> I think the translation word by word or sentence by sentence by the interpreter is not an *ex post facto* narrative statement within the rule against the admissibility of hearsay, but is an integral part of one transaction consisting of communicating through an interpreter. It is therefore enough if it is proved that what he did was to interpret faithfully.[15]

With respect, therefore, it is submitted that the application was rightly refused.

D. GRAHAM

ASHFORD SHIRE COUNCIL v. DEPENDABLE MOTORS PTY LTD[1]

Sale of goods—Implied warranty—Fitness for particular purpose—Reliance through agent on seller's skill and judgment—Sale of Goods Act 1923-1953, section 19 (1) (N.S.W.)

The appellant shire council wished to acquire a tractor for use in road construction work and the shire clerk, after consulting the shire president and other councillors, acting on their instructions, asked one B to look at a tractor which the respondents had for sale, to see 'whether it was suitable for the work required'. B had recently been appointed shire engineer but had not yet taken up his duties or become the servant of the council.

The argument in the Judicial Committee proceeded on the footing that B had called on the respondents and told their joint managing director, C, that he was there on behalf of the council and whilst inspecting the machine with C had asked about the capabilities of the tractor and whether it would do the road construction work for which it was required. He was told, *inter alia,* that 'that was the type of work that the tractor was built for—it is just the type of work to suit it'. B made no written or oral report of the conversation but told the shire clerk that he had inspected the tractor and that it seemed big enough for the work required. In reliance on B's report the shire president instructed the shire clerk to purchase the tractor, which was subsequently found to be not reasonably fit for the purposes of road construction. The appellant council claimed damages for breach of the implied condition of fitness under section 19 (1) of the Sale of Goods Act 1923-1953 (N.S.W.).[2]

[15] (1960) 34 A.L.J.R. 266.

[1] [1960] 3 W.L.R. 999; [1961] 1 All E.R. 96; (1961) 34 A.L.J.R. 89; Judicial Committee of the Privy Council: Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Morris of Borth-y-Gest. The advice of their Lordships was delivered by Lord Reid.

[2] This section is identical with Sale of Goods Act 1893, S. 14 (1) (Eng.) and Goods Act 1958, s. 19 (Vic.).

S. 19 '. . . there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be manufacturer or not) there is an implied condition that

At the trial, Ferguson J., sitting alone, entered judgment for the defendant, as he did not think that it was shown that the buyer had relied on the skill and judgment of the seller. The majority of the Full Court of the New South Wales Supreme Court[3] were of contrary opinion and found for the appellant council, while on appeal, the majority of the High Court of Australia[4] considered that the council had relied on the skill and judgment of the engineer designate and not on that of the seller. They thought that the fact that the engineer relied upon what the seller told him was not sufficient to invoke section 19 (1), and restored the judgment of Ferguson J. On appeal the Judicial Committee of the Privy Council advised the restoration of the decision of the New South Wales Full Supreme Court, awarding damages to the appellants.

The appeal depended on a construction of the facts rather than on an examination of principles of law.[5] The Judicial Committee acting on what had taken place between the clerk, engineer and the respondents, concluded that in the circumstances the proper inference was that B was being asked to anticipate his duties as shire engineer, and to do gratuitously what it would have been his duty to do if he had already become the appellant's servant. The Judicial Committee, therefore, necessarily inferred that he was given such authority as he would have had as their servant.[6] B was accordingly acting within the scope of his authority in disclosing to the sellers on behalf of the appellants the particular purpose for which the tractor was required, and such authority so to act was held to cover the disclosing of the purpose so as to show that he was relying on the seller's skill or judgment in making his report to the appellants. The Judicial Committee concluded that C must have realized as a reasonable man that B intended to rely on the assurances C had given, and should be supposed to know that the appellants were so relying when they placed the order.

The judgment appeared to be more concerned with conceptions of the manner in which a corporation or other business organization may proceed through its servants and agents in negotiating a purchase, rather than the effect of section 19 of the Goods Act.[7] The Judicial Committee had no doubt of the authority of B to ask for and to receive assurances on

---

> the goods shall be reasonably fit for that purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose . . .'.

It was conceded in the present appeal that the sale in question was not a sale under a patent or trade name, and that it was in the course of the seller's business to supply tractors such as that bought.

[3] *Ashford Shire Council v. Dependable Motors Pty Ltd,* unreported; Owen, Herron JJ. (Hardie J. dissenting).

[4] *Dependable Motors Pty Ltd v. Ashford Shire Council* (1960) 33 A.L.J.R. 64. McTiernan, Taylor, Menzies JJ. (Dixon C.J., Kitto J. dissenting).

[5] This is not unusual in cases concerning this section which involve inferences made from the construction of negotiations between the parties prior to contracting. *E.g. Manchester Liners Ltd v. Rea Ltd* [1922] 2 A.C. 74. (H.L.).

[6] In accord with the dissenting judgment of Dixon C.J., (1960) 33 A.L.J.R. 64 *ff.* As to what evidence is admissible: *Gillespie Bros v. Cheney, Eggar & Co.* [1896] 2 Q.B. 59.

[7] (1960) 33 A.L.J.R. 64, 67, *per* Dixon C.J.

behalf of the appellant council if he had already taken up his duties, as this would have been part of his duties as engineer. As the inference of agency on the part of B in respect of the council's enquiry was accepted[8] there was little difficulty in finding consequent reliance on the seller's skill and judgment.

The respondents argued that the principle that a person could not rely on something of which he was ignorant prevented the statutory implication arising in such a case as the present where no report of any warranty by the seller was passed on to the buyer. They attempted to lay weight upon the statement of Lord Wright in *Cammell Laird & Co. v. Manganese Bronze and Brass Co.*:[9]

> Such a reliance must be affirmatively shown: the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on this footing.

The Judicial Committee ruled that such a general statement of the law did not deal with the position of a buyer who acts through agents or servants as a corporation must necessarily do.[10] It is clear that if the agent who conducts the negotiations is the same person as the agent who makes the contract on behalf of the buyer there is no difficulty. The Judicial Committee pointed out that the appellant being a corporation, it could not itself rely on or be induced to act by anything, but could only rely or be induced to act by acting through its servants. What is necessary is that the buyer should contract in reliance on what took place during the negotiations and that reliance is made at the time of contract '. . . a matter of reasonable inference to the seller and to the Court'.[11]

In fact the Judicial Committee concluded that C must have realized that B would rely on his assurances in making his report to the council, and in the absence of reasons to suppose that the appellants were not so relying when they placed the order, C was liable. If B was acting outside the scope of his authority there could be no such liability, but it was considered that B's authority covered the disclosing of that purpose so as to show that he was relying on the seller's skill and judgment in making his report. It was accepted that in a transaction carried through by a corporation, different steps may be taken by different persons on its behalf, and it was permissible to combine their various actions to give legal completeness to the transaction. The clerk and president of the council were the persons who, acting on the report induced by C which was given to them by B, bought the tractor. The consideration of whether what took place between one agent and the seller has been communicated to the other agent is irrelevant when such legal completeness is given to the whole transaction by combining the various actions of the agents,

[8] The inference drawn by the majority of the High Court was that there was no such agency: (1960) 33 A.L.J.R. 64, 74, 77.

[9] [1934] A.C. 402, 423. Also *Medway Oil & Storage Co. v. Silica Gel Corpn* (1928) 33 Com. Cas. 195, 196.

[10] (1961) 34 A.L.J.R. 409, 412.

[11] *Manchester Liners Ltd v. Rea Ltd* [1922] 2 A.C. 74, 90, *per* Lord Sumner, cited with approval (1961) 34 A.L.J.R. 409, 412.

once it is shown that the agent receives the seller's assurances on behalf of the corporation.

Perhaps it is not necessary to show in such a case more than the fact that the agent is acting within his authority in disclosing to the seller, on behalf of the buyer, the particular purpose for which the goods are required. Before the passing of the English Goods Act 1893[12] it was an established common law principle that if a man knowingly sells an article for a particular purpose he impliedly warrants that it should be fit for that purpose.[13] In referring to the relevant section[14] in the English Act, the House of Lords in 1922[15] was of the opinion that the Act did not qualify this old doctrine, accepting the view already expressed in both the House of Lords[16] and in the Court of Appeal.[17]

However, in decisions after the passing of the Act it has become accepted that the inference of reliance will ordinarily be made if the buyer expressly states in the contract of purchase the purpose for which he requires the goods, or if the seller was (before or at the time of purchase) by implication made so aware by the buyer. *Manchester Liners Ltd v. Rea Ltd*[18] appeared to conclude that the inference of reliance will ordinarily be drawn on the strength of a contract made with knowledge on the part of the seller of the purpose for which the goods are required.[19] The inference can be made where the seller offers goods without a word as to their fitness.[20] To escape liability it has been suggested that a seller must show that he contracted on the footing that the risk of the goods proving unfit for the purpose for which they were required stood with the buyer.[21] The House of Lords in the *Cammell Laird* case[22] expressly reversed the Court of Appeal in concluding that such reliance may be inferred from the communication by the purchaser and need not be supported by positive evidence.[23] Lord Wright emphasized that reliance must be affirmatively shown, but nevertheless accepted

[12] 56 & 57 Vict. c. 71.

[13] *Jones v. Bright* (1829) 5 Bing. 531. Best C.J. regarded this as established by *Laing v. Fidgeon* (1815) 6 Taunt. 108; subsequently approved *Randall v. Newson* (1877) L.R. 2 Q.B.D. 102, 109, *per* Brett L.J.

[14] S. 14 (1) of the English Act, equivalent to s. 19 (1) of the relevant N.S.W. and Victorian Acts.

[15] *Manchester Liners Ltd v. Rea Ltd* [1922] 2 A.C. 74, 79, *per* Lord Buckmaster, 84-87, *per* Lord Atkinson.

[16] *Jacobs v. Scott & Co.* (1899) 36 S.L.R. 611.

[17] *Preist v. Last* [1903] 2 K.B. 148. Perhaps subject to the qualification expressed by Cozens-Hardy M.R. in *Bristol Tramways v. Fiat Motors* [1910] 2 K.B. 831, 836, that as a statutory enactment it alone must be looked at, even though it might have altered the common law. *Thornett & Fehr v. Beers & Son* [1919] 1 K.B. 486 was decided on the principle that there was such alteration with reference to s. 14 (2). See *Chalmers' Sale of Goods* (13th ed. 1957) 1, 54 note (b). In the High Court, Dixon C.J. was of opinion that the Act did not necessarily set the same criterion. (1960) 33 A.L.J.R. 64, 66.

[18] [1922] 2 A.C. 74.

[19] *Ibid.* 79, 81. Lord Atkinson, 84-86, regarded the principle as established in *Bristol Tramways v. Fiat Motors* [1910] 2 K.B. 831. Lord Sumner was less explicit and made reliance a matter of 'reasonable inference to the seller and to the Court' *Ibid.* 90.

[20] As was the case in *Manchester Liners Ltd v. Rea Ltd* [1922] 2 A.C. 74.

[21] Hughes, 'Sale of Goods Act 1893, s. 14 (1) and (2)' (1959) 22 *Modern Law Review* 484, 487.

[22] *Cammell Laird & Co. v. Manganese Bronze & Brass Co.* [1934] A.C. 402.

[23] *Ibid.* 413. Lord Warrington regarded this as established in *Manchester Liners Ltd v. Rea Ltd* [1922] 2 A.C. 74.

that there was inferential reliance in *Cammell Laird*[24] and his broader statement seems contrary to the tenor of former decisions.[25] Whilst speaking on this point, *Cheshire and Fifoot*[26] states:

> It is a question of fact in each case whether the seller as a reasonable man must have known that reliance was placed on his skill or judgment, but he is taken to have this knowledge if a disclosure is made of the special purpose for which the goods are required.[27]

Though this interpretation would result in section 19 having effects which in some respects no longer correspond to its language, it would appear that the fact of a seller supplying goods with knowledge of the buyer's purpose can be sufficient to raise the implied condition.[28] There would seem to be no reason why such purpose should not be disclosed through an agent. A corporation must, as the Judicial Committee pointed out, act through an agent or servant. If it is accepted that Dixon C.J. is correct in his proposition that different steps taken by different persons on the corporation's behalf may be combined to give legal completeness to a transaction, it would seem that disclosure of purpose by the agent himself would be sufficient from which to infer reliance. This includes the case of negotiations to buy goods by making known to the sellers that the corporation as buyer relies, through its servants and agents, upon the seller's skill and judgment.[29] Reliance may not be exclusive of all else, '. . . it is sufficient if it is such as to constitute a substantial and effective inducement.'[30]

The Judicial Committee did not choose to deal with this appeal on this basis, but in the result the same conclusion was reached, there being ample evidence to show that the seller must have realized that the engineer was relying on his assurances in making his report to the buyers. Once it was accepted that the engineer had authority to disclose the purpose for which the goods were required, in the absence of evidence to the contrary, there was reliance on the seller's skill and judgment for the purposes of the statutory implication of fitness under the provision of section 19 (1) of the Goods Act.

G. F. GRIFFITH

[24] [1934] A.C. 402.

[25] E.g. *Manchester Liners Ltd v. Rea Ltd* [1922] 2 A.C. 74; Lord Wright in *Grant v. Australian Knitting Mills Ltd* [1936] A.C. 85, 99, concluded that in the case of the sale of goods whose purpose is self evident from their nature the inference will usually arise by implication. In *Frank v. Grosvenor Motor Auctions Pty Ltd* [1960] V.R. 607, 613-614 Pape J. was prepared to make the implication in the case of the sale of a motor-car—the description being sufficient to show reliance on the seller. In the High Court judgment of the instant case Dixon C.J. and McTiernan J. were of opinion that the purpose for which the tractor was bought was self-evident. (1960) 33 A.L.J.R. 64, 65-66, 68. This *could* be sufficient to raise the implication of reliance.

[26] *The Law of Contract* (5th ed. 1960) 129.

[27] *Halsbury's Laws of England* (3rd ed. 1960) xxxiii, 81-82 agrees that this is the normal case.

[28] *Hughes, op. cit.* 493 suggests that there is no burden on the buyer other than showing that the seller knows of the purpose. The Courts have leant in favour of the buyer in doubtful cases. See Atiyah *The Sale of Goods* (1957) 62 *ff.*

[29] Dixon C.J. noted that for the purpose of ascertaining the suitability of the implement for the council's purposes B represented the corporation, (1960) 33 A.L.J.R. 64, 66. Such representation would seem sufficient to give rise to the implication.

[30] *Medway Oil & Storage Co. Ltd v. Silica Gel Corpn* (1928) 33 Com. Cas. 195, 196, *per* Lord Sumner.

TRUSTEES OF CHURCH PROPERTY OF THE DIOCESE OF NEWCASTLE AND ANOR v. EBBECK AND OTHERS[1]

Wills—Construction—Condition attached to gift—Validity—Uncertainty—Public policy

In this originating summons the executrix of the will asked the court to determine the validity of a proviso to gifts in remainder under a trust established by the testator in which she had a life interest.

The testator, so far as is material, provided, after a life interest to his widow that the trustees should hold on trust for three named sons subject to the proviso

> that the devise and bequest to each of my said sons shall be upon condition that he and his wife shall at the date of the death of my said wife . . . profess the Protestant faith and accordingly,

he declared 'that if at the date aforesaid my trustees shall not be satisfied that any son of mine and his wife profess the Protestant faith then and in every such case such son' should forfeit his interest in the estate. He further provided that the decision of the trustees as to whether any son and his wife professed the Protestant faith should be final. Any forfeited interest was to be held in trust for four charitable objects.

At the date of the testator's will two of the sons were already married to Roman Catholic wives and the third son was engaged to marry a Roman Catholic, and subsequently did so. The wife and three sons survived the testator.

In answer to the question asked by the originating summons Else-Mitchell J. held[2] that the condition was a condition subsequent defeating, if it were to operate, the vested interests of the sons. He further held that the proviso was void for uncertainty. He did not think that the provision that the beneficiaries were to satisfy the trustees of their faith made the condition any more certain than if there had not been any such provision.[3]

The High Court was of opinion, however, that although the proviso was indeed a condition subsequent it was not void for uncertainty. Dixon C.J. and Windeyer J. held nevertheless that the condition was void because it offended against public policy.

The court felt that matrimony was a holy and noble estate which ought to be protected by the law. But there were differences as to how this was to be best done. Dixon C.J. was unrepentant of his dissenting judgment in *Ramsay v. The Trustees and Executors and Agency Co. Ltd.*[4] In that case a sum was directed to be held on trust and the income to be paid to a named son for so long as he was married to his present wife, and, on the termination of that period, to him absolutely. Latham C.J., Starke and McTiernan JJ. thought that there was nothing inimical to public policy in this provision because it resulted in no real threat to the son's

[1] (1961) 34 A.L.J.R. 413; High Court of Australia; Dixon C.J., Kitto and Windeyer JJ.
[2] (1959) 76 W.N. (N.S.W.) 399, *sub. nom. Ebbeck v. Ebbeck.*
[3] *Ibid.* 401. [4] (1947) 77 C.L.R. 321.