for the plaintiff when the plaintiff purchased goods in England for shipment to Australia. It would arrange for the shipment of the goods and, where the goods were purchased f.o.b. London, it would provide the necessary credit to pay for the goods and for the freight, insurance and other incidental charges. For these services it charged the plaintiff three per cent commission called " buying commission ". In order to recover these out-goings and commission it would obtain a sight-draft from the head office of the plaintiff's bank in London and this sight-draft would be presented to the plaintiff's bank in Melbourne for acceptance and met by that bank when it fell due either sixty or ninety days after acceptance as the case might be. The plaintiff dealt with McDonald Scales & Co. Ltd. purely as shippers and financiers and this company had no authority to act as buying agents for the plaintiff. If the plaintiff desired to make any contracts of purchase in England it made them through its subsidiary company.

On 24th August 1951 McDonald Scales & Co. Ltd. communicated in writing with Driver. The communication took the form of an order No. B/51/60 for five thousand trouser presses at thirteen shillings each f.o.b. London. Delivery as soon as possible. Two thousand five hundred shipment to Sydney, two thousand five hundred shipment to Melbourne. Driver was asked to acknowledge this order promptly by pro forma invoice in triplicate clearly showing prices and delivery. Under " Shipping Instructions " it was said in the order " Apply when ready, quoting mark, order number, number of packages, gross and nett weights and nett value. Do not deliver without instructions ". The order also said that a statement with cash discount deducted must accompany the invoice. On 5th September 1951 Driver, referring to this order by its number B/51/60, sent a pro forma invoice to McDonald

Scales & Co. Ltd. It was for five thousand Empire Electric Trouser Pressers (export model) at fourteen shillings each f.o.b. London £3,500. It stated " Price increased from 13/-, as quoted on your order to 14/- above authorised by Messrs. J. S. Robertson (Aust.) Pty. Ltd. to our agents as by their letter of 6th August, 1951. Delivery 2,500 to Melbourne, 2,500 to Sydney. Confirming our agent's (Arnos Supplies Co.) purchase Order No. 7808 of 9th August, 1951 as amended by subsequent correspondence. Order now ready for shipment . . . cases marked :—to Melbourne J.S.R. Melbourne 1/5, to Sydney J.S.R. Sydney 1/4. Payment :—in London against invoices nett."

The subsequent course of events can be briefly described. The five thousand presses were packed by Driver and shipped one-half to Sydney and one-half to Melbourne. McDonald Scales & Co. Ltd. paid Driver for the presses f.o.b. London, took out the necessary bills of lading, insurance cover and other shipping documents and paid the freights and other shipping charges. In due course the presses arrived in Sydney and Melbourne and were delivered to the plaintiff, the plaintiff paying the duty and landing charges and other incidental expenses. McDonald Scales & Co. Ltd. drew a sight-draft for the amount of their account on the plaintiff which was accepted by the plaintiff and its bank in Melbourne and met in due course. This account included all McDonald Scales & Co. Ltd.'s out-of-pocket expenses and its buying commission of three per cent. The plaintiff claims that when it inspected the presses on arrival in Sydney and Melbourne they were found to be in several respects of inferior quality to the specimens supplied to it by the defendants prior to the giving of the order of 23rd July and that they were unsaleable. Accordingly, relying on s. 39 of the *Goods Act* 1928 (Vict.), it refused to accept the presses. It discovered that two of the cases in which the presses were packed for shipment to Sydney had been pillaged during the voyage and it made a claim on the insurance company for the loss sustained and was paid the sum of seventy-eight pounds.

The defendants refused to accept responsibility for the presses being of inferior quality, asserting that they were acting as agents only for their principal in London, and the plaintiff then commenced the present action. The sum of £7,212 9s. 3d. claimed in the action comprises £6,023 18s. 0d. which the plaintiff expended in connection with the purchase of the presses and £1,188 11s. 3d. for loss of profit which the plaintiff claims that it would have made on the re-sale of the presses if they had been in conformity with the contract. In its statement of claim the plaintiff alleged that in

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July 1951 the plaintiff and the defendants Martin or alternatively the said defendants as agents for and on behalf of the defendant Driver entered into a contract for the purchase by the plaintiff from the defendants Martin or the defendant Driver of five thousand new trouser presses at the price of thirteen shillings sterling each f.o.b. London. In its particulars the plaintiff stated that the contract was in writing and was included in the following documents—(1) quotation dated 10th July 1951; (2) order dated 23rd July 1951; (3) letter dated 31st July 1951; (4) letter dated 6th August 1951; and to be implied from (5) the provision by the defendants Martin for the plaintiff on or about 6th July 1951 of a sample of trouser press; and (6) the *Goods Act* and its operation. The plaintiff also alleged that it was a term and condition of the contract that the trouser presses—(a) should be of a quality equal to sample submitted by the defendants Martin to the plaintiff; (b) should be of merchantable quality; (c) should be reasonably fit for sale to the public by the plaintiff and use as trouser presses; and a further condition that the plaintiff should have a reasonable opportunity to compare the bulk with the sample.

In their statement of defence the defendants denied that in July 1951 or at any other time they entered into any such contract with the plaintiff either as principals or as agents of Driver. They alleged that if any such contract was made it was a contract between the plaintiff and Driver and if they participated in any way in the making of the contract they did so solely as agents for and on behalf of Driver and not as principals or on their own behalf. They also denied that what was done in London by McDonald Scales & Co. Ltd. was done in performance of the contract alleged in the statement of claim and contended that these acts were all done pursuant to a new contract entered into by McDonald Scales & Co. Ltd. with Driver on behalf of the plaintiff.

When the action came on for hearing before *Martin* J. the plaintiff tendered oral and documentary evidence on all the issues raised in the pleadings. The defendants tendered certain documents as exhibits during the plaintiff's case. At the close of that case counsel for the defendants asked for leave to move for judgment and was allowed to do so on his undertaking to call no evidence to deal with the formation of the alleged contract. As the defendants had already gone into evidence on this issue by tendering certain documents as exhibits the undertaking was in effect an undertaking not to call further evidence on this issue.

The plaintiff had alleged in the statement of claim that in performance of the contract and at the request of the defendants it

had paid the sum of £A6,023 18s. 0d., already mentioned, consisting of £S paid to the defendant Driver £3,500, London port charges £4 7s. 4d., freight and insurance £152 1s. 11d., commission £109 13s. 11d., totalling £S3,766 3s. 2d., which equals in Australian pounds £4,726 13s. 4d., bank charges £A72 18s. 0d., dock and landing charges £A1,224 6s. 8d., total £A6,023 18s. 0d. The purpose of tendering some of these documents appears to have been to prove that these sums were not paid in performance of any contract made between the plaintiff and the defendants but in performance of a different contract made between McDonald Scales & Co. Ltd. on behalf of the plaintiff and Driver. The plaintiff in the statement of claim had also alleged that it had refused to accept the presses, the refusal being contained in letters dated 8th January 1952 and 4th February 1952 and an invoice dated 25th February 1952 from the plaintiff to the defendants; and the defendants in their statement of defence, in addition to denying these allegations, had pleaded that the plaintiff had asserted title to the presses delivered to it by claiming and obtaining insurance moneys in respect of pilferage of the presses.

This defence was based on s. 40 of the *Goods Act*. Under s. 39 of that Act the plaintiff would not be deemed to have accepted the goods unless and until it had a reasonable opportunity of examining them for the purpose of seeing whether they were in conformity with the contract after the presses had been landed in Sydney and Melbourne. But s. 40 provides instances where the buyer shall be deemed to have accepted the goods, one instance being where he does any act in relation to them which is inconsistent with the ownership of the seller. It has been held that the provisions of s. 40 are not limited by those in s. 39 and that where a buyer is deemed to have accepted the goods within the meaning of s. 40 he loses his right to reject them under s. 39: *Hardy & Co.* v. *Hillerns and Fowler* (1). The insurance policy put in evidence by the defendants was presumably tendered as part of the proof that the plaintiff had made a claim on the insurance company for the presses pillaged during the voyage to Sydney and recovered the sum of seventy-eight pounds. Accordingly, when the defendants moved for judgment, they had gone into evidence on at least three issues. But his Honour only called upon counsel for the defendants to undertake to call no evidence to deal with the formation of the contract alleged so that, if we disagree with his Honour's opinion on that point, it may still be open to the defendants to call evidence on all the other issues. But other contentions, as

(1) (1923) 2 K.B. 490.

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will appear, were also raised before us, and it would seem that our answers to these contentions will dispose of them and that the only issues still outstanding will be whether the goods were in conformity with the contract and, if they were not, what would be the proper measure of damages. Section 37 of the *Judiciary Act* 1903-1955 authorizes this Court to reverse the judgment appealed from and give such judgment as ought to have been given in the first instance and in all the circumstances it must be open to us, if we think his Honour was wrong, to do what his Honour should have done, that is, refuse the motion for judgment, and therefore to set aside the judgment on the claim and the order for costs so far as attributable to this judgment and remit the cause to his Honour for further hearing.

On the motion for judgment his Honour held that there was no concluded contract between the parties. He held that the plaintiff's letter to the defendants of 23rd July was an offer but that the defendants' letter to the plaintiff of 31st July was not an acceptance of this offer. He said that, if there was a concluded contract, he thought that the Martins would be personally liable upon it. Before us it was contended for the plaintiff that there was a concluded contract to be found in the documents itemized in the particulars and that under this contract the defendants were liable as principals. For the respondents it was contended that—(1) there was no concluded contract; (2) if there was, the defendants contracted merely as agents for Driver and not as principals; (3) the contract alleged in the statement of claim was not shown to have been performed and the performance proved was performance pursuant to some other contract; (4) the plaintiff was not entitled to the remedy sought because on the evidence the plaintiff must be deemed to have accepted the goods when they arrived in Sydney because by making a claim on the insurance company it did an act in relation to them which was inconsistent with the ownership of the seller; (5) the plaintiff had not proved a breach of any of the conditions relied on.

Of the several contentions thus raised by the parties the initial and outstanding questions are—(1) whether there was a concluded contract between the parties and, if there was, (2) whether the defendants are personally liable for breach of that contract. Neither of these questions is easy to solve but they should, I think, be answered in favour of the plaintiff. It is not essential to determine whether the "quotation" of July 10th was an offer or a mere intimation of the terms on which the defendants were prepared to do business with the plaintiff with respect to the four articles

quoted. A lot can be said in favour of the quotation being an offer. It appears to be an offer in respect of the first three items and there is no reason why the quotation for the trouser presses should not be similarly regarded. Certain authorities were cited but they are not of much assistance. It is sufficient to say that the present case, relating as it does to commercial transactions, is more in line with *Philp & Co.* v. *Knoblauch* (1) than with *Harvey* v. *Facey* (2). In the case of the first three items an unconditional order appears to have been given, but in the case of the trouser presses the quotation, if offer it was, was not accepted but instead a counter-offer was made on 23rd July. The importance of the letter of 10th July, whether it amounted to an offer or not, is that all four lines quoted in the letter are quoted as lines which the defendants can supply and there is no indication that the defendants intended to supply any of the goods other than as principals. The exact words of the quotation in respect of the presses are "Empire Presser @ 13/- each sterling f.o.b. London, you put up credit, we cover one year guarantee here in 5,000 lots". This language clearly contemplates that the presses will be manufactured in England because the plaintiff is to put up the credit to pay for them f.o.b. London at thirteen shillings each sterling. But, surely, the agreement to put up the credit is intended to be an agreement between the plaintiff and the defendants. The presses are to be purchased in lots of five thousand and the defendants are to cover one year's guarantee in Australia which must mean that the defendants are to reimburse the plaintiff for the expense incurred in servicing the presses under the guarantee to keep them in repair for one year after sale. They must have intended to undertake this liability as a principal, and there is nothing to suggest that if an order was given they should be agents only in accepting the order but principals in covering the guarantee. On 10th July the plaintiff did not know that Driver was to manufacture the presses. Before the plaintiff made the counter-offer of 23rd July it knew this but the counter-offer is in terms an offer made to the defendants as principals and not to them as agents for Driver. The counter-offer is made to Arnos Supplies Ltd. It requests the defendants to supply five thousand Empire trouser presses. It includes the terms of the quotation relating to the delivery of the presses f.o.b. London and to the covering of the guarantee and it adds the further terms—(1) that delivery should be as soon as possible; (2) that the goods should be made up in two equal consignments. Two thousand five hundred to be shipped

(1) (1907) S.C. 994. (2) (1893) A.C. 552.

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to Melbourne and two thousand five hundred to Sydney; and (3) that the order should be subject to the plaintiff receiving the sole Australian distribution for that line. The meaning of the last-mentioned term is not as clear as it might be but the question had been discussed between the parties and it must mean that the plaintiff was to have the sole right to distribute the presses for sale in Australia and, therefore, to determine the price and other conditions upon which they should be sold here. The counter-offer states that payment would be a sixty day draft through McDonald Scales Ltd., Moorgate, London. This term seems on the evidence to have crept into the document, which emanated from the accounts branch of the plaintiff, by mistake. It really refers to the means the plaintiff would adopt to establish the necessary credit to pay for the goods f.o.b. London, that is to say that, in accordance with the standing arrangements between the plaintiff and McDonald Scales & Co. Ltd., the latter company would pay the manufacturer for the goods f.o.b. London and arrange for their shipment and would recoup itself by means of a sixty day sight-draft drawn on the plaintiff in the usual way. This provision was the only one queried by the defendants in their reply of 31st July. They said they understood that Messrs. McDonald Scales Ltd. would meet the account for these presses upon production of the shipping documents in London. The plaintiff did not expressly reply to this query, but the whole transaction went forward on the assumption that this was what the plaintiff intended. In view of the statement in the quotation of 10th July that the plaintiff was to put up the credit to pay for the goods f.o.b. London and of the offer in the letter of 23rd July to purchase the presses f.o.b. London the plaintiff could not have intended otherwise. Nor did the defendants expressly accept the condition in the letter of 23rd July that the plaintiff was to receive the sole Australian distribution for the presses but the letter of 31st July cannot fairly be read as other than an acceptance of the order as a whole, and the letter of 6th August and the amendment of the price of the goods to which it refers are not explicable on any other basis except that an agreement had been concluded for the purchase by the plaintiff of the presses on the terms contained in its letter of 23rd July, the goods to be paid for in cash by McDonald Scales & Co. Ltd. on behalf of the plaintiff f.o.b. London. The steps which McDonald Scales & Co. Ltd. subsequently took in London in order to obtain delivery of the goods and pay for them f.o.b. London and have them shipped to Australia were all referable to this agreement. They took the form of an order dated 24th August direct from McDonald

Scales & Co. Ltd. to Driver but Driver knew it was not an independent order intended to create new and direct contractual relations between that company and himself because in the pro forma invoice of 5th September he refers to the order which he had received from Arnos Supplies Ltd. All these steps were taken as a convenient method of performing the contract made in Australia and carrying it into effect.

The reference by Driver to Arnos Supplies Co. as his agents cannot throw any light on the question whether the defendants contracted with the plaintiff as principals or as mere agents. This question must be answered by an examination of what occurred between the plaintiff and the defendants. In the correspondence that took place between the parties on 10th, 23rd and 31st July and 6th August 1951 there is no express statement anywhere that the defendants are contracting as agents and not as principals. In relation to the guarantee and the appointment of the plaintiff as sole Australian distributors of the presses the defendants could not have intended to contract otherwise than as principals and, this being so, it is difficult to understand why, in relation to the order as a whole, the defendants should not also be regarded as principals. Stress was laid on the fact that the plaintiff had undertaken to pay for the goods in full in London whereas, if the defendants were principals, one would have expected that they would have purchased the goods from Driver for a less sum than the price at which they sold the goods to the plaintiff. But, even as agents, the defendants would still have to look to Driver for their commission, no provision having been made to deduct this from the price prior to payment. Whether the defendants were subsequently to recover commission on what was, as between them and Driver, a sale by Driver to the plaintiff, or whether the arrangement between them and Driver was that they were to purchase the presses from Driver and re-sell them to the plaintiff and receive some proportion of the purchase money from Driver is immaterial. Probably they were Driver's agents but this would not prevent them from contracting with the plaintiff as principals. The origin of the payment by McDonald Scales & Co. Ltd. to Driver in London was plainly the initial request by the defendants that the plaintiff should put up the credit to pay for the goods f.o.b. London and this would appear to mean, and to mean only, that the plaintiff was to put up the credit on behalf of the defendants. On the evidence all that the plaintiff knew was that Driver was to manufacture the presses, and it was nowhere stated that he was to manufacture them for the plaintiff and not for the defendants. The

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defendants nowhere stated that they were to be agents only or that they were making the contract with the plaintiff on behalf of Driver and the documents of 10th and 31st July and 6th August are all signed by the defendants without any qualification. The proper way for a person who signs a contract for a principal and who wishes to exclude any personal liability is to sign as agent: *Universal Steam Navigation Co. Ltd.* v. *James McKelvie & Co.* (1). But a person who is really an agent may still save his personal liability although he signs the contract without qualification if it is clear from the body of the contract that he contracted only as agent, per *Archibald* J. in *Gadd* v. *Houghton* (2). "Prima facie a party is personally liable on a contract if he puts his unqualified signature to it. In order, therefore, to exonerate the agent from liability the contract must show, when construed as a whole, that he contracted as agent only and did not undertake any personal liability": *Halsbury's Laws of England* (3rd ed.), vol. I, p. 228; *Bowstead* on *Agency* (11th ed.) (1951), p. 246. The facts of the present case bear a close analogy to the facts in *Dramburg* v. *Pollitzer* (3) except that the present facts point more strongly to the personal liability of the defendants than the facts in that case pointed to the personal liability of the dealer over whose door were inscribed the words "Sole Agent for Kneppers Actien Gesellschaft and Co. of Vienna". The plaintiffs sent to the dealer a written order dated 5th September 1871 addressed to him personally for gelatine paper to be delivered by monthly instalments. To this the defendant replied by letter of 8th September 1871—"I acknowledge with thanks the receipt of your favour of 5th, containing order for 150 reams gelatine, which I have forwarded to Kneppers Actien Gesellschaft, in Vienna, to be executed in monthly parcels of 30 reams each, and remain, dear sirs, yours truly, S. Pollitzer". It was held that the defendant was personally liable for the breach of this contract. *Bovill* C.J. said: "The order of the 5th April (*sic* September) was given by the plaintiff in his own name, was addressed to S. Pollitzer, Upper Thames-street, without the slightest reference to his being agent to the house in Vienna, or to any other firm, and it appears on the evidence that Pollitzer was a person who dealt in this coloured gelatine paper. Under these circumstances, the order given would on the face of it import that it is a contract with Pollitzer, and with him only, in his individual capacity, and not as agent of Kneppers. The answer comes from Pollitzer, is addressed to the plaintiff by Pollitzer, and signed in

(1) (1923) A.C. 492.
(2) (1876) L.R. 1 Ex. D. 357.
(3) (1873) 28 L.T. (N.S.) 470.

his own name. There is no description of him by himself qualifying his signature in his individual capacity. All that can be said is, that in the terms of the order he states he has forwarded it to Kneppers, which might very well be that he should be agent here to make a contract, and rely on Kneppers to fulfil it. Such a transaction is common enough amongst commercial persons in this country, who may make a contract in their own names here, and then say, 'We have sent the order to be executed abroad', and if givers of the order be aware of the house which is to execute the same, they may and commonly do write directly to that house respecting the execution" (1). *Denman* J. said: "Now, in my judgment, the words of the letter of the 8th September, relied on for the defendant, viz., 'which I have forwarded to Kneppers Actien Gesellschaft, in Vienna, to be executed', do not make them disclosed principals, but are perfectly consistent with an engagement on the defendant's own part to get the work done, just as in many other cases in ordinary life, where an order is given to a man to do a certain thing, and for the purpose of getting the order executed he has to send it abroad; and, therefore, the defendant so doing, and saying that he had done so here, does not amount to making Kneppers principals in the transaction" (2). See also *Reid* v. *Dreaper* (3); *Basma* v. *Weekes* (4). These principles may have to be applied with caution where the terms of the contract are not contained in a single document signed by the agent but have to be spelt out from a number of documents but they indicate a very definite approach. In the present case the defendants have nowhere signed as agents and there is nothing in the heading or body of any of the documents to indicate that they are contracting not on behalf of themselves but on account of Driver.

His Honour was of opinion that there was no concluded contract between the parties because the defendants' letter of 31st July was not an unequivocal acceptance of the offer contained in the plaintiff's letter of 23rd July. He said that he did not think that the first paragraph of the letter of 31st July was such an acceptance. He said that all the first paragraph meant was that the defendants were intimating to the plaintiff that they had cabled to the manufacturer and they had high hopes he would undertake the work. The difficulty in the case is that the parties have used a sort of "commercial shorthand" in order to indicate their intentions instead of expressing them fully and completely. But it is clear

(1) (1873) 28 L.T. (N.S.), at p. 471.
(2) (1873) 28 L.T. (N.S.), at p. 472.
(3) (1861) 6 H. & N. 813 [158 E.R. 335].
(4) (1950) A.C. 441, at p. 454.

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that it was never intended that a formal contract should be executed. The letter of 31st July appears to carry the case much further than his Honour suggests. The first sentence, "We would like to thank you for your Orders Nos. 1934 and 1839", is surely, unless subsequently modified, an unequivocal acceptance of those orders, just as unequivocal in the case of the order for the presses as in the case of the order for the other lines. The rest of the letter, apart from the query as to payment, relates purely to the performance of the contract, that is to the date of delivery. As to that, the plaintiff had merely stipulated "Delivery as soon as possible". That stipulation does not make the contract uncertain: *Bowes* v. *Chaleyer* (1). The paragraph referred to by his Honour does not imply any doubt that the manufacturer will undertake the work. It assumes that he will and that he will commence to manufacture the goods immediately so that the defendants will be able to let the plaintiff know within the next few days when the goods will be delivered. The subsequent agreement on 6th August to increase the price to fourteen shillings points decisively to a concluded agreement at least on that date if no contract had been made by 31st July. The whole of the subsequent acts of the parties are explicable only on the basis that a contract had been made. Driver received an order from the defendants dated 9th August for the supply of the presses. He had previously received cabled instructions. The plaintiff put McDonald Scales & Co. Ltd. into motion in order to carry out the contract on its part. The necessary credit was put up in London to pay for the presses f.o.b. London. The plaintiff took delivery of the presses in London. The defendants knew what was being done. On 6th November 1951 they wrote to the plaintiff to say that they had received advice by airmail that the whole of the plaintiff's order No. 1934 for five thousand units Empire Trouser Pressers had been shipped one-half per S.S. *Corinaldo* on 6th September 1951, the other half per S.S. *Melbourne Star* on 24th September 1951. There is not a suggestion from beginning to end of the correspondence that the parties ever considered that they were not *ad idem*. They had agreed on the goods to be purchased, the price, the place of delivery, and manner of payment. When the defendants accepted the order and forwarded it on to London, they must have also agreed to the other two terms, one relating to the guarantee suggested by themselves and the other relating to the distribution of the goods in Australia suggested by the plaintiff. These terms are not couched in language so vague and uncertain as to be incapable of any precise meaning.

(1) (1923) 32 C.L.R. 159.

We are here dealing with commercial documents and of such documents Viscount *Maugham* said in *G. Scammell Ltd.* v. *Ouston* (1): "In commercial documents connected with dealings in a trade with which the parties are perfectly familiar the court is very willing, if satisfied that the parties thought that they made a binding contract, to imply terms and in particular terms as to the method of carrying out the contract which it would be impossible to supply in other kinds of contract: see *Hillas & Co. Ltd.* v. *Arcos Ltd.* (2)". See also *Nicolene Ltd.* v. *Simmonds* (3).

It therefore becomes necessary to consider the other contentions raised by counsel for the defendants. They are the contentions numbered (3), (4) and (5) above. That numbered (3) has already been answered. The evidence proves performance of the contract alleged in the statement of claim and not performance of some other contract. Little need be said about the contention numbered (4). Section 39 (1) of the *Goods Act* provides that where goods are delivered to the buyer which he has not previously examined he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. Section 40 of the Act provides that the buyer is deemed to have accepted the goods . . . when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. As has already been said when two of the cases of presses reached Sydney they were found to have been pillaged and the plaintiff made a claim under the insurance policy for the loss sustained and was paid for this loss. It was submitted that this was an act of the plaintiff in relation to the presses shipped to Sydney that was inconsistent with the ownership of the seller. A buyer who takes delivery of goods which he has not previously examined has the right under s. 39 of the *Goods Act* to examine the goods for the purpose of ascertaining whether they are in conformity with the contract. Pending the exercise of this right he has the property in the goods subject to the condition that they shall revest in the seller if upon the examination he finds them to be not in accordance with the contract: *Kwei Tek Chao* v. *British Traders & Shippers Ltd.* (4). A purchaser who has this conditional property in goods for which he has paid the price and of which he has taken delivery must have the right to insure the goods without forfeiting his right to reject the goods under s. 39.

(1) (1941) A.C. 251.
(2) (1932) L.T. (N.S.) 503, at pp. 511, 512, 514; (1941) A.C. 251, at p. 255.
(3) (1953) 1 Q.B. 543.
(4) (1954) 2 Q.B. 459, at p. 487.

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By insuring the goods, he does nothing which is inconsistent with the ownership of the seller. If a loss occurs and he makes a claim on the insurance company for the loss and receives payment, the payment takes the place of the goods that have been lost and, if the buyer subsequently became entitled to reject the goods, he would have to credit the seller with the insurance moneys. It is simply an illustration of the principle that a person must do everything he can to mitigate the damage flowing from a breach of contract. A buyer who acts in this way does nothing inconsistent with the ownership of the seller. His actions are completely consistent with that ownership.

Finally there is the fifth contention. Although specimens of the trouser presses were given to the plaintiff by the defendants before the contract was made, the contract was not a contract for the sale of goods by sample. There is no express or implied term in the contract to this effect. The mere exhibition of a sample during the negotiation of a contract does not make the contract a sale by sample: *Halsbury's Laws of England* (2nd ed.), vol. 29, pp. 67, 68. The contract was for the sale of future goods, that is Empire trouser presses to be manufactured to fulfill the contract. The evidence relating to the provision of the specimens is admissible to identify the subject matter of the contract because trouser presses may be of many kinds. It is only by examining a specimen that one can find out the particular kind of presses the parties had in mind. The initial description can only be made specific in this way: *Cameron & Co.* v. *Slutzkin Pty. Ltd.* (1). The sale is a sale by description: *Grant* v. *Australian Knitting Mills Ltd.* (2) (see also per *Dixon* J. in this Court (3)) and in that case s. 18 of the *Goods Act* provides that there is an implied condition that the goods shall correspond with the description. There is evidence that the presses when examined by the plaintiff on arrival were found to be inferior in quality to the specimens the defendants had shown the plaintiff and the plaintiff was therefore entitled to reject them. Possibly the condition referred to in s. 19 (ii) of the *Goods Act* that the goods should be of merchantable quality should also be implied although it may be arguable whether the defendants are sellers who deal in goods of that description. But in view of the quotation of 10th July in which the defendants quoted the presses along with three other lines as goods in which they dealt it would be difficult to hold that they were not sellers who dealt in goods of those descriptions. It is unnecessary to express any final opinion

(1) (1923) 32 C.L.R. 81.
(2) (1936) A.C. 85, at p. 100.
(3) (1933) 50 C.L.R. 387, at pp. 417, 418.

on this point. It is sufficient to say that there is evidence of a breach of both these conditions. If the goods did not correspond with the description in the contract the plaintiff would be entitled to reject them and sue to recover all the moneys he had expended in performing the contract. The defendants knew that the plaintiff was purchasing the goods for re-sale and in particular that it was purchasing to catch the Christmas trade and the plaintiff could, it would seem, also sue to recover the profits it would have been able to make if the goods had corresponded with the description. But the fourth and fifth contentions need not be fully investigated at this stage because of the course of the hearing. They can be fully investigated on the further hearing when the defendants may tender further evidence.

The appeal should be allowed with costs and the order already outlined made.

TAYLOR J. In the action which has led to this appeal the appellant sued the respondents and one, W. T. Driver, for damages alleged to have resulted from a substantial breach of a contract for the sale of five thousand articles described as trouser presses. The claims against the respondents and Driver were made alternatively, it being alleged, in the first place, that the former had, themselves, undertaken to sell the subject goods to the appellant and, alternatively, that they had entered into the contract as the agent of and for and on behalf of Driver. For reasons which have already been made plain the suit did not proceed against Driver upon the hearing and the appellant sought to recover damages from the respondents on the basis that they had acted as principals in the matter. But upon the hearing of the suit the primary difficulty which confronted the appellant was not so much whether the respondents had acted as principals in the matter but whether the evidence established that they had entered into any binding agreement at all with the appellant. In the opinion of the learned trial judge the appellant failed on this point and he entered judgment for the respondents. For reasons which I shall shortly give I am of the opinion that this conclusion was correct.

The four documents which were said to have constituted the contract have already been set out and, with respect to the contention that the respondents did not contract as principals, it is sufficient to observe that if they contracted at all they did not purport to do so merely as agents. Perhaps it may be said that the terms of the documents—and particularly those relating to the matter of payment and the substantial provisions of the letter of

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31st July 1951—are not necessarily inconsistent with an intention on the part of the respondents to act as agents in the matter but this falls far short of the requirement that in order for an agent to escape liability under a written contract to which he has subscribed the contract itself must make it clear that he has contracted merely in the capacity of an agent.

The initial question therefore is whether any binding contract was ever made between the parties to this appeal. This, again, is a question which must be resolved, at least in the main, by a consideration of the documents themselves. The documents already referred to are said to constitute the contract sued upon and no attempt was made to spell out any other contract from the subsequent conduct of the parties. Indeed any such attempt would have been futile for there was no subsequent conduct on the part of the respondents, or on the part of any person or persons acting for them, from which any relevant contract could have been implied. Approaching the matter on this basis it is, in my opinion, reasonably clear that the parties did not make a binding contract. The first document, called a "quotation" does not tender an offer to supply any specific quantity of the goods in question but even if it constituted an offer to supply any quantity which the appellant might have cared to specify, the "order" of 23rd July 1951 was not an acceptance of it. The latter document proposed specific and different terms as to payment and was expressly "subject to J. S. Robertson receiving sole Aust. Distribution for this line". Whatever this stipulation may mean it is apparant that the order can be regarded only as a counter-offer. It was, however, contended that this counter-offer was accepted by the respondent's letter of 31st July 1951 but if this be the correct conclusion it must be reached in spite of the fact that this letter neither purports to accept the counter-offer generally or by reference to its particular terms. What it says is that the respondents "have today cabled London and we anticipate that they will put this order into work immediately and we shall get an indication of delivery date within the next few days". Moreover, with respect to payment, the letter adds that "we understand that Messrs. McDonald Scales Ltd. will meet the account for these presses upon production of the shipping documents in London". The fourth document is a letter written by the respondents to the appellant confirming an alteration in the price of the subject goods and it intimated that the order had been amended accordingly. I find it impossible to accept the view that, at this stage, there was any binding agreement between the parties. Quite apart from any other difficulty in the

matter the condition relating to "distribution" rights, which was contained in the order, had not been the subject of agreement between the parties unless acceptance of this condition ought properly to be implied from the terms of the letter of 31st July. But on what grounds could any such implication be made? The condition itself was vague and did not include any reference to the terms upon which any such rights should be made available or granted nor was the period for which such rights should endure referred to in any way. The appellant, contending as it does, that the delivery of the letter of 31st July operated to bring a binding agreement into existence, is, therefore, immediately confronted with the practical impossibility of defining the contractual obligation of the parties on this point. There is, in my opinion, no doubt that agreement on this point had not been reached and that if, thereafter, the respondents had tendered the subject goods to the appellant the latter would have been entitled to maintain that it was not under any contractual duty to accept them.

There is, however, a broader ground which leads to the conclusion that the documents did not constitute a binding agreement. The contention that the letter of 31st July operated as an acceptance of the condition relating to the Australian distribution rights could succeed only on the view that such an acceptance was implicit in the terms of the letter or ought properly to be inferred from them. In my opinion, this view is not open upon the terms of the letter for when it is borne in mind—as may legitimately be done for this purpose—that the appellant knew before the giving of the order that the subject goods would be manufactured in England by Driver and that the respondents were representing him in the transaction it becomes abundantly clear that no such implication can be made. The evidence does not disclose whether the Australian distribution rights for any period were within the disposal of the respondents, nor do the documents throw any light upon the matter, and it would be quite unsafe to conclude upon any grounds of commercial necessity, or indeed upon any grounds, that there is implicit in the letter of 31st July, or that there should be inferred from its terms, any undertaking on the part of the respondents to grant to the appellant or to procure for it the Australian distribution rights for the subject goods. Perhaps if the condition contained in the order had been more explicit and had required that such rights should be made available for a specified period of years and upon certain specified terms the difficulty in the way of the appellant on this broader point might have presented itself with greater force, but the fact that the condition was expressed in general

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terms does not diminish the difficulty involved in accepting the view that the letter of 31st July constituted an express or implied acceptance of it. The vague nature of the condition, however, gives rise also to the other difficulty, to which I have already referred, and makes it impossible to say what stipulation on this point ought to be implied even if one tended to accept the view that some agreement on this point was reached. It is, of course, possible that this consideration could lead to the conclusion that there was a binding agreement for the sale of the subject goods with, annexed to it, a vague and unenforceable provision as to the distribution rights. But such a conclusion would be highly artificial and consideration of the documents satisfies me that the parties did not make any binding agreement and that on 31st July, and thereafter, each was entitled to withdraw from further negotiation. Before leaving this aspect of the case there are some further brief observations which should be made concerning the suggestion that subsequent events showed that the parties regarded themselves as bound respectively to deliver and pay for the subject goods and that the course of dealing showed that the stipulation as to the Australian distribution rights was waived. In the first place—and it is a repetition of what I have already said—there were no subsequent dealings between the parties or between the appellant and any person or persons having authority to bind the respondents. The suggestion that the subsequent delivery of the subject goods was made by or on behalf of the respondents, of course, depends upon the validity of the conclusion that it was made in performance of a pre-existing contract which bound the respondents to make such a delivery. In the circumstances, it is said, the method actually chosen for the delivery of the goods was adopted as a convenient method of carrying out that contract. But the delivery itself cannot, in the circumstances of this case, be relied upon as a material factor in subjecting the respondents to contractual liability for neither the manufacturer, nor any other person who participated in making the delivery, had any authority to bind, or, indeed, any intention of binding, the respondents. Finally I should add, the appellant had not, either by its pleadings or particulars asserted otherwise. Its case, in so far as it was concerned with establishing the existence of the contract sued upon, was founded upon the four documents referred to and, although counsel did upon the hearing of the appeal rely to some extent upon the so-called subsequent course of dealing between the parties, the events that happened cannot avail the appellant upon this point.

But if this view of the case should be wrong there is, in my view, another reason why the appeal must fail. In August 1951 the

English company previously referred to, McDonald Scales Ltd., became interested in the matter. The evidence shows that on a number of previous occasions this company had provided credit for the purchase of goods by the appellant in England and had acted as its shipping agent. What instructions were given to it on this particular occasion do not precisely appear but it seems sufficiently clear that it was, at least, requested to pay the manufacturer, Driver, for the goods in question, to make the necessary shipping and insurance arrangements and to pay the requisite freight and insurance charges. It was pursuant to these instructions that on 24th August 1951 McDonald Scales Ltd. forwarded to Driver an order in the following form :—

" Order from McDonald Scales & Co., Ltd.
Coventry House 3, South Place, Moorgate E.C.2., London.
24th August 1951 19 RW
Messrs. W. T. Driver,
36 North Road, London N.7.

Our Order No. B/51/60
(This must be quoted in all communications respecting this Order)
' Empire ' Trouser Pressers
5,000 Trouser Pressers @ 13.- each F.O.B. London
Delivery : as soon as possible.
2,500 Shipment to Sydney
2,500 Shipment to Melbourne.
Please acknowledge this Order promptly by pro forma Invoice in triplicate clearly showing prices and delivery.
Instructions Please read carefully.
Invoices : To be rendered in quintuplicate on certified forms for the Country concerned, showing the relative Current Domestic value. Mark and Shipping specification required.
Discounts : Trade and cash discounts to be deducted in full, unless otherwise stated.
Shipping Instructions : Apply when ready, quoting mark, order number, number of packages, gross and nett weights and nett value. Do not deliver without instructions.
Statement : With cash discount deducted must accompany invoices.
Packing : Type of packing to be stated in invoice. Hay or Straw not to be used without a Medical Certificate.
Acknowledgement : Please advise current prices and estimated delivery date promptly.
Export Licence : Please advise if Export Licence is required. When necessary this order is subject to Licence being granted.

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Purchase Tax : Above goods purchased by us, holders of Purchase Tax Certificate No. Central 2/3241, are intended solely for export.

per pro McDonald Scales & Co. Ltd.
C. Bren.
Director."

On 5th September 1951 Driver acknowledged this order by a pro forma invoice in the following terms :—

"To McDonald Scales & Co. Ltd.
Dated 5th September, 1951.
Invoice.

Pro-Forma. 'A' Telephone North 3205/6/7

Messrs. McDonald Scales & Co. Ltd.
Coventry House,
3, South Place, London, E.C.2.

Bought of
W. T. DRIVER
36, North Road, London, N.7.

Date 5/9/51 Reference P.F. Order No. B/51/60

	£	s.	d.
5,000 'Empire' Electric Trouser Pressers (Export Model) @ 14/-d. each F.O.B. London ..	3,500	0	0

Price increase from 13/-d., as quoted on your order to 14/-d above authorized by Messrs. J. S. Robertson (Australia) Pty. Ltd., to our Agents, as their letter of 6th August, 1951.

Delivery :—2,500 to Melbourne
2,500 to Sydney

Confirming our Agent's (Arnos Supplies Co.) Purchase Order No : 7808 of 9th August, 1951, as amended by subsequent correspondent

Order now ready for shipment :—Add 6" all round for externals.

To Melbourne	Quantity	To Sydney	Quantity
3' 10" x 3' 3" x 2' 5"	700	4' 4" x 2' 11" x 2' 11"	800
4' 0" x 2' 8" x 2' 7"	600	3' 6" x 3' 3" x 2' 10"	700
3' 0" x 2' 4" x 2' 6"	400	3' 11" x 2' 3" x 3' 0"	600
3' 0" x 2' 4" x 2' 6"	400	3' 4" x 2' 4" x 2' 8"	400
3' 0" x 2' 4" x 2' 6"	400		

Cases marked :—To Melbourne J.S.R. Melbourne, 1/5
To Sydney J.S.R. Sydney 1/4

Payment :—In London against invoices, Nett.

It is understood that your clients wish to receive this order as soon as possible, and well in time for the Christmas trade. We understand that you have already registered this shipment and

trust that you will do everything in your power to obtain the necessary space as quickly as possible".

As appears from these documents the specified goods were then ready for shipment and invoices bearing dates 6th and 24th September respectively were thereafter presented to McDonald Scales Ltd. by Driver and he received payment. The goods were subsequently shipped direct to the appellant at Melbourne and Sydney.

The claim of the appellant was, as already appears, that the goods were defective and it seeks to make the respondents liable for the delivery, in purported performance of their contract, of goods which were not of the contractual standard. In support of this claim it says that the delivery which followed the above arrangements was a delivery, in effect, by the respondents in performance of their contractual obligations. The evidence, it is said, showed that this method of performance had been chosen by or decided upon by the appellant and the respondents as a convenient method of carrying out the contract made between them. But it is important to observe that such a view of the matter cannot rest merely upon the acceptance of the conclusion that the respondents had made a contract with the appellant which bound them personally. It attributes also to the parties a belief that they knew and appreciated that the respondents were so bound and an intention that the obligations of the latter were to be discharged by a delivery of the subject goods to the appellant direct from the manufacturer, of whose existence and identity, it should be observed, the appellant was aware before the order of 23rd July 1951 was given. To my mind the course of events is quite inconsistent with any such belief or intention. In the first place, if there was in existence a contract which bound the respondents, the contract bound the appellant to pay the price of the subject goods to the respondents and not to some other person. The stipulation in the quotation as to price does not provide otherwise nor does the provision in the order to the effect that payment should be made in London by a sixty day draft through McDonald Scales Ltd. The intimation in the letter of 31st July 1951 that "we understand that Messrs. McDonald Scales Ltd. will meet the account for these presses upon production of the shipping documents in London" may be ambiguous, but if it be understood as a provision relating to the payment of the price of goods sold under a contract pursuant to which the respondents were the sellers, it can mean only that the seller's account would be met in London. But the subsequent dealings did not proceed on this basis.

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There is nothing in the order which was given by McDonald Scales Ltd. to Driver on 24th August 1951 to suggest that it was given merely for the purpose of formally obviating an intermediate delivery to the respondents. Indeed it does not refer in any way to any pre-existing contract, although the pro forma invoice, dated 5th September 1951, expressly refers to the position of the respondents in the matter as representative only of the manufacturer, and it was on the basis of these two documents that the subsequent tender of invoices and delivery and payment were made. But, so the argument of the appellant runs, McDonald Scales Ltd. had no authority to make any contract on its behalf and, accordingly, it is said the delivery was not made under any new contract to which it was a party. In my view this assertion does not assist the appellant. The order given by McDonald Scales Ltd. does not purport to have been given on behalf of the appellant but it does purport to be and in fact was an order for goods at a specified price and upon specified terms. Indeed it proposes terms which did not appear in the original documents and there is implicit in it an undertaking that, if the order be accepted, McDonald Scales Ltd. will pay for the goods in question. Whether the order was expressly accepted or not by the forwarding of the pro forma invoice the fact is that the goods were delivered by Driver according to the instructions of McDonald Scales Ltd. and payment was made in accordance with the terms set out in the pro forma invoice. I have great difficulty in understanding how it could have been supposed or intended that a delivery could or should be arranged in this fashion, and in the absence of the respondents, merely as a convenient method of discharging contractual obligations which the parties believed the previous dealing in Melbourne had imposed upon the respondents. To say that it was so arranged merely as a convenient method of discharging a contract which had been made in Melbourne means that the parties not only agreed that delivery should be made direct by Driver but also that the obligation to pay the price which, on the assumption that the respondents had contracted personally was payable to them, should be discharged by payment to Driver. It is sufficient on this point to say that there is nothing to suggest in the remotest degree that Driver had authority from the respondents to receive the purchase price on their behalf or that the respondents assented to the obligation to pay for the goods, which arose on the assumption referred to, being discharged by a payment to Driver for his own purposes. The fact is that an obligation to make the payment to Driver arose independently of the dealings between the appellant and the respondents;