1934 *Present :* **Macdonell C.J. and Garvin S.P.J.**

ASSEN CUTTY *v.* BROOKE BOND LTD.

67—D. C. Colombo, 41,436.

Sale of goods—Delivery to buyer—Act of buyer inconsistent with ownership of seller—Whether acceptance may be presumed—Rejection of goods by buyer—Detention of goods by buyer after rejection—Damages for wrongful conversion—Breach of condition—Damages for warranty—Action on unwritten contract—Prescription—Recovery of money paid—Voluntary payment—Ordinance No. 22 of 1871, ss. 8 and 9.

A purchaser of goods is entitled during a period reasonably sufficient for examination to elect whether he will accept or reject them. Any act of the buyer inconsistent with the ownership of the seller from which acceptance may be presumed must be done before the election has been determined.

Where the election has been determined by rejection the buyer becomes a bailee of the goods, and where during the existence of such a relationship the buyer detains the goods, the remedy of the seller lies in an action for damages. Where the buyer has accepted the goods, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty for which damages may be claimed but not as a ground for rejecting the goods and repudiating the contract.

A claim for damages for breach of warranty of goods delivered upon an unwritten contract of sale is not an action " for or in respect of goods sold and delivered " within the meaning of section 9 of the Prescription Ordinance, No. 22 of 1871, and is not barred until after the lapse of three years after the cause of action shall have arisen.

Where a person with knowledge of facts pays money which he is not in law bound to pay and in circumstances showing that he is paying it voluntarily he is not entitled to recover it.

THIS was an action arising from three contracts, P 1, P 2, and P 5, for the sale and purchase of tea dated September 13, September 18, and September 25, 1930, respectively, in terms of which plaintiff sold and delivered certain quantities of tea to the defendant. The plaintiff's claim related to contracts P 1 and P 5, while the defendant's claim in reconvention was based on contract P 2.

In respect of contract P 5 the plaintiff pleaded that he had delivered to the defendant 5,140 lb. of tea and became entitled to the sum of Rs. 1,174.77 which the defendant failed and neglected to pay. With respect to P 1 the plaintiff pleaded that he had delivered the tea and received the sum of Rs. 874.69, but that later the defendant compelled him by coercion and threat to pay the defendant the said sum of Rs. 874.69 on the ground that the tea supplied was not sufficiently good.

The defence to the claim based on contract P 5 was that the tea supplied was found not to correspond with the sample and was rejected. As regards plaintiff's claim to be paid the sum of Rs. 874.69 alleged to have been obtained from him by coercion and threat, the defendant alleged that, about a week after the delivery on the contract P 1 had been made, it was discovered that the tea was not equal to sample and that on its rejection the plaintiff voluntarily repaid the value. In reconvention the

defendant alleged that the tea delivered on P2 was found on examination not to correspond to sample, that he had rejected the same and that the plaintiff was liable to repay the sum of Rs. 675.

The learned District Judge awarded plaintiff a sum of Rs. 1,311.69 and costs and dismissed the defendant's claim in reconvention.

Hayley, K.C. (with him *Gratiaen*), for defendant, appellants.—The sale on all three contracts was by sample. The tea delivered under contract P5 was very much below sample and the appellants were justified in rejecting it. (Section 15, Sale of Goods Ordinance, No. 11 of 1896.) Further, when the rejection of the tea was communicated to the respondent's agent he acquiesced by asking the appellants to give back the tea. Where the buyer has refused to accept the goods he is not bound to return them to the seller. Therefore the fact that the rejected tea was lying at the store of the appellants does not amount to an acceptance by them. The learned District Judge was wrong in awarding him any sum whatsoever on the tea delivered under contract P5.

The sum of Rs. 874.69 paid by the appellants and refunded to them by the respondent is reclaimed by the respondent on the ground that there was a failure of consideration. The question of consideration does not arise here as the refund of the sum of Rs. 874.69 was outside any contract for the sale of goods and must therefore be governed by the Common law. There was adequate cause for the refund, for the respondent paid the money hoping that the threatened prosecution would be abandoned. Further, a person paying money which in law he is not bound to pay and in circumstances implying that he is paying it voluntarily cannot recover it. (*Maskell v. Horner.*[1])

The bulk of the tea delivered under contract P 2 did not correspond to sample. Out of 33 bags only 8 were up to sample. The appellants have paid for the lot at contract price and are therefore entitled to a refund as there has been a breach of warranty of quality.

H. V. Perera (with him *D. W. Fernando* and *J. L. M. Fernando*), for plaintiff, respondent.—The appellants although they refused to accept the tea on contract P 5 retained the tea in their store and refused to allow the respondent to take it away. This is an act "inconsistent with the ownership of the seller", and in these circumstances the appellants are deemed to have accepted the tea. (Section 34, Sale of Goods Ordinance ; *Chapman v. Morton*[2]).

The consideration for the refund of Rs. 874.69 was the return of the tea delivered under P 1. The appellants have failed to return the tea and the respondent is therefore entitled to reclaim that sum.

There is no breach of warranty of quality as regards the tea delivered under P 2. Even though the bulk did not correspond with sample the tea was not unmerchantable. More than one year has elapsed since the delivery under contract P 2 and no claim can be maintained for a refund of the purchase price in view of the provisions of section 9 of the Prescription Ordinance. (*Horsfall v. Martin*[3].)

[1] *(1915) 3 K. B. 106.*

[2] *11 M. & W. 534.*

[3] *4 N. L. R. 70.*

Hayley, K.C., in reply.—The term merchantable in contracts for the sale of goods means "reasonably fit for the particular purpose for which it is bought". (*Jones v. Just*[1]; *Randall v. Newson*[2].) The tea here was bought for the purpose of export and the tea delivered under these contracts was not fit for that purpose.

Section 9 of Ordinance No. 22 of 1871 contemplates cases of goods sold and delivered and not as here cases of breach of warranty of quality. The section that applies to this claim in reconvention is section 8. The difference between these two sections is discussed in a number of cases. See *Campbell & Co. v. Wijesekera*[3]; *Markar v. Hassen*[4]; *Robson v. Aitken Spence & Co.*[5]; *K. P. V. Louis de Silva v. A. P. Don Louis*[6]; *Rodrigo v. Jinasena & Co.*[7].

Cur. adv. vult.

April 24, 1934. MACDONELL C.J.—

In this case the plaintiff sued for the recovery of Rs. 1,174.77 for tea sold and delivered to the defendants on September 24, 1930, and for the refund of a certain Rs. 874.69 paid by them to the defendants on September 25, 1930, and the defendants claim in reconvention Rs. 675.04, being portion of a certain Rs. 897.40 which the defendants paid to the plaintiff on September 20, 1930, for tea sold and delivered to them on that date.

The plaintiff's business was to sell tea and the business of the defendant company was to buy tea for export. On September 13, 1930, the defendants on a contract P 1 bought from the plaintiff through a broker 4,000 lb. of tea dust in chests, at 25 cents a pound, and on September 16, 1930, the plaintiff did deliver 3,994 lb. to the defendants in 40 chests. This had been a sale by sample, and on delivery the defendants examined 2 out of the 40 chests, found them equal to sample and accepted the 40 chests delivered to them. They forthwith paid to the plaintiff Rs. 874.69, the agreed-on price. On September 18, 1930, the defendants agreed on P2 to purchase from the plaintiff 3,500 lb. of broken pekoe at 28 cents a pound. This also was a sale by sample. On September 20, the plaintiff delivered to the defendants 3,604 lb. in 33 bags. On delivery the defendants opened 8 of the 33 bags, found them up to sample, accepted the delivery and paid the plaintiff the agreed-on price, Rs. 897.40; it is a portion, Rs. 675.04, of this sum which the defendants claim in reconvention. On the same September 20, 1930, the defendants on contract P 5 agreed to buy 5,000 lb. of tea dust from the plaintiff at 26 cents per pound. This also was a sale by sample. On September 24, 1930, the plaintiff delivered 5,140 lb. of tea dust in 54 chests. The price of this consignment was Rs. 1,174.77 and plaintiff claims payment of it. The defendants examined 8 of these on delivery and found that the contents were above sample. This made them suspicious. They examined the other chests delivered under this contract P 5 and found the contents quite inferior to the sample. Later on they made a further examination of the chests delivered on contract P 1 and of the bags delivered on contract P 2 and found that those contents also were very much below

[1] *L. R. 3 Q. B. 197.*
[2] *2 Q. B. D. 102.*
[3] *21 N. L. R. at 435.*
[4] *2 N. L. R. 219.*
[5] *13 N. L. R. 11.*
[6] *4 S. C. C. 89.*
[7] *32 N. L. R. 322.*

sample. The defendants communicated with the Criminal Investigation Department suggesting a prosecution for fraud, and next day, September 25, they interviewed one Meeran, a clerk of plaintiff, and one Seyadi Ali Cutty, who describes himself as attorney for the plaintiff, complained of the worthless character of the tea delivered under each of the three deliveries, stated that they were moving the Criminal Investigation Department to institute a prosecution, and also that they rejected the tea delivered under P 5. Seyadi Ali Cutty then asked defendants to give him back that delivery of tea. This was a clear refusal by buyer to accept, acquiesced in by the vendor, plaintiff. The defendants' representatives then went again to the Criminal Investigation Department, leaving Meeran, the plaintiff's clerk in their office, and on their return about midday one of them found on his desk an uncrossed cheque for Rs. 874.69 which the defendants at once cashed. This was the amount previously paid by the defendants on P 1 and is the sum of which plaintiff claims the return. It would appear that the defendants had asked for a return of this Rs. 874.69, paid by them on the delivery P 1, and that one of the plaintiff's representatives had said earlier in the morning that he would let the defendants have "some money". Later in the day, according to one witness for the defendants, Meeran's attention was specially drawn to the quality of the tea on delivery P 2, and he said he would send a cheque refunding payment on that delivery, but no such cheque was sent.

The remaining facts are these. The defendants did not return to the plaintiff anyone of the three consignments of tea delivered on P 1, P 2, or P 5. They received "advice" from the Criminal Investigation Department not to do so lest it be tampered with before the prosecution of the plaintiff, and when plaintiff asked for a return of the tea delivered, the defendants refused. The defendant's manager says that acting on advice from the Criminal Investigation Department he did not return the tea delivered on P 1 and P 2, and that on the same advice he did not allow plaintiff to take back the tea delivered on P 5; we may take it then that there were refusals to deliver these consignments or any of them. This was unfortunate, at least with regard to the tea delivered on P 5 acceptance of which had been refused with the acquiescence of the plaintiff. The defendants having refused acceptance of that tea were not bound to return it to the plaintiff, the seller (Ordinance No. 11 of 1896, section 35), but they were bound not to put obstacles in the way of the seller retaking possession. If the Criminal Investigation Department wanted to detain the tea for the purposes of a prosecution, it was for that department to take such action as might be necessary, not to get someone else to shoulder its responsibility. Most of defendants' difficulties in this case arise from their refusal to let plaintiff retake possession of the tea delivered to them by the plaintiff.

The plaintiff prosecuted certain members of the defendants' firm for extortion under section 372 of the Penal Code, also in another case under sections 333 and 486 of the Penal Code, but when the cases came up for trial the complainant's lawyer said he was not ready and asked for an adjournment which was refused, the accused in each case being thereupon discharged.

A criminal prosecution was instituted by the Criminal Investigation Department against Seyadi Ali Cutty and he was convicted by the Magistrate, but the conviction was set aside by the Supreme Court on the ground that it was not proved that he personally had knowledge of the fraud. In the meanwhile, on November 12, 1930, the plaintiff had commenced the present action.

The evidence in the case with regard to the tea delivered on P 1 was that it was " very inferior ", " not to be recommended for sale ", and that " it might be described as rubbishy tea ". With regard to that delivered on P 2, the evidence was that 8 bags agreed with sample and that the remaining 25 bags could have been sold in the market at a purely nominal price and that tea of that description is not sold in the market at all. With regard to the tea delivered on P 5, the evidence was that it could have been sold possibly at 5 or 6 cents a pound and that it was very difficult to find a market for it at all. The witness as to the quality of the tea said in answer to the Court, " The samples of tea I examined were of baggy quality ", and he had previously explained that by " baggy " it meant tea with a musty flavour caused by damp or age of the tea. From this evidence it is clear that plaintiff on these contracts of sale by sample failed to comply with section 15 of the Sale of Goods Ordinance, No. 11 of 1896—

" (2) In the case of a contract for sale by sample—

(*a*) There is an implied condition that the bulk shall correspond with the sample in quality . . . .

(*c*) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample ".

It could not be denied that the bulk of the goods delivered did not correspond with the sample, but it was argued that though they might have had a defect " not apparent on reasonable examination of the sample " still this did not " render them unmerchantable ", since on the evidence they could be sold though at a very low price. This does not seem to be a correct apprehension of the word " unmerchantable ". *Jones v. Just* [1] was a case where hemp damaged by sea water when sold by the buyer fetched 75 per cent. of the price which similar hemp would have fetched if undamaged (owing to a fortuitous rise in prices the amount it sold at was not far short of the invoice price), yet it was held to have been properly left to the Jury to say if the hemp, after such damage, was merchantable. " If the subject-matter be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description, that is to say, shall be that article, saleable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description—that is to say, it must be that article or commodity and reasonably fit for the particular purpose."—*per* Esher M.R. in *Randall v. Newson* [2]. Here the particular purpose was that the tea should be exported, or at least that it should be sold as broken pekoe or as tea dust, and on the evidence it was clearly not fit for either of those

[1] *L. R. 3 Q. B. 197.* [2] *2 Q. B. D. 102.*

purposes. Saleability at a very reduced figure does not make an article merchantable, and the wording of issues 2 and 13, " Was such and such tea unmerchantable *and* of no commercial value ? " was ambiguous and quite possibly misled the Court below.

The plaintiff, as has been said, sued the defendants for Rs. 1,174.77, the price of the tea delivered on P 5, and for the return of the Rs. 874.69 repaid by him to the defendants on P 1 on the ground that this refund had been obtained from him by coercion and threats. The District Judge gave him Rs. 437 on his claim on P 5; that is to say, he declined to give the plaintiff the contract price but went into the question of what the tea was actually worth and gave plaintiff judgment on a *quantum meruit*. The evidence was ample to enable him to decide the whole question of value, and the amount of his finding, Rs. 437, is not challenged by defendants. He also ordered defendants to refund the Rs. 874.69 on P 1 not because it had been obtained by coercion or threats but because in the absence of the return of the tea delivered on P 1, there was no consideration for this refund.

First as to the claim on P 5.

This delivery on P 5, save for the 8 chests found to be above sample, had been rejected by defendants on September 25, 1930, the day after it was delivered to them, and the plaintiff's representative by asking for return of the goods had acquiesced in the rejection. But we were invited to say that in spite of these facts there had been an acceptance by defendants in accordance with section 34 of the Ordinance No. 11 of 1896. " The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or 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, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them ". Here, there had been words by the defendants, the buyers, consistent with a rejection but they had followed up these words by an act, refusal to allow plaintiff, the seller, to retake possession of the goods and this was " an act in relation to " the goods, " inconsistent with the ownership of the seller "; consequently, it was argued, there had been an acceptance by the defendants, the buyers, within section 34. I think, as was said by my brother Garvin in the course of the argument, that the act inconsistent with the ownership of the seller must be done while there is still a subsisting contract between the parties and before anything has been done, such as a rejection of the goods by the buyer, to put an end to the contract. Consider the section as a whole. It shows how, when goods are tendered on a contract of sale, there can be an acceptance of them, and it says there is acceptance, explicity, if the buyer does accept, or implicitly, if the buyer (1) does an act inconsistent with the vendor's ownership, or (2) retains the goods and does not within a reasonable time intimate that he has rejected them, since from such act (1) or omission (2), acceptance is a necessary implication. But the assumption underlying the whole section is that for it to apply there must be a contract still subsisting. Test the argument yet further. If the facts are as in the present case, namely, delivery, and an acceptance and receipt sufficient to satisfy the requirements of section 4 and to make the contract enforceable, and then

a definite rejection of the goods by the buyer acquiesced in by the vendor, then the contract is at an end. We will suppose—an illustration put in the argument on this appeal—that the vendor as in this case leaves the goods in the custody of the buyer but that he says he will send for them in a day or two and that the buyer receives a call from a friend urgently in need of similar goods and that he, the buyer, most improperly allows the friend to take possession of the goods and, let us say, remove them. He, as also the friend, is liable, but for a conversion of the goods. But it was argued to us that the vendor has a choice of remedies, for the conversion, or on the original contract of sale. Suppose the same facts, namely, delivery of goods on a contract, rejection by the buyer, goods left temporarily in the buyer's possession, and later in the day the buyer intimates to the vendor that he has changed his mind and will accept the goods after all. Could he retain them without getting the vendor's consent? Clearly not, for the original contract was put an end to by his rejection earlier in the day, and if he now become the buyer of the goods, this will be by virtue of a new contract, his now offer to accept now agreed to by the vendor. And suppose that the price of similar goods has risen in the meantime and the vendor's reply to the buyer is that he may have the goods but at the now higher price, could the buyer claim to have them at the price named in the original contract? If not, then on the argument put to us he would be bound to take the goods because he had done an act "inconsistent with the ownership of the seller", original contract, yet at a higher price, new contract. An argument which necessitates these admission must be regarded with doubt.

The only case cited to us in support of it was *Chapman v. Morton*[1], the purport of which was that where a buyer had used words capable of meaning that he rejected the goods but had gone on to negotiate with the seller about the quality of the goods and had finally advertised the goods for sale, it was rightly left to the Jury to say whether there had been a rejection or an acceptance. It is to be noted that learned Counsel had to go back to 1843 to find a case in support of his argument, a case too which does not seem to have been followed. It is far earlier than the Sale of Goods Act or our own Ordinance No. 11 of 1896, and if it is in favour of the argument he put to us, I must respectfully decline to follow it.

The reason for this argument, pressed upon us with much ingenuity and at great length, was this. The trial Judge had given plaintiff on P 5 not the contract price Rs. 1,174.77 but what the goods were worth, Rs. 437 in accordance with the evidence as to their value. If, however, the refusal by defendants to allow plaintiff to retake the tea of P 5 was an "act inconsistent with the owernship of the seller", and so an acceptance of the goods within section 34, it would have been the duty of the trial Judge to give judgment for the plaintiff for the whole amount of that delivery, leaving the defendants to counter-claim in reduction on a breach of warranty which they would be too late now in doing since it would be argued that such a claim as prescribed under Ordinance No. 22 of 1871.

I did not understand that the defendants in this appeal contested the decision of the learned trial Judge as to P 5, namely, that plaintiff was entitled on it to Rs. 437. Then this part of the judgment below must stand.

[1] *11 M. & W. 534, 152 E. R. 917.*

There is next to consider the decision as to the Rs. 874.69 paid by defendants on P 1, refunded to them by plaintiff and now reclaimed by plaintiff as having been obtained by coercion and threats. The learned trial Judge does not accept the plaintiff's account of how this amount came to be repaid to defendants, but he says "I can find no other consideration for this return except the promise to return the tea. As this tea was not returned the consideration for the cheque has wholly failed and the plaintiff is entitled to its return". With all respect, this conclusion dose not seem to follow. First of all, plaintiff put his case on extortion and not on failure of consideration at all. Further, I am doubtful if consideration enters into the question. Sales of goods with us are regulated by Ordinance No. 11 of 1896 which is identical with the English Sale of Goods Act, then in sales of goods consideration is an essential. But this refund of Rs. 874.69 was outside any contract for the sale of goods. The contract of sale P 1, in which the price of the tea delivered was the sum of Rs. 874.69, was at an end; there had been delivery of the goods the subject of the contract, acceptance of them, and payment for them. If the plaintiff's contention had been that he paid the Rs. 874.69 to rescind that contract, and regain possession of the tea he had delivered, then the transaction would be under the Ordinance and its validity could be tested by the presence or absence of consideration, but this is not the plaintiff's contention either in his plaint or in his evidence. Then the transaction falls outside the Ordinance altogether and is one to be ruled according to the Common law, and we must inquire, not if there was consideration for this repayment but if there was an adequate *causa,* and in doing so we remind ourselves that the notion of consideration is that of an act or forbearance capable of being estimated in terms of money while that of *causa* involves a purpose. Was a promise made or an act done *serio et deliberato animo*—Vinnius III. 14.2, section 11, quoted by Lee (3rd ed.) p. 432? If it was, and if the promise made or act done is capable of legal consequences, then there is *causa.* Now here there was no doubt whatever of the "serious and deliberate intent"; plaintiff paid the money hoping that he would thereby get some advantage —the abandonment of the threatened prosecution, or the saving of his own repute as a trader, or possibly that there would at least be no trouble over the delivery on P 2—and there was unquestioned *causa* for the payment.

During the argument, it was suggested that this refund of the Rs. 874.69 by the plaintiff was not a "voluntary" payment but there is nothing in the evidence to show that it was not voluntary. *Maskell v. Horner*[1] was cited to us. In this case Lord Reading C.J. said at p. 118, "If a person with knowledge of the facts pays money which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it". The refund here seems a clear instance of a voluntary payment with full knowledge of the circumstances, and it cannot be recovered. The decision that this payment of the Rs. 874.69 must be refunded by the defendants is not well founded and must be set aside.

[1] *(1915) 3 K. B. 106.*

If the plaintiff had been content to ask for the value of the tea delivered on P 1, or had asked for it in the alternative to his claim for a refund of the Rs. 874.69, then it might have been possible to give him something, a *quantum meruit,* on that delivery P 1, but he did not make any such claim, and I do not see how we could adjudicate on such a claim now. There is no finding in the judgment that I can discover as to the value of the tea delivered on P 1, and there is also the difficulty that the claim was not made either in the pleadings or in the issues, as also the question of prescription.

There remains that part of the judgment affecting the delivery on P 2. Here the defendants accepted the goods and paid for them the contract price Rs. 897.40. They claim in reconvention Rs. 675.04, that is, Rs. 897.40 less Rs. 222.36 the value of the contract price of the 8 bags out of the 33 up to sample. On the issues framed as to the delivery on P 2 it was found that the 33 bags were not equal to sample—this should read "25 bags were not equal to sample", the defendants themselves admit that 8 of the bags were equal to sample and that they are liable to pay for them—and it was also found that "25 of the said bags were unmerchantable and of no commercial value"; I have remarked on the wording of this issue above. The judgment says as follows:—"With regard to the claim in reconvention I have already stated that the defendant company is not entitled to reject the tea and the claim made on that basis must fail. Counsel for defendants . . . . asked me to treat the claim in reconvention as one for damages but I do not think I would be justified in doing so as different considerations would apply if a claim for damages had been made. Further, it is not clear whether a claim for damages is not prescribed". The defendants were certainly unable to say they "rejected" the tea for they had accepted it within section 34 and had paid for it, but their claim in reconvention, rightly apprehended, is for a breach of warranty of quality, and this point is clearly raised and answered in their favour in the issue, that the tea delivered was not equal to sample. If so, the remedy, if any, of defendants is damages but the issue, breach of warranty, was certainly before the Court for decision, though not expressed in those words. It is not easy to understand the judgment where it says that the defendants' claim in reconvention cannot be treated as "one for damages" since different considerations would apply if a claim for damages had been made". The claim in reconvention as to this delivery P 2 may be wrongly expressed in that it avers a rejection of that delivery, but the essential point, breach of warranty of quality, can be collected from it and is sufficiently raised in the issues, and therefor was before the Court of trial. All the facts of the matter were gone into exhaustively and it is difficult to see what other evidence could have been produced by either side or what "different considerations would apply" if the claim were treated as one for damages. In dealing with the delivery P 5 whereon the plaintiff claimed Rs. 1,174.77 and was awarded Rs. 437, the judgment says, "as the plaintiff was deprived of his property by the wrongful action of the defendant company it should pay him the value of that property". That means that the Court went into the figures of the case, estimated the value of plaintiff's property detained by the defendants, and awarded to plaintiff not the

contract price but the value, *quantum meruit,* as damages. The defendants' claim in reconvention on delivery P 2 is the converse of this. They have paid the contract price and now ask for a refund of the difference between that contract price and the value—if you will, as damages. The evidence adduced was sufficient to enable the Court to estimate the value of the delivery P 5 and seems equally sufficient to have enabled it to estimate the value of the delivery P 2. As the plaintiff was entitled to, and recovered *quantum meruit* on P 5, by parity of reason defendants are entitled to a refund based on *quantum meruit* of what they paid on P 2.

The gist of their claim was breach of warranty, and the breach of warranty having been found proved the only question really argued to us was that the claim in reconvention not having been brought within a year from when it accrued was prescribed under Ordinance No. 22 of 1871, section 9, " No action shall be maintainable for or in respect of any goods sold and delivered . . . . unless the same shall be brought within one year after the debt shall have become due ".

It was argued to us for the defendants that section 9 deals with executed contracts only—goods have been sold and delivered, work and labour have been done, wages have been earned—and that it is on those executed facts that action is brought, which action must by the section be brought within one year after by such executed facts a debt has become due, but that section 9 does not deal with contracts other than executed contracts, even though the contract in issue may arise out of an executed contract such as one of goods sold and delivered. This argument for the defendants seems correct, see *per* Ennis J. in *Campbell & Co. v. Wijesekera*[1].—

> " With reference to the meaning of the term 'goods sold and delivered', I would refer to section 4 of the Sale of Goods Ordinance, No. 11 of 1896. (That Ordinance was enacted long after the Limitation Ordinance, but is referred to by way of illustration.) That section provides that a contract for the sale of goods shall not be enforceable by action unless the buyer has accepted part of the goods sold ; or has paid the price of a part of it ; or unless the contract has been reduced to writing and signed by the party to be charged. It would seem then, that a contract for goods sold and delivered applies rather to an unwritten contract, which can be enforced by an action owing to the goods having been delivered, rather than to the contract made in writing and signed by the parties. In the circumstances I would hold that this is not a case of goods sold for which an action lies owing to the fact of delivery, but rather a case where the action is brought on the written contract, *i.e.,* it is not the action which is concisely known as one for the price of goods sold and delivered. I would accordingly regard section 7 of the Ordinance No. 22 of 1871 as a special enactment overruling section 9. "

In applying these *dicta* to the present case I would lay stress on the words " this is not a case of goods sold for which an action lies owing to the fact of delivery " for here the claim in reconvention lies not because

[1] *21 N. L. R. at p. 435.*

of a delivery but because there has been a breach of warranty in delivering goods not up to sample. The distinction is put also by Bonser C.J. in *Markar v. Hassen* [1],—

> "I read section 8 as providing that the period of prescription applying to the *actio venditi* in general is to be three years, and section 9 as providing that in the particular case of a sale of movables where there has been a delivery to the buyer of the thing sold the period is to be reduced to one year",—

and this dictum seems to hold good now, even after the enactment of Ordinance No. 11 of 1896. If further authority is needed, we can remind ourselves that the Prescription Ordinance, No. 22 of 1871, was passed while the distinction between forms of actions still existed, and while it did, no one could possibly sue for goods sold and delivered where the facts of his case showed a breach of warranty; see Bullen & Leake's *Precedents of Pleading, 1868, p. 38, p. 267.* This was an unwritten contract, even if made by means of broker's notes—see *Robson v. Aitken Spence & Co.* [2] and cases there cited. Again referring to *Campbell & Co. v. Wijesekera* [3], and the extract quoted therein at page 434 from *Pretty v. Solly* [4]; as between the sections of the Prescription Ordinance—8, unwritten contracts, and 9, goods sold and delivered—the latter section is the particular enactment and so "operative" while the former section is the general enactment and so "must be taken to affect only the other parts of the statute to which it may properly apply". Section 9, the particular enactment, operates in the case of contracts for and in respect of goods sold "for which an action lies owing to the fact of delivery"; section 8 operates in the case of unwritten contracts (as section 7 in the case of written contracts) for or in respect of goods sold for which an action lies otherwise than owing to the fact of delivery—as here, where it arises because the goods delivered were not according to sample. On the whole question see *K. P. V. Louis de Silva v. A. P. Don Louis* [5], a Full Bench decision, where the actual point decided was that a claim for rent on a written lease is prescribable under section 7 as being a written contract and not under section 8, even though rent is specifically named in section 8; *per* Cayley C.J.:—

> "It was argued that as the 8th section speaks of 'rent', the 7th section must apply to agreements other than to pay rent under a lease. We think, however, that the converse is the case and that the word 'rent' in the 8th section means, rent payable under obligations other than such as are mentioned in the 7th section, for instance, rent for use and occupation simply without express agreement, rent due in respect of a monthly tenancy and such like. The 7th section deals with actions on written obligations, sections 8 with actions on unwritten obligations; and the word 'rent' when used in section 8 must, we think, upon the principle *noscitur a sociis* be taken to mean rent payable otherwise than under a written contract."

[1] *2 N. L. R. at p. 219.*
[2] *13 N. L. R. 11.*
[3] *21 N. L. R. 431.*
[4] *26 Beav. 606, 53 E. R. p. 1032.*
[5] *4 S. C. C. 89.*

Commenting on that judgment in *Rodrigo v. Jinasena & Co.*, Maartensz J. said,—

> "The *ratio decidendi* . . . . applies to the argument of appellant's Counsel in this appeal that, as section 9 specially mentions actions for goods sold and delivered, section 7 must apply to agreements other than agreements for the sale of goods. This decision of the Full Court does not appear to have been cited in the case of *Horsfall v. Martin* (4 N. L. R. 70), where Moncrieff J. held that section 9 of the Ordinance applied to all actions for goods sold and delivered irrespective of the nature of the agreement",

and he over-ruled the argument for the appellant. Adapting the last sentence of this so that it shall read "it is argued that section 9 of the Ordinance applies to all actions for goods sold and delivered irrespective of the nature of the agreement *or of the claim thereunder*", I would respectfully adopt the decision of Maartensz J. The claim in reconvention of the defendants will then be governed by section 8 of the Ordinance No. 22 of 1871 and capable therefore of being brought within three years and so not prescribed.

If by any chance I am wrong and this claim in reconvention is really one "for loss, injury, or damage", then it will be governed by section 10 of the Ordinance which allows two years for bringing such action, and again will have been in time.

I have had the advantage of seeing my brother Garvin's judgment and agree with his calculations as to what must be deducted from the amount claimed by defendants in reconvention. Their appeal on that claim must be allowed, but only for Rs. 512.38.

In the result then the judgment below must be reversed as to the order that defendants do refund to plaintiff the Rs. 874.69 on P 1, and as to the claim in reconvention on P 2, but for a sum of Rs. 512.38 only; the judgment below awarding plaintiff Rs. 437 on P 5 will stand. The defendants having substantially succeeded in this ppeal must have the costs of the same. Deducting Rs. 437 from Rs. 512.38 leaves Rs. 75.38, and judgment must be entered for defendants for this sum. I agree that defendants be given half the costs incurred by them in the proceedings below.

GARVIN S.P.J.—

This is an appeal by the defendant from a decree which awards the plaintiff a sum of Rs. 1,311.69 and costs while dismissing the defendant's claim in reconvention. It is common ground that the parties entered into three contracts for the sale and purchase of tea as follows:—

(1) On September 13, 1930, plaintiff agreed to sell to the defendant 4,000 lb. of G. B. dust at 25 cents per lb.
(2) On September 18, 1930, plaintiff agreed to sell to the defendant 3,600 lb. B. B. broken pekoe at 28 cents per lb.
(3) On September 25, 1930, plaintiff agreed to sell to the defendant 5,000 lb. G. B. dust at 26 cents per lb.

[1] *32 N. L. R. 322.*

These contracts have for convenience been referred to in the course of the argument as the contracts P 1, P 2, and P 5, respectively, for the reason that the terms of each contract are set out in the brokers notes produced and marked P 1, P 2, and P 5, respectively. The plaintiff's claim relates to the contracts P 5 and P 1—while the defendant's claim in reconvention is based on the contract P 2.

In respect of the contract P 5 the plaintiff pleaded that he had in terms thereof delivered to the defendant 5,140 lb. of tea and became entitled to receive the sum of Rs. 1,174.77 which the defendant failed and neglected to pay. He further pleaded that he duly delivered the tea in terms of the contract P 1 and received the sum of Rs. 874.69 being the price thereof but that later the defendant compelled him "by coercion and threat to pay the defendant the said sum of Rs. 874.69, on the ground that the tea dust supplied was not sufficiently good". He accordingly prayed for judgment for that amount as well.

The defence to the claim based on contract P 5 was that the bulk of the tea supplied when examined was found not to correspond with the sample, was unmerchantable and of no commercial value, and was accordingly rejected. As regards the plaintiff's claim to be paid the sum of Rs. 874.69 alleged to have been obtained from him "by coercion and threat" the defendant alleged that about a week after the deliveries on contract P 1 had been made and accepted and the price paid, they discovered on examination of the bulk that it was not equal to sample and was in fact unmerchantable, that "they rejected the same", that the plaintiff became liable to repay to them the sum of Rs. 874.69 paid to him, and that the plaintiff acknowledged his liability to do so and duly repaid them.

In reconvention, the defendant alleged that, as in the case of the tea delivered on contract P 1, so also in the case of the tea delivered on contract P 2 they found after payment that the bulk did not correspond with the sample, that they "rejected the same" and that the plaintiff was liable to repay them the sum of Rs. 897.40 (less Rs. 222.36 being the value of the contents of 8 bags which were up to sample). They accordingly prayed for judgment for the sum of Rs. 675.04.

The learned District Judge found with reference to the plaintiff's claim based on the contract P 5 that the tea had been rightly rejected as being inferior to sample, but he proceeded to award the plaintiff judgment for the sum of Rs. 437, being the value of the tea computed at 6 cents per lb., as damages on the basis that the tea had been wrongfully detained by the defendant.

The District Judge also allowed the claim for the repayment of the sum of Rs. 874.69 not upon the ground that the money had been obtained by the defendant "by coercion and threat" but upon the grouund that there was no consideration for the payment.

The claim in reconvention was dismissed upon the short ground that there had been a complete acceptance and payment and that the subsequent discovery at a later date that the bulk was inferior to sample did not entitle the defendant to "reject" the tea which they had accepted or to maintain a claim on that footing. He further refused to entertain the defendant's application that he should in the alternative be awarded

damages as for breach of warranty giving as his reason that "different considerations would apply if a claim for damages had been made" and that "it is not clear that a claim for damages is not prescribed".

The grounds upon which this appel was pressed upon as by Counsel for the appellant are:

(1) that having found that the tea delivered in fulfilment of contract P 5 had been rightly rejected the learned District Judge should have dismissed the action so far as it related to that claim; that he was wrong in permitting the plaintiff to recover damages on the basis that the tea had been wrongfully detained in the absence of any reference to such an alternative claim in the pleadings; and, alternatively, that if he was right in so doing in view of the circumstances that the material issues of fact had been raised and that all material facts were before him, then he was wrong in refusing the defendant's prayer that his claim in reconvention should be regarded as a claim for damages for breach of warranty,

(2) that having rejected the plaintiff's plea that the sum of Rs. 874.69 was extorted from him by "coercion and threat" the District Judge was wrong in holding that the plaintiff was entitled to be repaid that amount on the ground that there was no consideration for the payment to the defendant; that the sum of Rs. 874.69 was a voluntary payment made by the plaintiff when it was discovered that the bulk of the tea delivered by him on P 1 was inferior to sample and in recognition of his liability to the defendant,

(3) that his claim in reconvention was well founded but that if the District Judge was right in holding that it was not sustainable as formulated in the pleadings he should in the circumstances have awarded the defendant damages as for a breach of warranty.

The only witness called in support of the plaintiff's case was his witness Seyadi Ali Cutty. Several witnesses gave evidence for the defence and of these the principal were W. R. N. Philps and H. Broome. The main issue of fact in the case related to the plaintiff's allegation that the sum of Rs. 874.69 had been extorted from him "by coercion and threat". When dealing with this issue, the learned District Judge observes, "In the absence of Mr. Moser and Meeran I do not see how any coercion can be established even if the witness (Seyadi Ali Cutty) is to be believed. I do not, however, believe him where his evidence is in conflict with that of Mr. Philps or Mr. Broome". A perusal of the evidence reveals ample grounds for the refusal by any Court to act on the evidence of Seyadi Ali Cutty. There is, therefore, no difficulty in ascertaining the facts material to the decision of the points at which the parties were at issue.

In discharge of his obligations under the contract P 1 the plaintiff on September 16, 1930, delivered at the defendants' stores 3,994 lb. of tea. In accordance with the usual practice the storekeeper opened a few chests, drew samples, and sent them to the office to be compared with the sale sample. The comparison showed that it was equal to sample. The tea was accordingly accepted and a cheque for Rs. 874.69 was drawn and handed over in payment of the price.

Similarly, delivery was made on September 20, 1930, under contract P 2. The same procedure was gone through and in due course a cheque for Rs. 897.40 was drawn and handed over in payment.

On September 24 the plaintiff made a delivery of tea in fulfilment of the contract P 5. Eight chests were opened in the usual course at the stores and samples drawn and forwarded to the office. Mr. Philps who compared these with the sale sample found them superior to the sample. This evidently was very unusual, for Mr. Philps says his suspicions were aroused and he caused four other samples to be drawn and sent to him. These on examination proved to be greatly inferior. He then caused all the tea delivered by the plaintiff on the contracts P 5 and P 1 to be examined and found it to be so inferior as to merit the description " rubbish ".

A serious view was taken of the matter. The defendants' lawyers were consulted and the matter reported to the police. Mr. Philps saw Assistant Superintendent Guneratne and made an appointment with him for 9.30 the following morning. Before he left the office to keep his appointment on the 25th, the broker who put through these contracts and Meeran, the plaintiff's representative, arrived. Mr. Philps told Meeran what he had discovered and what he said was interpreted by the broker Moser. He also said that the matter would be placed in the hands of the police. The evidence shows that Mr. Philps took Meeran up to his office, showed him the tea on liquor, and told him it was inferior to sample and that he would place the matter in the hands of the police.

It was not suggested that the tea was not the inferior substance which it was proved to be by the evidence of Mr. Philps and Mr. Waldock. Meeran, the plaintiff's representative, was made fully aware of every material circumstance. There is no doubt that Mr. Philps rejected the tea delivered on the contract P 5. Equally there is no doubt that the plaintiff's representative acquiesced in the rejection. It is also proved by the evidence of Mr. Philps and Mr. Broome that the plaintiff's representative was asked what he proposed to do about the payment made on the contract P 1. It was intimated to him that he was expected to repay the money and that, if he did not, action would be taken to recover the money. Meeran said he would go into the matter and see what he could do. He went away—it is thought to the store—and then sent word by the broker Moser that he would let them have a cheque. Mr. Broome appears to have said that he wanted an uncrossed cheque.

Mr. Philps and Mr. Broome then went to keep their appointment with Assistant Superintendent Guneratne and on their return Mr. Broome found a cheque for Rs. 874.69 on his desk. Mr. Broome consulted the defendants' lawyers and Mr. Guneratne as to whether he should accept the cheque. On their advice he did so, presented it, and obtained payment. He also wrote to the plaintiff the letter P 9 dated September 25, 1930, acknowledging receipt of the cheque and adding " the repayment of this money will not preclude the right to bring against you any civil or criminal action ". It was not until they returned from the Police Station that it was first discovered that the delivery of tea made on the contract P 2 was also inferior to sample. Later that afternoon about 4 P.M. Meercan came to the defendants' office and asked for a delivery order for

the tea in respect of which Rs. 874.69 had been repaid. He was told by Mr. Broome that they had been in communication with Assistant Superintendent Guneratne of the Criminal Investigation Department who had informed them that the tea should not be handed over. Meeran was also told that the tea delivered on contract P 2 was found to be inferior to sample. He said he would send a cheque for the amount paid next morning. No cheque arrived. It was in these circumstances the learned District Judge, having found that the tea delivered on the contract P 5 had been properly rejected, proceeded to award the plaintiff as damages for, what he held to be the unlawful detention of the tea, a lesser sum which he found to be the actual value of the tea delivered.

Counsel for the respondent sought to meet the plea that the Judge should on his finding have dismissed the claim, made on the footing that the tea had been accepted, by seeking to support the judgment upon the ground that the Judge's finding that there had been no acceptance was wrong. The unlawful detention of the tea by the defendant, it was urged, was an act inconsistent with the ownership of the plaintiff and must therefore be deemed to be an acceptance of the tea.

When a seller delivers goods in terms of a contract of sale it is the duty of the buyer to accept and pay for the goods if they are the kind and quality contracted for. If having the right to do so he rejects the goods, "he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them"—section 35 of Ordinance No. 11 of 1896.

Certain rules are also laid down for ascertaining whether there has been an acceptance. They are as follows:—

> Section 34. "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or 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, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

These sections read together do not justify the assumption that may act done by the buyer in relation to the goods delivered no matter how slight a trespass it may involve upon the rights of the seller as owner, and, irrespective of the stage of the transaction at which it may be done, must be deemed to be an acceptance. Indeed, an act done by the buyer in relation to the goods inconsistent with the ownership of the seller even before the intimation to the seller that the buyer refuses to accept is not necessarily such an act as is required by this section to be deemed an acceptance. For example—"A resale is not necessarily an acceptance; for the facts may show that no such determination of an election (*i.e.*, election to accept or reject) can be presumed, as where the buyer resells before he has had an opportunity of examining the goods, and the sub-buyer has not taken the goods"—*Benjamin on Sale, p. 860; Wallis v. Pratt.*

In the case before us the defendant retained the goods after rejection in the honest though mistaken belief that, having been instructed as

[1] *(1911) A. C. 394.*

they thought by the police to retain them for the purpose of production as evidence in the criminal proceedings the nin contemplation, they were required by law to do so. Moreover, the plaintiff was made fully aware through his representative of all these circumstances which are wholly inconsistent with an election to accept the goods which in the exercise of their undoubted right to do so they had previously refused to accept. A buyer is entitled during a period reasonably sufficient for the examination to elect whether he will accept or reject them. If during that period he does an act in relation to the goods inconsistent with the right of the seller he is deemed to have accepted the goods. But where his election has been determined by a rejection of the goods, he becomes a bailee of the goods.

Upon the rejection of the goods the defendant therefore became in law a bailee of the goods. The act complained of was an act done during the existence of that relationship and in so far as they had no legal right to refuse to permit the bailor, *i.e.*, the plaintiff, to remove the goods the plaintiff has his remedy. The contention that there was here no acceptance but a definite rejection of the goods to which the plaintiff assented is in my judgment sound, and the District Judge has so found. The plaintiff's action to the extent to which it was based on the averment that the tea delivered on P 5 was accepted therefore failed.

It remain still to consider whether the Judge's order allowing the plaintiff damages as for wrongful detention of the goods should be sustained. While it is true that the plaintiff did not in the pleadings include an alternative claim based on tort, the other averments substantially raised every issue of fact material to such a claim. Further, the issues upon which the parties went to trial specifically raised every question of fact material to such a claim and the evidence, it is not denied, has disclosed every relevant fact and circumstance. It has not been suggested that any defence was possible to such a claim had it been specifically pleaded or that the defendant has suffered any prejudice. Such being the circumstances, an order which has the effect of finally determining the respective rights of the parties in accordance with the actual facts and circumstances of this transaction should not be disturbed upon the sole ground that the claim was not formulated in the pleadings. The second of the three points taken in appeal has reference to the repayment by the plaintiff of the sum of Rs. 874.69 being the amount paid to him by the defendant for the tea delivered on contract P 1. The plaintiff's case was that he was compelled to pay this amount to the defendant " by coercion and threat ". He told a long and detailed story of how he was compelled to pay this amount to release Meeran and himself when Philps and Broome threatened to assault them and hand them over to the police. This story was categorically denied and the District Judge has rightly rejected the evidence adduced by the plaintiff. Havng done so, he dealt with certain other questions and later in his judgment returns to the matter of this payment as follows :—

> " I have stated earlier that I do not accept the plaintiff's account of the return of the cheque for Rs. 874.69. What then was the consideration for the return of the cheque ? I think the plaintiff in agreeing to receive the tea and return the cheque was hoping that when the cheque

was returned the defendant company would drop the proposed criminal proceedings but his motive is immaterial and in view of the terms of P 9 I can find no other consideration for this return except the return of the tea. As this tea was not returned the consideration for the cheque wholly failed and the plaintiff is entitled to its return. "

The plaintiff's case was that this money was obtained from him by the coercion and threats of which he spoke and not for consideration. It never was his defence that the money was paid for a consideration which failed.

The plea upon which he based this claim having been shown to be false, there remains only the evidence of Mr. Philps and Mr. Broome as to the circumstances under which this payment was made. That evidence establishes that this was a voluntary payment made by the plaintiff with full knowledge of all the circumstances. The right of a person to retain money so paid does not depend upon proof of consideration. Money paid by a person who was not bound to do so is not always and in every case recoverable by action. The special circumstances, namely, those of compulsion, pleaded by the plaintiff having failed, this remains a voluntary payment made with full knowledge of the circumstances and is not therefore recoverable. *(Maskell v. Horner.)*

Assuming, as the District Judge appears to have done, that the plaintiff upon payment became entitled to claim the return of the inferior tea delivered by him, his remedy was not an action to recover the repayment of this money on the false plea that it had been obtained from him by compulsion.

The judgment of the District Judge on this point must therefore be reversed and the claim dismissed.

Lastly, there is the defendant's contention that his claim in reconvention should not have been dismissed and alternatively that it should have been treated as a claim for damages for breach of warranty and judgment entered in his favour for the amount of those damages. The defendant's claim in reconvention relates to the tea delivered on the contract P 2. The company averred that on the representation that the tea delivered on September 20 was up to sample, they paid the plaintiff the price Rs. 897.40, that on September 25 it was discovered that 25 out of 33 bags delivered contained tea which was inferior to sample and unmerchantable, and claimed that by reason of the breach by the plaintiff of the condition of the contract as to quality the defendant lawfully rejected the same and became entitled to be paid the sum of Rs. 897.40 (less Rs. 222.36 the value of the 8 bags of good tea).

There are indications in the answer that, as the evidence shows, the "rejection" referred to was made five days after samples had been drawn, compared with the sale sample and the price paid. The learned District Judge has found that there was an acceptance of the tea on September 25, and that conclusion is supported by the evidence in the case. The defendant company had ample opportunity to examine every part of this delivery if they desired to do so. They made such examination as they deemed sufficient, accepted, and paid for the tea. It is urged, however, that notwithstanding a prior acceptance where the plaintiff was

[1] *(1915) 3 K. B. 106.*

shown to have committed a breach of the condition that the goods should correspond with the sample the defendants still had the right to reject the goods and repudiate the contract. A buyer would ordinarily be entitled to refuse to accept goods for breach of a condition of the sale and in some cases to repudiate the contract. But when a contract has been completely performed by delivery on the part of the seller and acceptance and payment on the part of the buyer the stage at which the goods might have been rejected has passed. Having exercised his election to accept or reject by accepting the goods, the buyer's remedy for breach of a condition as to quality is in damages.

The case is governed by section 11 (3) of the Sale of Goods Ordinance, No. 11 of 1896, which is as follows:—

> "Where a contract of sale is not severable, and the buyer has accepted the goods or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, expressed or implied, to that effect."

In such a case the remedy of the buyer is provided for by section 51 (1) of the Ordinance—

> "Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—
>
> (*a*) Set up against the seller the breach of warranty in diminution or extinction of the price; or
>
> (*b*) Maintain an action against the seller for damages for the breach of warranty."

Inasmuch as the defendant accepted the goods he was compelled to treat the breach of the conditions as to quality as a breach of warranty and his remedy was to sue for his damages. The District Judge was therefore right in holding that his claim in reconvention as formulated in his answer failed.

Whether the District Judge was right in refusing to treat the claim as a claim for damages for breach of warranty has now to be considered. It has been strongly pressed upon us that inasmuch as the Judge treated the plaintiff's claim on the contract P 5, which failed as such, as a claim for damages for wrongful detention, he should similarly have treated the defendant's claim for a refund of the money paid on contract P 5 as an action for breach of warranty. All the considerations set out earlier which appeared to me to afford sufficient reason for supporting the Judge's decision to treat the plaintiff's claim on P 5 as a claim for damages apply with even greater force to the case of the defendant's claim in reconvention. Moreover, in the case of the defendant's claim a formal application was made to the District Judge to treat it as a claim for damages for breach of warranty before the conclusion of the trial. Had it been allowed it would have enabled the plaintiff to adduce any evidence or make any submission in support of any further defence he may have

desired to advance. But it is manifest that no defence was possible and Counsel in appeal was unable to indicate any respect in which the allowance of the defendant's application could have prejudiced him, nor what further defence there could be to such a claim. The only objection urged was that the defendant's claim was barred by the lapse of one year from the time the cause of action arose. Had the defendant's prayer that his claim should be regarded as one for damages been granted, this plea might well have been considered as a defence to the claim. There is no reason therefore why the defendant's application should not have been allowed. Proceeding then upon the footing that the District Judge should have treated the claim in reconvention as a claim for breach of warranty, the defendants would be entitled to relief if his claim is not statute barred. The point as the District Judge observes is not free of difficulty.

The question is whether a claim for damages arising from a breach of a condition as to the quality of goods delivered upon a contract of sale is barred after the lapse of one year under section 9 of Ordinance No. 22 of 1871 or whether the period of limitation is the longer period of 3 years prescribed by section 8 or the still longer period of 6 years which is the period of limitation in cases falling within section 7.

In this case the contracts pleaded were admitted. There was no dispute as to the contracts or the terms of the contracts. The only evidence adduced consisted of the broker's bought notes P 1, P 2, and P 5. Presumably the corresponding sold notes were forwarded to the seller. However that may be, broker's bought and sold notes are not ordinarily regarded as the contract but are a memorandum that a contract has been made—*Robson v. Aitken Spence* [1]. Such notes are evidence of the contract but are not necessarily a contract in writing. The contract may have been made verbally and it must on the evidence before us be taken that there is here no written contract. Section 7 of the Prescription Ordinance deals with written contracts and cannot therefore be invoked.

In so far therefore as this is an action upon an unwritten contract it would appear to come directly within section 8 which prescribes the period of limitation for actions on unwritten contracts. But a difficulty is created by section 9 which is as follows :—

> "No action shall be maintainable for or in respect of any goods sold and delivered, or for any shop bill or book debt, or for work and labour done, or for the wages of artisans, labourers, or servants, unless the same shall be brought within one year after the debt shall have become due."

The submission for the appellant is that section 9 excepts from the terms of section 8 all actions whether for the price thereof or for damages in respect of contracts for the sale of goods where the goods sold had been delivered to the buyer. On the other hand it was argued that section 9 has reference only to actions for the price of goods sold and delivered.

The sections of the Prescription Ordinance relating to limitations of actions are the sections numbered 6 to 11. In each of these sections the actions specified therein are grouped together and a period of limitation fixed for each group. Although these groups were presumably intended

[1] *(1909) 13 N. L. R. 11.*

to be mutually exclusive, the language employed does not invariably enable one to say with certainty under which section a particular action falls. An instance of such a difficulty is the case of an action for rent which is specially mentioned in section 8 as one which is barred in 3 years from the time the cause of action arose. It was urged, however, in *Louis de Silva v. A. P. Don Louis*[1], that an action for rent due on a lease came under section 7 as rent due on a written contract and as such was not barred until after the lapse of 6 years from the time the cause of action arose. The *ratio decidendi* of that decision would seem to be that section 7 which dealt with actions on written contracts when read conformably with section 8 which dealt with actions for rent and other actions on unwritten contracts lead to the conclusion that the actions for rent mentioned in section 8 were actions on unwritten agreements and not actions for rent payable under a written agreement.

In *Rodrigo v. Jinasena & Co.*,[2] Maartensz A.J. referred to the above case and expressed the opinion that on the same principle an action upon a written agreement to recover the value of materials supplied was not barred in 1 year under section 9 and that the case fell within the provisions of section 7.

One case cited in the course of argument, *Horsfall v. Martin*[3], decides specifically that an action for recovery of money due for goods sold and delivered falls under section 9 and is barred in one year. Moncreiff J. perhaps travelled further in his judgment than was necessary for the decision of the point immediately before him but he undoubtedly does hold that any action "for or in respect of goods sold and delivered" whether it be upon an unwritten or even on a written contract are excluded from the operation of sections 8 and 7 respectively by the provisions of section 9.

To the extent to which that learned Judge held that an action for or in respect of goods sold and delivered fell under section 9 to the exclusion of section 7 when the action was based on a written contract his judgment is in conflict with the principle of the decision in *Louis de Silva v. A. P. Don Louis (supra)* which is a judgment of the Full Court. In *Dawbarn v. Ryall*[4], Lascelles C.J. says, with reference to this judgment of Moncreiff J., "the reasoning of this decision is not easily reconciled with the decision of the Full Court in *K. P. Louis de Silva v. A. P. G. Don Louis*".

The decision in *Horsfall v. Martin (supra)* can no longer be regarded as authority for the proposition that an action for or in respect of goods sold and delivered based upon a written contract comes within the operation of section 9 to the exclusion of section 7. But it does not appear to have been considered or dissented from in so far as it has reference to actions in respect of goods sold and delivered upon an unwritten contract. The principle of *K. P. Louis de Silva v. A. P. G. Don Louis (supra)* which is that such actions when based on written contracts come within the operation of section 7 cannot be relied on to exclude from the operation of section 9 all actions for or in respect of goods sold and delivered based on unwritten contracts or agreements. To do so would be to give no effect whatever to section 9 since all such actions must be based either

[1] *4 S. C. C. 89.*
[2] *(1931) 32 N. L. R. 322.*
[3] *(1900) 4 N. L. R. 70.*
[4] *(1914) 17 N. L. R. 372.*

upon a written or an unwritten contract whether express or implied. The actions for goods sold and delivered contemplated by section 9 in so far as they are not based on written contracts are embraced by the general words of section 8—" or upon any unwritten promise, contract, bargain or agreement ". But if we read these two sections, as I think we must, so as to give a distinct interpretation to each of these sections we are driven to the conclusion that the object of the legislature was to exclude from section 8 the actions for which special provision is made by section 9. Thus, it only remains to ascertain what actions, though they may be actions on unwritten contracts, are by section 9 excluded from the operation of section 8.

The words " action for goods sold and delivered ", if taken literally, suggest that the action contemplated is one for the return or recovery of goods sold and delivered. But the phrase is not infrequently employed to indicate an action for the recovery of the price of goods sold and delivered. In Schedule II. No. 33 of the Civil Procedure Code, various forms of plaints are set out and the forms (10) and (11) are entitled respectively " For goods sold at a fixed price " and " For goods sold at a reasonable price ". In each case the claim is for the price or value of the goods sold. This, it would seem, is the sense in which the phrase is used in section 9. Actions for the recovery of the price of goods sold and delivered would clearly be barred in the time prescribed in section 9. It was submitted however that the words " or in respect of " were employed by the draftsman with the intention of extending the meaning of the provision so as to include claims for damages in cases in which the goods sold had been delivered but not claims for damages upon the contract where the goods had not been delivered by the sellers. Such a distinction would be highly artificial and based on no principle. In my view they were inserted merely for the purpose of making it clear that the words " action for goods sold and delivered " were not to be taken literally but as meaning actions for the recovery of the price or value of goods sold and delivered and in that sense " in respect of " goods sold and delivered. This view is reinforced by a consideration of other parts of section 9 and in particular its concluding words—" unless the same (*i.e.*, the action) shall be brought within one year *after the debt* shall have become due ". The period of prescription in most of the other sections commences to run from the time when " the cause of action shall have arisen " or " shall have accrued ". In this single instance it runs from the time " *the debt shall have become due* ". The term " debt " does not ordinarily include a claim for unliquidated damages and the implication is that this short term of one year was prescribed as a bar to action for " debt " as distinguished from other actions on unwritten contracts. The word " debt " affords a key to the interpretation of the section. The other classes of actions contemplated namely, " for any shop bill, book debts, or for work and labour done or for the wages of artisans, labourers, or servants " may all legitimately be described as action for the recovery of debts. Upon a true construction of section 9 its operation must in my opinion be limited to the recovery of debts due in respect of the matter specified therein, and it is only such actions that are excluded from the operation of section 8. A claim for damages for breach of warranty of goods

delivered upon an unwritten contract of sale is not an action "for or in respect of goods sold and delivered" within the meaning of section 9 and is not therefore barred until after the lapse of three years after the cause of action shall have arisen.

Since the defendant's claim for damages is not barred by time the only remaining question is what amount is payable as damages. The defendant claimed Rs. 897.40 less Rs. 222.36 being the value of 8 bags of tea found to be up to sample. But the balance sum of Rs. 675.04 has still further to be reduced by the market value of the inferior tea retained by the defendant. The learned District Judge has assessed the value of the tea at 6 cents but we have not been told the weight of the 25 bags of bad tea. There is no difficulty, however, in arriving at this figure. The quantity of tea delivered on this contract amounted to 3,604 lb. and at the contract price 28 cents per lb. was of the value of Rs. 1,009.12. From this Rs. 111.72 has to be deducted for duty and cess leaving Rs. 897.40 as the nett price which was paid by the defendant. The nett price paid per lb. of tea is therefore cents 24.9. The sum of Rs. 222.36 represents the nett value of 893 lb. of tea and the balance still in the hands of the defendants for which they must pay the market price is 2,711 lb. This quantity of tea at the market price of 6 cents per lb. is of the value of Rs. 162.66 which must be deducted from the defendant's claim of Rs. 675.04. The defendant is therefore entitled in respect of his claim in reconvention to be awarded Rs. 512.38 as damages.

In the result therefore the plaintiff fails save in respect of the sum of Rs. 437 awarded him by the District Judge for the wrongful detention of the tea delivered on the contract P 1. As against this must be set the sum of Rs. 512.38 being the damages payable to the defendant in respect of his claim in reconvention.

The judgment under appeal will therefore be set aside and judgment entered for the defendant for the sum of Rs. 75.38. The defendant is entitled to the costs of this appeal and the plaintiff will also pay him half the costs incurred by him in the Court below.

Judgment varied.