1961
*Jun. 6
Oct. 23

RUNNYMEDE IRON & STEEL LIMITED (*Plaintiff*) ..... APPELLANT;

AND

ROSSEN ENGINEERING AND CONSTRUCTION COMPANY (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of goods—Part of shipment of "relaying rails" not qualifying as such—Entire shipment rejected on ground goods not in accordance with contract—Rights of parties—The Sale of Goods Act, R.S.O. 1950, c. 345, s. 29(3).

By a contract in writing the defendant agreed to sell to the plaintiff all the "relaying rail" in a railway siding included in a plant which the defendant had purchased for salvage purposes. The plaintiff had not seen the goods which it was purchasing and it was clearly a sale by description. After much delay on the part of the plaintiff the defendant shipped the "relaying rail" to the plaintiff, but the latter rejected the entire shipment on the ground that the goods were not in accordance with the contract. Of the contents of the first of the cars in which the rails were shipped, 80 per cent consisted of "relaying rail" and 20 per cent of material which did not qualify as "relaying rail". In the second and third cars the corresponding percentages were 75 per cent and 25 per cent. The rejected goods were later resold by the defendant. The plaintiff claimed the return of its deposit and damages; the defendant disputed the claim in its entirety and counter-claimed for the sum of $569.45.

The trial judge allowed the defendant the contract price of $50 a ton on the 80 per cent in the first car and the 75 per cent in the second and third cars, together with 80 per cent and 75 per cent of the freight and demurrage charges of the respective cars; furthermore the defendant was allowed the market price of $37.50 per ton for the balance of the contents of the three cars, together with its loss on the sale of 12 tons of spikes not shipped, and for incidental charges, amounting in all to $11,535.16. Against this he allowed the plaintiff its $6,000 deposit and the proceeds of the resale, amounting to $8,190, leaving a balance in favour of the plaintiff of $4,654.84, for which sum judgment was given. The counter-claim was dismissed. The plaintiff at the trial had abandoned its claim for damages and sought only the return of its deposit. The trial judgment was affirmed by a judgment of the Court of Appeal. From that decision the plaintiff appealed by special permission of this Court.

Held (Kerwin C.J. and Judson J. dissenting): The appeal should be allowed.

Per Locke, Cartwright and Ritchie JJ.: The case fell within the terms of s. 29(3) of *The Sale of Goods Act*, R.S.O. 1950, c. 345. The seller delivered to the buyer the relaying rail he contracted to sell mixed with

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

goods of a different description (i.e. "scrap"). The buyer in rejecting the whole shipment had the right so to do. In view of the finding that between 20 and 25 per cent of the total shipment consisted of scrap it was impossible to apply the rule *de minimis non curat lex. Rapalli v. K. L. Take, Ltd.*, [1958] 2 Lloyd's Rep. 469, referred to.

Aitken, Campbell & Co. Ltd. v. Boullen & Gatenby, [1908] S.C. 490; *Easterbrook and Others v. Gibb & Co.* (1887), 3 T.L.R. 401, considered; *Alkins Brothers v. G. A. Grier & Sons Ltd.* (1924), 55 O.L.R. 667, distinguished; *Arcos Ltd. v. E. A. Ronaasen & Son*, [1933] A.C. 470, followed.

Per Kerwin C.J. and Judson J., *dissenting:* The term "relaying rail" is not a term of precise classification—the nearest one can get to it is that it is rail that can be relaid on any track. All of the rails shipped to the plaintiff had in fact been laid in track and were there when sold. The balance of the goods which had been damaged during the process of lifting and removal were goods of the same description but inferior in quality. It was apparent from the evidence that with a little cropping and drilling at a very minor cost the goods contained in the cars could all have been classified as relaying rails. *Aitken, Campbell & Co. Ltd. v. Boulden and Gatenby, supra,* referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Schroeder J. Appeal allowed, Kerwin C.J. and Judson J. dissenting.

J. J. Robinette, Q.C., for the plaintiff, appellant.

J. D. Arnup, Q.C., and *A. M. Austin*, for the defendant, respondent.

The judgment of the Chief Justice and of Judson J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—This is an appeal by Runnymede Iron & Steel Limited, from a judgment of the Court of Appeal for Ontario[1] affirming the judgment at the trial of Schroeder J. The genesis of the dispute between the parties is an agreement of October 1951. While there may be reasons for the fact that it was nearly ten years later when the matter came before this Court, it should be made clear that the delay does not rest with the tribunals. The writ was issued October 21, 1952. The trial took place in June 1953, and judgment was delivered June 19, 1953. The appeal was heard by the Court of Appeal in December 1953, and judgment delivered by that Court on February 11, 1954. It does not appear from the case or factums when notice of appeal to this Court was given, but, because of certain documents appearing in the Court's files, the parties were required to appear before me to explain if the appeal had

[1] [1954] O.R. 153.

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been settled, or the reason for the delay in bringing it on for argument. On the return of the motion, and after hearing the agents for the solicitors, special permission was given to set down the appeal for hearing at the April Term, 1961.

In its statement of claim the plaintiff-appellant claimed the return of a deposit of $6,000 paid on account of the purchase price of certain steel rails, agreed to be sold by the respondent to the appellant by the agrement of October 1951, and $6,375 for loss of profits on 255 tons at $25 per ton. The defendant disputed the claim in its entirety and counter-claimed for the sum of $569.45.

The trial judge allowed the respondent the contract price of $50 a ton on 80 per cent of the rails shipped by it in the first railway car and 75 per cent of the rails shipped in the second and third cars, together with 80 per cent and 75 per cent of the freight and demurrage charges of the respective cars; furthermore, the respondent was allowed the market price of $37.50 per ton for the rest of the shipments, together with its loss on the sale of twelve tons of spikes not shipped to Toronto, and for incidental telephone, telegraph and bank charges, amounting in all to $11,535.16. Against this he allowed the appellant its $6,000 deposit and the proceeds of the sale of the entire contents of the three cars to a company controlled by one Merrilees, amounting to $8,190, leaving a balance in favour of the appellant of $2,654.84, for which sum judgment was given the appellant, together with one-half of its costs of the action. The counterclaim was dismissed with costs. At the trial the appellant had abandoned its claim for damages for loss of profits and the respondent did not contend that the appellant should pay for a fourth car and the trial judge therefore did not deal with these matters. It was this judgment which was affirmed by the Court of Appeal.

The appellant claims that the contract was for the sale of goods by description within the meaning of subs. (3) of s. 29 of *The Ontario Sale of Goods Act*, R.S.O. 1950, c. 345:

> 29. (3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

The appellant also claims that the respondent delivered some goods of a different description. I agree with the trial judge and the Court of Appeal that these submissions are not entitled to prevail.

Early in 1951 the respondent had purchased for salvage purposes the plant of Grenville Crushed Rock Company at Hawk Lake, Ontario. This plant included a railway siding and the subject-matter of the contract between the parties was the material included in this railway siding. The contract is contained in a letter, dated October 18, 1951, from the respondent to the appellant of which the following are the pertinent parts:

Have received your cheque as a deposit on the rail and am changing the specifications as follows to reconcile your purchase with our last telephone conversation. The rail will be as follows:

1100 lineal ft., more or less, of 60 lbs. per yd. ~~used rail~~		re-
8200 lineal ft., more or less, of 80 lbs. per yd. ~~used rail~~		laying rail
5700 lineal ft., more or less, of 85 lbs. per yd. ~~used rail~~		"J.T."

with a maximum of twelve switches although I think we only have eight and with six 85 lb. wise and five 80 lb. wise. The average length of this rail to be around 30 ft. This order to include all Spacing Bars and all Splice Bars, Nuts and Bolts, and up to ten tons of Spikes which are to include all the new Spikes on the job whatever the weight is. The price for this used rail is to be $50.00 per ton on car Hawk Lake, Ontario. Seventy-five per cent of this order is to be available for shipment before January 1st 1952, the balance by the end of April 1952 or sooner.

We may have fifty or hundred ton more rail or fifty ton less rail but the intent is that we will hold for you all of the used rail on the job for your disposition and that we are selling you all this used rail and that we have no authority to dispose of any rail other than to you on the job at Hawk Lake.

In July 1952, after a long delay which was attributable to the appellant's unwillingness to give shipping instructions, the respondent shipped two cars f.o.b. Hawk Lake to the appellant at Toronto, which it rejected. A third car was already en route but since the respondent considered that the appellant's rejection of the first two cars was unjustified, it did not release the third car except on acceptance of a sight draft. A fourth car was also shipped and the appellant refused to accept this. All four cars were eventually purchased by Mr. Merrilees' company, which is the biggest

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dealer in rails in Canada, at $50 per ton for the first three cars and $37.50 per ton for the fourth. The trial judge's finding of fact is based upon an acceptance of the evidence of Mr. Merrilees and is contained in the following extract:

> I accept this classification of the contents of the first three cars as containing 80%, 75% and 75% of siding quality relaying rails. The balance consisted of "potential relaying rails" which could be converted into relaying rails, as already indicated, but, according to the evidence of Mr. Merrilees, rails having only reclamation possibilities do not comply with the quality called for by the contract, whereas the former rails do measure up to the necessary standard.

The Court of Appeal held:

> There is no doubt that the appellant received all the relay rails available from the Hawk Lake siding, and that is what the respondent had undertaken to supply. There was nothing in the agreement as to an inventory and although the appellant on various occasions asked for an inventory it was known at the time that the agreement was entered into that the quantity and quality of the relay rails were uncertain.

It is important to bear in mind that the subject-matter of this contract was rails in position on a siding and in use at the time of the contract. The contract contemplated the lifting and movement of these rails. The term "relaying rail" is not a term of precise classification and the nearest that one can get to it is that it is rail that can be relaid on any track. Obviously this rail, which was siding rail, could not be moved into a higher category.

All of the rails shipped to the appellant had in fact been laid in track and were there when sold. During the process of lifting and removal, some of it suffered minor damage. In the circumstances of this case, therefore, the trial judge was clearly right in his finding that the balance of the rails which had been damaged did not constitute goods of a different description and I cannot read the reasons in the Court of Appeal as indicating anything to the contrary or any inconsistency between their reasons and those of the trial judge. The balance of the goods were goods of the same description but inferior in quality. It is apparent from the evidence that with a little cropping and drilling at a very minor cost the goods contained in the cars in question could all have been classified as relaying rails.

Most of the decisions referred to on the argument and in the Courts below are really of very little assistance. In considering the cases in Scotland it must be borne in mind that the Scottish law differs from the English in view of

subs. (2) of s. 11 and s. 62 of the Imperial *Sale of Goods Act, 1893*, but the first few sentences of the judgment of Lord Low in *Aitken, Campbell & Co. Ltd. v. Boullen and Gatenby*[1] may be taken to be a correct statement applicable to the present case so far as concerns the point to be determined:

> I am of opinion that this is not a case to which sec. 30(3) of the Sale of Goods Act, 1893, applies. That enactment deals with the case of a seller delivering to a buyer "the goods he contracted to sell mixed with goods of a different description not included in the contract." I think that the word "description" is there plainly used to denote the kind of goods contracted for, and that the right of partial rejection conferred upon the buyer applies only to cases where goods of the kind contracted for are mixed with goods of a different kind, and not to cases where all the goods are of the kind contracted for, but part of them is not of such good quality as the seller was bound to supply.

The appeal should be dismissed with costs.

The judgment of Locke, Cartwright and Ritchie JJ. was delivered by

CARTWRIGHT J.:—The facts out of which this litigation arises are stated in the reasons of the Chief Justice and are set out in great detail in the reasons delivered in the courts below. In none of the reasons delivered does there appear to me to be any difference of opinion as to what actually occurred. I propose to summarize briefly the facts upon which the rights of the parties depend.

The contract between the parties was in writing and was for the sale by the respondent to the appellant of all the "relaying rail" in the siding of Grenville Crushed Rock Company at Hawk Lake, at the price of $50 per ton on car at Hawk Lake. The appellant had not seen the goods which it was purchasing and it was clearly a sale by description.

When, after great delay, the appellant finally gave shipping instructions the respondent shipped all this "relaying rail" to the appellant at Toronto in four railway cars all of which were rejected by the appellant on the ground that the goods shipped were not in accordance with the contract. By reason of an arrangement between the parties we are concerned with only three of these cars. Of the contents of one of these cars 80 per cent consisted of "relaying rail" and 20 per cent of material which did not qualify as "relaying rail". In the other two cars the corresponding percentages were 75 per cent and 25 per cent.

[1] [1908] S.C. 490 at 494-5.

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The evidence of the witness Merrilees who purchased the rejected goods from the respondent was accepted by the learned trial judge. This witness was explicit in his statement that used rail which can be re-laid in any track, even of the lowest category, falls within the description "relaying rail" but that used rail on which it is necessary that any work be done before it can be re-laid does not comply with that description. The learned trial judge said in part:

> I attach the utmost significance to the testimony of Mr. Merrilees, supported as it is by his subsequent experience in disposing of the rails. His evidence, standing alone, is, to my mind, more worthy of credit and entitled to greater weight than the evidence of all the plaintiff's expert witnesses combined. I accept this classification of the contents of the first three cars as containing 80%, 75% and 75% of siding quality relaying rails. The balance consisted of "potential relaying rails" which could be converted into relaying rails, as already indicated, but, according to the evidence of Mr. Merrilees, rails having only reclamation possibilities do not comply with the quality called for by the contract, whereas the former rails do measure up to the necessary standard.

The learned trial judge held that the appellant was bound to pay for the 80 per cent in car number 1 and for the 75 per cent in cars numbers 2 and 3 at the contract price of $50 per ton and to pay for the balance of the contents of the three cars at the price of $37.50 per ton. He also held that the appellant was chargeable with only 80 per cent of the cost of transportation of the first car and 75 per cent of the cost of transportation of the other two cars. The words used by the learned trial judge in this regard are as follows:

> Counsel for the defendant concedes that his clients are bound by the evidence of Andrew Merrilees, even if they think that the percentages of goods not complying with the contract as stated by him are somewhat high. He admits the plaintiff's right to recover its deposit of $6,000, subject to deductions, for the price of the material shipped to Toronto and the freight charges and certain other smaller items hereinafter mentioned, after crediting to the plaintiff the sum of $8,190 realized on the sale of the same to Andrew Merrilees Limited. In computing these deductions the defendant has charged $50 a ton in respect of the rails which were in conformity with the description contained in the contract, and $37.50 per ton in respect of the rails which were not. This I consider reasonable and proper. They also seek to charge against the plaintiff the full cost of the freight charges incurred by them on Runnymede's instructions. I think that it would be unfair to permit the defendant to charge more than 80% of the cost of transportation on the first car and 75% of the cost of transportation of the other two cars for the reason that it was wasteful and uneconomical to send to Toronto by freight rails which could only qualify as scrap material. Having failed to satisfy the requirements of the contract in that respect, the defendants ought to bear that portion of the freight charges attributable to the non-conforming part of the shipment.

It should be pointed out that the learned trial judge found that the cost of transportation of the goods from Hawk Lake to Toronto was approximately $30 a ton so that on the disposition of the case made by him the total cost at Toronto to the appellant of goods conforming to the contract would be $80 per ton and that of the percentages which did not conform to the contract would be $37.50 per ton; or, to express the matter differently, the cost to the buyer of the goods not conforming to the contract was fixed by the learned trial judge at $7.50 per ton f.o.b. Hawk Lake.

The reasoning which led the learned trial judge and the Court of Appeal to decide that on these findings of fact the appellant did not have the right to reject the whole shipment is summarized in the following passage in the reasons of the Court of Appeal delivered by Gibson J.A.:

> The contract was by no means definite as to the quantity of relay rails to be sold, but it was clearly understood that the appellant was to receive all the relay rails available on the Hawk Lake siding. All the rails which the respondent considered to be of relay quality were shipped to Toronto and of these, after hearing expert evidence from both parties, the learned trial judge found as a fact that 80 per cent of the first carload and 75 per cent of the second and third carloads were relay rails.
>
> Because some of the rails for one reason or another failed to come up to the standard required for relay rails and were therefore classified as scrap they do not become "goods of a different description". They are goods of the same description but inferior in quality: *Aitken, Campbell & Company, Limited v. Boullen & Gatenby* (1908) S.C. 490; *Easterbrook et al. v. Gibb and Co.* (1887), 3 T.L.R. 401.
>
> Therefore, s. 29(3) of The Sale of Goods Act, R.S.O. 1950, c. 345, has no application and the buyer is not entitled to reject the whole shipment because some only of the goods are inferior in quality.

With respect the second paragraph of this passage appears to me to be contrary to the evidence expressly accepted by the learned trial judge and inconsistent with the findings of fact made by both the courts below.

The goods sold were described in the contract as "relaying rail" not as used rail with a representation or warranty that they would be of the quality of "relaying rail" or of any particular quality. The appellant purchased "relaying rail"; he did not purchase "potential relaying rail" or scrap that might be transformed into "relaying rail".

It appears to me to be a contradiction in terms to say that some of the rails shipped "failed to come up to the standard required for relay rails and were therefore classified as scrap" and at the same time to say that they do not

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thereby become "goods of a different description". This amounts to saying that the description "scrap" is the same as the description "relaying rail".

In my opinion, the case falls within the terms of s. 29(3) of *The Sale of Goods Act*, R.S.O. 1950, c. 345:

> (3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

The seller delivered to the buyer the relaying rail he contracted to sell mixed with goods of a different description (*i.e.* "scrap"). It is common ground that the buyer rejected the whole shipment. In my opinion he had the right to do this. In view of the finding that between 20 per cent and 25 per cent of the total shipment consisted of scrap it is impossible to apply the rule *de minimis non curat lex*. The principle applicable to the facts found in the case at bar is succinctly stated by Jenkins L.J., with whom the other members of the Court of Appeal agreed, in *Rapalli v. K. L. Take, Ltd.*[1]:

> The purchaser is entitled to have delivered to him goods complying with the contractual description, and, failing that, he is entitled to reject unless the rule of *de minimis* in its strict sense applies. Clearly, in my view, 6 to 7 per cent, is a proportion which cannot be disregarded as *de minimis*.

In addition to the two cases referred to in the passage from the reasons of Gibson J.A., quoted above, the learned trial judge referred to the case of *Alkins Brothers v. G. A. Grier and Sons Limited*[2], and it is necessary to examine these three decisions.

In *Aitken, Campbell and Company Limited v. Boullen and Gatenby*[3], the contract was for the sale of 133 pieces of maroon twills by sample. It was found that 64 of the pieces delivered while answering the description "maroon twills" were of a quality inferior to that of the sample. It was held that the purchasers could not retain the pieces which were in accordance with the contract and reject the 64 pieces which were not; but the judgments make it plain that the

[1] [1958] 2 Lloyd's Rep. 469 at p. 480.
[2] (1924), 55 O.L.R. 667.
[3] [1908] S.C. 490.

purchasers had the right to reject the whole shipment. It is sufficient to quote the following passage from the judgment of Lord Low at page 496:

> Suppose that when the defenders refused to take back the 64 pieces, the pursuers had at once also returned the remaining 69 pieces, and intimated that they repudiated the contract and rejected the whole goods, I cannot imagine any ground upon which it could have been held that they were not entitled to follow that course.

In applying this case it must, of course, be remembered that s. 11 of the *Sale of Goods Act* of the United Kingdom which otherwise corresponds to section 12 of the Ontario Act contained subsection (2) reading as follows:

> (2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

However, so far as it is applicable this decision would appear to support the position of the appellant in the case at bar rather than that of the respondent.

In *Easterbrook and Others v. Gibb and Co.*[1], the contract was for the sale of 1,500 Bauer's patent pipe-vices. The goods delivered were Bauer's patent pipe-vices but a number of them were found to be defective. The grounds of the decision appear in the following passage in the reasons of the Master of the Rolls at page 401:

> The contract here was not a contract for successive deliveries, though, as a fact, successive deliveries were made, and must be considered as one contract for one whole lot. Accordingly the purchaser could only reject if that which was offered as the whole lot was so different from the whole lot ordered as to make the lot offered not in accordance with the description in the contract. Mr. Justice Grantham did not think that the goods delivered so far differed as a lot from the description in the contract as not to correspond with the lot ordered and so as to entitle the defendants to reject. The referee found 206 defective out of 1,417 examined, and though this number was rather high, yet, considering that the defects were trivial and could be put right in a very short time and at a very small cost, his Lordship could not differ from the learned Judge at the trial.

There is nothing in the report to suggest that the buyers were allowed any reduction from the full contract price and the decision appears to turn on a finding of fact that the goods delivered were in accordance with the contract, the defects which were present in some of them being regarded

[1] (1887), 3 T.L.R. 401.

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as so trifling as to fall within the *de minimis* principle. I do not regard this judgment as establishing any general principle which assists the respondent in the case at bar.

In *Alkins Brothers v. G. A. Grier and Sons, Ltd.*[1], the contract was for the purchase of the whole product of the seller's mill during the sawing season of 1920, "dead culls out", the wood to be sawn in accordance with instructions given by the buyers. The whole product of the mill was delivered but included some "dead culls" and some of the lumber was not sawn in conformity with the instructions. The referee to whom a reference had been directed "to ascertain and state what sum, if any, is due from the defendant company to the plaintiffs" reported that the defendant had accepted the goods after inspection, or after full opportunity to inspect, and had thereby lost its right to reject; he allowed substantial deductions from the contract price in respect of the "dead culls" and "miscuts". This view was affirmed by Rose J. and by the Court of Appeal. The question whether the defendants could have rejected the whole had they not lost the right to do so by acceptance is left open. This case is distinguishable on the facts from the case at bar in which there is no suggestion that the appellant accepted the goods delivered by the respondent.

In my view, the case at bar is governed by the principles stated by the House of Lords in *Arcos, Ltd. v. E. A. Ronaasen and Son*[2]. The agreement in that case was for the sale of a quantity of staves required by the buyers as the sellers knew for making cement barrels; the contract specified that the staves were to be of one-half an inch in thickness. 75.3 per cent of the staves delivered were more than one-half an inch but not more than nine-sixteenths of an inch in thickness and 18.3 per cent were more than nine-sixteenths of an inch but not more than five-eights of an inch in thickness. It was found as a fact by the umpire that all the staves delivered were fit for the purpose of making cement barrels and "were commercially within and merchantable under the contract". It was held by Wright J. whose judgment was affirmed unanimously by the Court of Appeal and the House of Lords that the buyers were entitled to reject all the staves.

[1] (1924), 55 O.L.R. 667.

[2] [1933] A.C. 470, 102 L.J.K.B. 346.

At page 474, Lord Buckmaster, with whom Lord Blanesburgh and Lord Macmillan agreed said:

> The fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description, and I think the phrase "commercially" itself shows that while the goods did not in fact answer the description, they could, as a matter of commerce, be so dealt with. But the rights of the buyers under the contract are not so limited. If the article they have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought.

At page 479, Lord Atkin said:

> It was contended that in all commercial contracts the question was whether there was a "substantial" compliance with the contract: there always must be some margin: and it is for the tribunal of fact to determine whether the margin is exceeded or not. I cannot agree. If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does $\frac{1}{2}$ inch mean about $\frac{1}{2}$ inch. If the seller wants a margin he must and in my experience does stipulate for it. Of course by recognized trade usage particular figures may be given a different meaning, as in a baker's dozen; or there may be even incorporated a definite margin more or less: but there is no evidence or finding of such a usage in the present case.
>
> No doubt there may be microscopic deviations which business men and therefore lawyers will ignore.

It appears to me that on the findings of fact made in the courts below in the case at bar the variation between the contract description and the goods delivered was wider than in the *Arcos* case.

For the above reasons I am of opinion that the appeal succeeds. The appellant at the trial abandoned its claim for damages and sought only the return of the deposit of $6,000. The learned trial judge dismissed the respondent's counter-claim without costs and no appeal was taken from that dismissal.

I would allow the appeal, set aside the judgment of the Court of Appeal and that of the learned trial judge, except in so far as it dismissed the counter-claim without costs, and direct that judgment be entered in favour of the appellant for $6,000 with costs throughout.

Appeal allowed with costs, KERWIN C.J. *and* JUDSON J. *dissenting.*

Solicitors for the plaintiff, appellant: Catzman and Wahl, Toronto.

Solicitors for the defendant, respondent: Mason, Foulds, Arnup, Walter and Weir, Toronto.