[HIGH COURT OF AUSTRALIA.]

GEORGE WILLS AND COMPANY LIMITED APPELLANT;
DEFENDANT,

AND

DAVIDS PROPRIETARY LIMITED . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Sale of Goods—Sale by description—Breach of warranty—Canned beetroot—Deterioration in storage—Merchantable quality—Implied condition.

District Court—Appeal—Questions of law—Notation by trial judge—District Courts Act 1912-1953, s. 144.

The buyer of a number of cases of canned beetroot in vinegar sued the seller for breach of an implied condition that the goods were of merchantable quality. Although the documents evidencing the contract referred merely to canned beetroot, both parties knew that the subject matter of the contract was in fact beetroot canned in vinegar, and the labels on the cans so described the The buyer's complaint was that the goods could not be held in stock without unreasonably quick deterioration. On examination fourteen to sixteen months after delivery some cans had developed hydrogen swells, some were blown so that liquid escaped from them. It appeared that beetroot canned in brine had not been found liable to deteriorate more rapidly than other canned vegetables and that a reputation for rapid deterioration did not attach in the trade to canned beetroot generally. In fact canning beetroot pickled in vinegar was introduced only some two or three years before the transaction and afterwards because of the short life of the product it was discontinued. The trial judge found that the fair life of tinned vegetables was three years, of beetroot canned in brine somewhat less and of beetroot canned in vinegar one year. He examined the wholesale grocery practice in relation to canned goods generally and held that the canned beetroot in question was not at the date of delivery of merchantable quality which was to be expected of cans of preserved foodstuffs. His Honour accordingly found for the plaintiffs, and his decision was upheld in the Full Court of the Supreme Court. On appeal,

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1956,

Sydney,

Nov. 26-28;

1957,

Melbourne, Feb. 18.

Dixon C.J., McTiernan, Williams, Fullagar and Taylor JJ. H. C. of A.

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Held: that the contract was and was understood to be for the supply of canned beetroot in vinegar and not simply beetroot and since when canned in vinegar beetroot has a tendency to deteriorate after a year the goods supplied were not unmerchantable merely because they did so deteriorate and did not last as long as beetroot differently preserved.

Counsel for the appellant (defendant), at the conclusion of evidence in the District Court, addressed the judge and submitted that there should be a verdict for the defendant. He did not at any stage specifically ask the judge to note any points of law.

Held, that although counsel did not specifically ask for any such notes to be made an examination of the reasons of the trial judge showed that the material questions were presented to him for decision, and the provisions of s. 144 of the District Courts Act 1912-1953 did not preclude an appeal to the Full Court.

Decision of the Supreme Court of New South Wales (Full Court): George Wills & Co. Ltd. v. Davids Pty. Ltd. (1956) S.R. (N.S.W.) 237; 73 W.N. 368, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the District Court of the Metropolitan District, the plaintiff, Davids Pty. Ltd., a firm of wholesale grocers, alleged that the defendant, George Wills & Co. Ltd., sold to it by description and the plaintiff purchased from the defendant at a price agreed upon by and between them a quantity of tinned beetroot; that the defendant dealt in goods of that description; that it was a term and condition of the agreement that the goods should be of merchantable quality; and that the goods delivered by the defendant to the plaintiff were not of merchantable quality and were condemned by the Public Health Authorities. The plaintiff claimed as damages the sum of £1,000. The defendant gave notice of its intention to defend.

At the trial the defendant admitted all the circumstances giving rise to the implication of the warranty and only raised, by way of defence, a denial of the breach.

The trial judge (Clegg D.C.J.) found the following facts:—(1) that the plaintiff purchased in all some 360 cases of beetroot from the defendant; (2) that the defendant was the distributor for the Glen Ellen Cannery Co. of South Australia; (3) that the purchase involved four separate contracts and deliveries, one on 28th July 1951, another on 30th July 1951, another on 15th August 1951 and another on 1st September 1951; (4) that in November 1952 the plaintiff had on the floor of its warehouse remaining unsold 221 cases of goods; (5) that in that month an inspector of the Department of

Health seized the goods and they were subsequently destroyed by reason of the fact that they were found to be in a deteriorated condition; (6) that a large number of cans had become mis-shapen at the ends of the can; a number had leaked and were giving off objectionable odours; (7) that the fair life of beetroot preserved and canned in the manner in which this beetroot was canned is twelve months; (8) that the life of other canned foodstuffs is three years; (9) that beetroot, together with certain other canned goods, namely, berried fruit and rhubarb, comprise less than ten per cent of the canned foodstuffs produced in Australia; (10) that the goods in question remain for a period of approximately one month in the hands of the canner before coming into the hands of the distributor; (11) that they are then sold by the distributor to the wholesale grocer and are then passed by the wholesale grocer to the retail grocer; (12) that the retail grocer in turn passes them on to the ultimate consumer, generally the housewife who may have foodstuffs on her pantry shelf some months before they are ultimately consumed; (13) that with canned goods only the canner knows what is inside the can, the construction of the inside of the can and the method by which the product got inside the can; (14) that only scientists and food technologists know the chemical changes which take place within the can once it is sold; (15) that the cause of deterioration of the beetroot within the can is brought about by the chemical action of the vinegar, combined with the juice of the beetroot on the exposed portions of metal within the can; (16) that the chemical action results in a gas being created which blows the ends of the can into a concave (sic) shape; (17) that such appearance of the can would prevent any prudent person buying a can in that condition; (18) that alternatively, the acid eats completely through the can, allows the juices within to escape and allows bacteria to enter the can; and (19) that even adopting the best methods of canning used in Australia the life of canned beetroot cannot be prolonged for very much more than twelve months.

The trial judge held (1) that in order to be merchantable, canned foodstuffs should possess the following qualities: (a) not be dangerous or deleterious to health; (b) not be of unpleasing appearance; (c) be palatable to the tongue; (d) not offensive in odour; and (e) possess a quality which is inherent in the very description of the goods, namely preserved canned foodstuffs, that is, lasting qualities far and away beyond that of the article in its natural state; (2) that in determining whether goods were merchantable he was required to regard the ultimate destination of the goods that was intended, and that in the absence of judicial authority

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dealing with canned goods the meaning of the word "merchantable" in relation to canned goods was one of "first impression"; and (3) (a) because over ninety per cent of canned foodstuffs have a lasting quality of over three years, canned beetroot and other canned goods are not merchantable unless some indication is given to the purchaser that they have a lesser lasting quality than a great majority of other canned goods; (b) that in determining the meaning of "merchantable" the knowledge of scientists and food technologists who are aware of chemical changes occurring within a sealed can should not be imputed to wholesale and retail grocers and housewives; and (c) that if a particular type of canned goods differs materially from the great majority of other canned goods, the article is not merchantable unless such differences are brought to the attention of the purchaser.

His Honour said the result of his view upon the matter was that the canned beetroot in question was not, at the date upon which it was sold by the defendant to the plaintiff, of merchantable quality in that it lacked the lasting quality which was to be expected of cans of preserved foodstuffs, and returned a verdict for the plaintiff for the sum of £522, the damages agreed upon by the parties.

From that decision the defendant appealed to the Full Court of the Supreme Court the grounds therefor being that on the facts found by the trial judge (i) his Honour should have entered a verdict for the defendant; (ii) there was no evidence that the goods were not of merchantable quality; and (iii) there was no evidence of any defect in the goods sold; (2) that his Honour wrongly admitted evidence of the customs and knowledge of wholesale and retail grocers and housewives; and (3) that the finding that the goods were not merchantable was in a respect which was outside the particulars furnished by the plaintiff to the defendant.

On the hearing of the motion for a new trial a preliminary objection to the competency of the motion was taken on behalf of the plaintiff, the objection being that the appeal was incompetent because the points of law upon which it was based were not specifically raised before the trial judge, and the requirements of the District Courts Act 1912-1953 (N.S.W.), s. 144 (3) had not been complied with in that counsel for the defendant had not requested the District Court judge to make a note of any question of law raised and of the facts of evidence in relation thereto and the judge's decision thereon. In support reference was made to Cross v. Denley (1); Victor Motors Co. Pty. Ltd. v. B.T.M. Agencies Pty. Ltd. (2) and Pierpoint v. Cartwright (3).

^{(1) (1952) 52} S.R. (N.S.W.) 112; 69 W.N. 137.

^{(2) (1955) 72} W.N. (N.S.W.) 112. (3) (1880) L.R. 5 C.P.D. 139.

The Full Court (Street C.J., Owen and Herron JJ.) heard argument on the preliminary objection and then on the substance of the appeal. It was conceded by counsel for the defendant that he had not specifically asked the judge to note any point of law, but it was submitted that the question of law had been taken and raised by counsel in his address to the trial judge and must necessarily have been considered by the judge in the written judgment which he subsequently delivered. Judgment was reserved. By its reserved judgment delivered later the court upheld the preliminary objection and also dismissed the appeal on the merits, the ground being that no point of law arose for decision (George Wills & Co. Ltd. v. Davids Pty. Ltd. (1)).

From that decision the defendant, by special leave, appealed to the High Court.

Further facts appear in the judgment of the Court hereunder.

B. P. Macfarlan Q.C. (with him R. G. Reynolds), for the appellant. The only claim made in this case was for breach of the warranty of merchantability. The invoices constitute the whole evidence of the contract. There was no complaint that the goods delivered did not correspond with the description in the contract, and it specifically appears in the case filed by the respondent that the subject matter of the contract was, by the understanding of the respondent, canned beetroot in vinegar. On no view of the law can this beetroot be presumed in a case of this warranty to have a longer life than that which it is inherently capable of having. The evidence discloses nothing which could be referable to the warranty or conditions under s. 19 (1). The trial judge was wrong in determining the merchantability by comparing a can of beetroot canned in vinegar with a can of canned meat. If the only condition of warranty is that under s. 19 (2) of the Sale of Goods Act 1923 the knowledge or beliefs of other persons, or, indeed, of the buyer himself, are irrelevant to a determination of what is merchantable. The intended use for which the goods were sold was for consumption as beetroot. Either the particular purpose was part of the description in ordering the goods, or, because it was suitable only for one purpose, it was a purpose which was deemed, and was declared part of the contract at the time the contract was made: see Cammell Laird & Co. Ltd. v. Manganese Bronze & Brass Co. Ltd. (2) and Grant v. Australian Knitting Mills Ltd. (3). Some

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^{(1) (1956)} S.R. (N.S.W.) 237; 73 W.N. 368.

^{(2) (1934)} A.C. 402.

^{(3) (1936)} A.C. 85, particularly at pp. 99, 100; (1935) 54 C.L.R. 49, at pp. 60, 61.

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useful observations on this subject matter are to be found in Drummond v. Van Ingen (1). There is no question that the goods answer the description contracted for; therefore it cannot be said that they are defective because all goods which answer that description have qualities which could be regarded as defects. complaint of the plaintiff-respondent is that these goods contained in them a defect which was not reasonably apparent upon reasonable inspection of the goods. The only way in which one could avoid that breach, if it is a breach, was by supplying the beetroot which did not answer the contractual description. Two warranties can overlap (David Jones Ltd. v. Willis (2)). The only issue is whether they had a defect at the time of the sale. It is a question of law as to whether the trial judge applied the proper tests to the proved facts in ascertaining whether there was a defect in the particular goods. The question of law arises because it is irrelevant to take into account the beliefs of the merchant or the buyers or the course of trade in the circumstances of this contract in determining whether or not there was a defect in the beetroot at the time it was supplied.

"Merchantable", as used in s. 19 (2), was dealt with in Canada Atlantic Grain Export Co. (Inc.) v. Eilers (3); Wieler v. Schilizzi (4); Gardiner v. Gray (5); Jones v. Just (6); Jones v. Padgett (7); Drummond v. Van Ingen (1); Cammell Laird & Co. Ltd. v. Manganese Bronze & Brass Co. Ltd. (8); Australian Knitting Mills Ltd. v. Grant (9) and David Jones Ltd. v. Willis (10). Those authorities are of assistance when considering the provisions of s. 19 (2) of the Sale of Goods Act 1923. There cannot be any defect within the meaning of s. 19 (2) if the goods actually supplied have the same qualities as any beetroot which "beetroot pickled in vinegar" must possess. Although a point must be raised before the trial judge it is not necessary that it should be noted: Benhiam v. Kinross (11). It is not correct to say that this was a submission on the facts. The finding of the Supreme Court in this case and in one of the cases upon which the Supreme Court said it relied are inconsistent not only with English authorities but also with earlier

(1) (1887) 12 App. Cas. 284.

(2) (1934) 52 C.L.R. 110; (1934) 34 S.R. (N.S.W.) 303, 561; (1934) 51 W.N. 106.

(3) (1929) 35 Com. Cas. 90, at pp. 101

et seq. (4) (1856) 17 C.B. 619 [139 E.R. 1219].

(5) (1815) 4 Camp. 144 [171 E.R. 46].

(6) (1868) L.R. 3 Q.B. 197.

(7) (1890) 24 Q.B.D. 650.

(8) (1934) A.C., at pp. 429, 430. (9) (1933) 50 C.L.R. 387, at p. 418;

9) (1933) 50 C.L.R. 387, at p. 418; (1936) A.C. 85, at pp. 99, 100; (1936) 54 C.L.R. 49, at pp. 60, 61.

(10) (1934) 52 C.L.R., at pp. 126, 133. (11) (1937) 54 W.N. (N.S.W.) 123.

decisions of the Supreme Court itself: see Smith v. Charles Baker & Sons (1); Abrahams v. Dimmock (2); McAndrew v. Gray (3) and Anderson v. Carrington (4). Where it is clear that a point of law of necessity arose and was decided the object of s. 144 of the District Courts Act 1912-1953 is not to frustrate the legal rights of the party against whom it was decided. Sub-section (3) of that section is protective of the rights of appellants and not restrictive, and has its historical origin in the days when there was not any taking of evidence by shorthand writers. The true rule is that if there is seen to be a ruling of a judge upon a point which was raised then the appeal is competent. It is not a matter of discretion in the Supreme Court but it may be that if a note has not been made and it cannot clearly be seen that a point was raised, then an appellant fails, not for the reason of discretion, but because he has not shown that, to the satisfaction of the court, the point was raised. [He referred to Victor Motors Co. Pty. Ltd. v. B.T.M. Agencies Pty. Ltd. (5); Cross v. Denley (6).] In Benhiam v. Kinross (7) the Supreme Court did what should have been done in this case, the point of law having been raised.

[Williams J. referred to Automobile & General Finance Co. Ltd. v. Cowley-Cooper (8).

That is a case where there was not any specific point noted at the trial. In this case the Supreme Court has never embarked upon the inquiry of the record, or the judgment, to ascertain whether the point of law was raised. That case is practically identical in the principles it states with Broughton v. Beard Watson & Co. Ltd. (9). The point of law was raised before the trial judge and the Supreme Court should have so held.

J. D. Holmes Q.C. (with him B. K. Cowie), for the respondent. The subject of the sale was articles of a class which both parties would expect to pass in turn from manufacturer to distributor or wholesaler, to retail grocer, and to the consumer, with a reasonable expectation of an "on the shelf" period, taking a period easily in excess of twelve months. So that goods sold which

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^{(1) (1891)} A.C. 325, at pp. 333, 349, 358, 368.

^{(2) (1915) 1} K.B. 662, at pp. 664, 670, 674, 675.

^{(3) (1920) 20} S.R. (N.S.W.) 635, at pp. 641, 642; (1920) 37 W.N. 205, at pp. 207, 208. (4) (1927) 27 S.R. (N.S.W.) 117;

^{(1927) 44} W.N. 24.

^{(5) (1955) 72} W.N. (N.S.W.) 112.

^{(6) (1952) 52} S.R. (N.S.W.), 112 at pp. 114, 117; (1952) 69 W.N. 137, at pp. 137, 138. (7) (1937) 54 W.N. (N.S.W.) 123.

^{(8) (1948) 49} S.R. (N.S.W.) 31; 66 W.N. 5.

^{(9) (1943) 44} S.R. (N.S.W.) 62; 61 W.N. 32.

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had a life of only twelve months were not merchantable notwithstanding they might comply with the contract description. Everybody in the trade took the view that canned beetroot should last for considerably more than twelve months: see Drummond v. Van Ingen (1). That case has been accepted in the later cases, since the Sale of Goods Act, as dealing, amongst other things, with the warranty here in question. "Warranty" and "merchantability" were considered in Niblett Ltd. v. Confectioners' Materials Co. Ltd. (2). All of the evidence was relevant for the purpose of ascertaining what was understood to be canned goods in the trade. Subject to it being read as beetroot canned in vinegar finding No. 19 of the findings of fact is accepted as being correct and in accordance with the evidence. The containers were defective. The trial judge did not find it necessary to make a finding on that point, which has not yet been dealt with. Where goods are known to all parties to be required to last for a lengthy period, the implication of the warranty of merchantable quality will not be excluded because the goods by their nature will not so long keep nor will it be limited to the normal lifetime of the goods. Other than the experts the witnesses did not know whether the beetroot had been canned in brine or in vinegar. To them the distinction in lasting quality was not known. There was no evidence, apart from the canning, of when the change was made from brine to vinegar. For the way in which the warranty of merchantable quality was expressed before the Act: see Beer v. Walker (3) and Hebb v. Stoddard (4). The question is: Was it merchantable in the trade; in the market (Drummond v. Van Ingen (5))? A breach of implied warranty was the point made in Niblett Ltd. v. Confectioners' Materials Co. Ltd. (6). The implied warranty arises out of the description of the goods. The whole point of the implication of merchantability is that it adds something to the condition that goods must comply with the description, otherwise there would be no scope for an implication of merchantability. That cannot be so, because the Act, in addition, provides for the implication of merchantability as well as compliance with the description. Beetroot pickled in vinegar must be canned beetroot with a lasting quality. There is here no dispute as to the meaning of the word "merchantable". That word is defined in Benjamin on Sale, 8th ed. (1950), p. 645.

^{(1) (1887) 12} App. Cas., at pp. 288, 289, 292, 296. (2) (1921) 3 K.B. 387, at pp. 395,

^{396, 403.}

^{(3) (1877) 46} L.J.Q.B. 677, at p. 679; 37 L.T. 278.

^{(4) (1935) 4} D.L.R. 394.

^{(5) (1887) 12} App. Cas., at pp. 288,

^{(6) (1921) 3} K.B., at pp. 399-404.

The dispute was on the facts. The verdict, apart from the preliminary point should stand. On the question of the preliminary point, if the Full Court was right, as it is submitted on one view of the case it was, in saying that this was entirely a question of fact and it had been dealt with entirely as a question of fact in point of decision, then of course no appeal lay to the Supreme Court, there not being any appeal on a question of fact. The Full Court would be right in saying the preliminary point was also another basis for saying the appeal should be dismissed. If the case made in the Supreme Court was in point of law a different case from the case which was determined in the District Court, then an appeal is not permissible (United Dominions Trust Ltd. v. Bycroft (1)). The way in which the case has been put in the Supreme Court and in this Court it is a new case and is not the case that was put before the District Court judge: see Suttor v. Gundowda Pty. Ltd. (2). The appeal should be dismissed.

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R. G. Reynolds, in reply.

J. D. Holmes Q.C., by leave. On the assumption that the appellant succeeds this Court should not make any order for costs of the Supreme Court appeal. In the circumstances the respondent would not have any recourse under the Suitors' Fund Act 1951 (N.S.W.) against the Suitors' Fund.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

Feb. 18, 1957.

In an action in the Metropolitan District Court the respondent, which carries on the business of a wholesale grocer, obtained, against the appellant, judgment for damages for the breach of an implied condition that certain goods purchased by it from the appellant should be of merchantable quality. No other claim was made by the respondent and it secured judgment for the sum of £522. A subsequent appeal to the Supreme Court of New South Wales was dismissed (3) and this appeal is brought by special leave from the order of dismissal.

On the trial of the action there was no dispute that the goods in question were the subject of a sale between the parties and that the sale was subject to an implied condition that the contractual goods should be of merchantable quality. The substantial question

^{(1) (1954) 3} All E.R. 455, at p. 459; Sol. Jo. 766.

^{(3) (1956)} S.R. (N.S.W.) 237; 73 W.N. 368.

^{(2) (1950) 81} C.L.R. 418, at pp. 438, 439.

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was, as will appear, whether the goods were of merchantable quality.

The goods supplied under the contract were some three hundred and sixty cases of canned beetroot. Each case contained thirty cans of beetroot and the labels on each can showed that the contents were the product of the Glen Ellen Cannery Co. and that the beetroot was "Pickled in Vinegar". The three hundred and sixty cases were purchased between the end of June 1951 and the beginning of September in the same year and the beetroot appears to have been the product of the most recent season. The purchase was made by the respondent in the expectation that the goods would be disposed of for sale by retail during the ensuing summer but, owing to a glut of canned vegetables in the grocery trade, the respondent, in November 1952, still held in store two hundred and twenty-one cases of the subject goods. During that month it was found that "hydrogen swells" had developed in many of the cans, some of them had "blown" and the contents were leaking. Moreover, bacteria had obtained access to some of the cans and in the same month they were condemned as unfit for human consumption by an officer of the Department of Public Health and, thereafter, they were destroyed.

The Glen Ellen Cannery Co. had commenced to can beetroot in vinegar in 1949 and this practice continued during 1951 and 1952. In the early part of 1949 and previously to that year it had been the company's practice to can beetroot in brine and it seems clear from the evidence that when canned in this fashion the resultant product had much better keeping qualities. But it was not found as palatable or attractive if canned in brine. is in effect a different product. Evidence was admitted to show that, in general, the life of other canned vegetables is a minimum of three years and the learned District Court judge appears to have been satisfied that this is so. He did not, however, find that beetroot canned in brine would last for such a period though it is clear enough that he considered that the life of such a product was much longer than beetroot pickled in vinegar. The "fair life" of the latter product he found to be approximately one year. It should be observed that at no stage did the appellant deny this fact; on the contrary it asserted that this was so and that its shorter life resulted from the circumstance that the addition of vinegar increased the already acid content of the pack with the result that the action of the acid on the interior of the container might well, after the expiration of twelve months, result in "hydrogen swells" and ultimately in the "blowing" of the container.

Nevertheless his Honour found that there had been a breach of the implied condition. He was led to this conclusion by a comparison between the lasting qualities of beetroot pickled in vinegar and those of the "majority of other canned goods". After referring to the lasting qualities of other canned goods and the nature of the wholesale grocery trade he expressed the view that "In order to be merchantable, canned foodstuffs should . . . possess the following qualities". "They should", he said, "be of not unpleasing appearance; they should be palatable to the tongue, and not offensive in odour" and "in addition . . . they should, in order to be merchantable, possess a quality which is inherent in the very description of the goods, that is preserved canned foodstuffs. In other words they should possess lasting qualities far and away beyond that of the article in its natural state". Much the same view was entertained by the members of the Full Court of the Supreme Court who, after discussing the meaning of the expression "merchantable quality", said: "In light of these principles we are of opinion that it was open to his Honour to decide the issue before him as a question of fact. The canned beetroot was sold to a firm of wholesale grocers. The firm carried on its business in New South Wales. It was open to his Honour to find that it was a circumstance attending the sale that the only purpose of the transaction was to distribute throughout New South Wales the commodity by methods ordinarily associated with a wholesaler, and that such distribution was to be made over a period of time to retail grocers and thence through the housewife or restaurant keeper or other agency to the ultimate consumer. It was clearly not sold for immediate consumption by the respondent. It was consequently open to his Honour to decide as a question of fact that, as understood in the world of commerce, the canned beetroot was to have a reasonable life or prospect of preservation which was to be commensurate with its known ultimate destination. The period of preservation which is to be regarded as reasonable differs, no doubt, to some extent with the class of goods put up in tins. Doubtless some keep longer than others. But in the wholesale grocery trade, according to his Honour's findings, it is understood that canned beetroot possessed the characteristic of preservation similar to canned beetroot of earlier seasons or of any other canned goods, or canned vegetables at any rate, so that such food would be estimated to remain fit for consumption and in a state of freshness when in the normal course it should reach the consumer. This characteristic of preservation, according to his Honour's view, was not limited only to the season of canning or solely to the calendar

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Dixon C.J. McTiernan J. Williams J. Fullagar J. Taylor J. year of purchase; in his view it was understood by merchants that if it were eventually retailed beyond that season or year it would still be edible "(1).

The conclusion of the members of the Full Court appears to have rested upon the view that in 1934 and 1936 "The House of Lords and the Judicial Committee expanded the definition of 'merchantable quality' so as to produce the result that if an article which is sold is only meant for one particular use in the ordinary course it must answer the one particular purpose for which it was sold ". " Merchantable ", it was said, " has come, therefore, to mean that the goods are suitable for the purpose for which they are normally used" (2). But neither of the cases referred to in their Honours' reasons—Cammell Laird & Co. Ltd. v. Manganese Bronze & Brass Co. Ltd. (3) and Grant v. Australian Knitting Mills Ltd. (4) —so decided. In the former case Lord Wright—with whose observations on this point Lord Tomlin and Lord Russell of Killowen appear to have agreed—considered that, although the contractual goods were unfit for the particular purpose specified, they had not been proved to be unmerchantable whilst, in the latter case, their Lordships of the Judicial Committee were concerned with a proved defect in articles of wearing apparel which constituted them, at one and the same time, both unfit to wear and unmerchantable. those circumstances Lord Wright said: "In effect, the implied condition of being fit for the particular purpose for which they are required, and the implied condition of being merchantable, produce in cases of this type the same result "(5). But this is far from saying that proof of unfitness for a particular purpose is always evidence of unmerchantability. Before goods can be characterised unmerchantable it must be shown that, as goods of that description or character, they are defective though no doubt, in many cases, proof of their unfitness for some particular and obvious purpose may well establish that the goods are defective. It is true that Lord Wright said in Grant's Case (4) that "whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use" (6) but it is clear that what he had in mind was that the existence of some defect in the condition or quality of contractual goods may, sometimes, be proved by evidence of this character. Indeed, even if

(3) (1934) A.C. 402.

(6) (1936) A.C., at pp. 99, 100; (1935) 54 C.L.R., at p. 60.

^{(1) (1956)} S.R. (N.S.W.), at p. 243; 73 W.N. (N.S.W.), at p. 372.

^{(2) (1956)} S.R. (N.S.W.), at p. 242; 73 W.N. (N.S.W.), at p. 371.

^{(4) (1936)} A.C. 85; (1935) 54 C.L.R.

^{(5) (1936)} A.C., at p. 100; (1935) 54 C.L.R., at p. 61.

this observation of his Lordship is not entirely clear, his ensuing observations leave no doubt on this point. Immediately thereafter he said: "it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination" (1) and subsequently he made the observation, already quoted, that "the implied condition of being fit for the particular purpose for which they are required, and the implied condition of being merchantable, produce in cases of this type the same result" (2).

The expression "merchantable quality", in relation to goods the subject of a contract of sale, must, obviously, constitute a reference to their condition or quality. Consequently, goods are said to be of merchantable quality "if they are of such a quality and in such a condition that a reasonable man, acting reasonably, would, after a full examination, accept them under the circumstances of the case in performance of his offer to buy them, whether he buys them for his own use or to sell again". (Benjamin on Sale, 8th ed. (1950), p. 645, and cases there cited.) Now, if as the learned District Court judge found, the normal life of beetroot canned in vinegar is twelve months, how can evidence that more than twelve months after its purchase it was found to have deteriorated in the manner previously described be taken as proof that it was defective when it was supplied? Or, perhaps it may be asked, if the contract called for the supply of beetroot canned in vinegar, how could the vendor have discharged its obligation under the contract by supplying canned beetroot which would keep for a longer period? Or, indeed, having been supplied with beetroot canned in vinegar, could the purchaser have rejected it merely because it had then ascertained that its normal life was twelve months only? The answer to these questions is provided by saying that, if the contract called for the supply of beetroot canned in vinegar, the parties were bound to deliver and accept goods of this description and, if the condition and quality of the goods were normal for goods of this description, the purchaser could have no complaint on the ground of their merchantability. It would be nothing to the point, on any such complaint, to show that beetroot canned in vinegar would not keep for as long a period as canned peas or canned beans or, indeed, beetroot canned in brine or for as long as other canned foodstuffs. Nor would it be material to show that a wholesaler, who had purchased such goods, might still have them in his store more than twelve months later. Indeed, evidence as to the keeping quality of other goods

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^{(1) (1936)} A.C., at p. 100; (1935) 54 C.L.R., at pp. 60, 61. (2) (1936) A.C., at p. 100; (1935) 54

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and as to the practice in the wholesale grocery trade would not be admissible in such circumstances.

As already indicated the action was tried in the District Court. That court is not a court of pleading and the issues between the parties were not defined as precisely as they might otherwise have been. The particulars of claim alleged the existence of a contract for the purchase of "a quantity of tinned beetroot" and, thereafter, alleged a breach of a condition that they should be of merchantable quality. In announcing its defence at the commencement of the hearing the appellant's counsel merely denied the breach alleged and the trial proceeded on this basis. It was an unfortunate consequence of the forms of the court that evidence was not led either by the respondent or the appellant to establish precisely what contracts were made. But it sufficiently appears that the purchases which were made were of the products of the Glen Ellen Cannery Co. and that those products were canned in vinegar. Moreover there had been an earlier purchase of products of this description in January 1951 and there seems little doubt that the later contracts were for similar goods. In any event no objection was raised by the respondent at any stage that the goods were canned in vinegar and, even after the institution of the proceedings, when particulars were sought by the appellant of the allegation that the goods were not of merchantable quality, no such complaint was On 25th October 1954 the appellant's solicitors wrote to the respondent's solicitors asking for particulars of the respects in which the contractual goods were alleged to be unmerchantable and on 12th November 1954 the respondent's solicitors replied. The reply was in the following terms: "We refer to your letters of the 25th ultimo and 9th instant and have to advise that it is alleged by the plaintiff that the goods supplied were not of merchantable quality in that: (1) The contents and the containers were defective in that the goods—(a) became "blown" and/or (b) leaked, and/or (c) developed hydrogen swells, and/or (d) contained viable bacteria. (2) They were not fit for human consumption. (3) They did not comply with the requirements of the Public Health Act and were ordered to be destroyed by the Board of Health."

Following the receipt of this letter the appellant's solicitors wrote inquiring "whether it is to be alleged at the hearing that the goods and containers were defective in the manner appearing in par. 1 of your letter and were not fit for human consumption at the time when the goods were supplied by the defendant company to the plaintiff". The reply to this letter, dated 22nd November

1954, was as follows: "In reply to your letter of the 15th instant you are advised that it will be alleged at the hearing that the goods and containers were defective and the goods were not fit for human consumption at the time when the goods were supplied by the defendant to the plaintiff and at all other relevant times."

In these circumstances there can be no doubt that the case which the respondent set out to make was that the goods in question were defective at the time of their delivery and that their subsequent deterioration resulted from this defective condition. issue the respondent failed for the learned District Court judge was satisfied that, as asserted by the appellant, the "fair" or normal life of beetroot canned in vinegar is twelve months and, upon this finding, there can be no reason for thinking that the deterioration noticed in November 1952 proceeded from any defect in the goods themselves or in the canning process or that it was otherwise than normal in goods of that description and character. Consequently there is no ground upon which it can be held that the goods were defective at the time of their delivery. This being so it is difficult to understand why the respondent should have succeeded in the District Court and again in the Full Court. But, as already indicated, it succeeded because, in the first instance, the learned District Court judge adopted an erroneous test to determine whether the goods were of merchantable quality and, in the Full Court, the erroneous assimilation of "merchantable quality" to fitness for a particular purpose or purposes led that court to think that the District Court judgment rested on a finding of fact which could be supported by reference to the evidence concerning the keeping qualities of other canned foodstuffs and consideration of the incidents of the wholesale and retail grocery trade. In all the circumstances it is, we think, proper to treat the contract as a contract for the sale of beetroot canned in vinegar and to regard the claim of the respondent as a claim that the goods were in a defective condition when delivered and that their subsequent deterioration resulted from their defective condition at that stage. Indeed this was of the very essence of the respondent's particulars and upon this view of the matter the respondent failed to make out a case. We should add that we are far from satisfied that the evidence establishes that the goods in question were unfit for any purpose made known by the respondent to the appellant but, as we are concerned only with an action for breach of the statutory condition of merchantable quality, it is unnecessary to say more.

On the appeal to the Full Court the further submission was made by the respondent that the appeal was incompetent because the

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Dixon C.J. McTiernan J. Williams J. Fullagar J. Taylor J. points of law on which it was based were not specifically raised in the District Court. After referring to two cases which were concerned with the provisions of s. 144 of the District Courts Act 1912-1953 the Full Court acceded to this submission as an independent ground for the dismissal of the appeal. Whilst counsel for the appellant did not specifically ask the District Court judge to make a note of any question of law raised at the trial some indication of the appellant's attitude at the trial is gathered from a perusal of the transcript which includes references to objections made on its behalf to evidence concerning the course of the wholesale grocery trade and the keeping qualities of other types of canned foodstuffs. Moreover, an examination of the reasons of the learned District Court judge leaves no room for doubting that the material questions were fairly and squarely presented to him for decision. The provisions of s. 144 did not preclude the appeal to the Full Court and, in our view, there was no other reason why the appeal should be regarded as incompetent.

For the reasons given the appeal should be allowed.

Appeal allowed with costs. Order of the Supreme Court discharged. In lieu thereof order that the appeal to the Supreme Court from the District Court be allowed with costs and the judgment of the District Court set aside and that judgment in the action in that court be entered for the defendant with costs.

Solicitors for the appellant, Norton, Smith & Co. Solicitors for the respondent, H. C.-M. Garling, Garling & Moore.

J. B.