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O'Connor J.

and the words "as though part of the estate of the donor," are used only in order to indicate the way in which the duty is to be calculated. It appears to me that when the legislature has used language so different in its phraseology in dealing with these four different classes of cases, it would be impossible to give effect to its intention unless we hold that the duty in this last case is to be charged in quite a different way from that in which it is to be charged in the other three cases. I agree that the decision of the Court appealed against is wrong, and that the appeal must be upheld to the extent of the variation ennunciated by the learned Chief Justice.

Appeal allowed. Order appealed from varied. Judgment for suppliant for £42 16s. 10d., with costs. Respondent to pay costs of appeal.

Solicitors, for appellant, *A. G. Roberts.*

Solicitor, for respondent, *Guinness*, State Crown Solicitor.

B. L.

Appl *Brisbane Shipwrights Provident Union* v *Heggie* (1906) 3 CLR 686

Aff *Commonwealth* v *Brisbane Milling Co Ltd* (1916) 21 CLR 559

Dist *Buchanan* v *Byrnes* (1906) 3 CLR 704

Foll/Appl *Hinton* v *R* (2000) 177 ALR 300

Discd *R* v *Snow* (1915) 20 CLR 315

[HIGH COURT OF AUSTRALIA.]

MUSGROVE AND ANOTHER . . . APPELLANTS;
PLAINTIFFS,

AND

McDONALD AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Nov.* 1, 2.

MELBOURNE, *Nov.* 25.

Griffith C.J., Barton and O'Connor JJ.

Practice—Appeal—New trial—Verdict of jury—Circuit Court—The Constitution (63 & 64 *Vict.* c. 12) *sec.* 73—"*All judgments, decrees, orders and sentences*" *—Contract of sale—When property passes—Waiver—Sale of Goods Act* (*South Australia*) 1895 (*No.* 630).

An appeal does not lie to the High Court of Australia from a verdict of a jury, or from a judgment of the Supreme Court of a State founded upon a general verdict of a jury, except by way of appeal from a decision of the Supreme Court in an application for a new trial.

An application for a new trial after verdict, upon whatever ground, does not fall within the words of The Constitution, sec. 73—"appeals from all judgments decrees orders and sentences" of Federal Courts or State Courts.

The nature of the jurisdiction exercised by Courts in granting new trials considered.

APPEAL from the Supreme Court of South Australia.

By memorandum dated 14th October, 1903, the respondents agreed to sell to the appellants 4000 4 and 6-tooth merino wethers, as inspected on 12th October, 1903, at 12s. per head, terms cash, delivery to be given and taken on or about the 15th December, 1903, at Morambro Station, off shears. It was further agreed by memorandum dated the 3rd December, 1903, that the respondents should sell and the appellants should purchase 2000 merino wethers, 4 years, as inspected, at 11s. 6d. per head, terms cash, delivery to be given and taken on or before the 15th December, 1903, at Morambro Station. Appellants brought an action for breach of these two contracts and in the alternative for conversion of 2000 of the sheep, alleging readiness and willingness and an offer on their part to take delivery of, and pay for, the sheep and refusal on the part of the respondents to deliver them. They further alleged that, on the 22nd December, 1903, and without any breach by the appellants, the respondents sold the sheep to a third party, without giving notice to the appellants. The defence was a denial of the performance of conditions precedent by the appellants, and an allegation that on the 18th, 19th, and 21st December, 1903, notice was given them of respondents' intention to re-sell the sheep. Respondents also paid into Court the sum of £250, with denial of liability, and entered a counter-claim for £186 for the cost of pasturage for the whole 6000 sheep and for labour, tending and general expenses, arising out of appellants' neglect to take delivery of the sheep on the date agreed upon. The action was tried in April, 1905, before *Gordon* J. and a jury, at the Mount Gambier Circuit Court, when the jury, by direction, returned a verdict for respondents, on which judgment was accordingly entered. The appeal was from this judgment.

Parsons, (with him *Torrens Ward*), for respondents.

This appeal does not lie. The action was tried by *Gordon* J. and a special jury at a Court sitting for the trial of issues in the

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Supreme Court and constituted under the *Third Judge and District Courts Act* 1858, No. 13, (South Australia). The jury gave a verdict for the present respondents under the Judge's direction, and the present appeal is in reality an appeal against the verdict. The verdict must stand until there has been a motion for a new trial in the Supreme Court of South Australia. The decision in *Parkin* v. *James* (1) does not cover the case of an appeal against a verdict. The appointment of *Gordon* J. to hold the Court at Mount Gambier "and also for the trial of all issues of the Supreme Court," was made by proclamation in the South Australian *Government Gazette*, p. 638 (6th April, 1905).

The Circuit Court is constituted under the *Circuit Courts Act* (South Australia) 1868, No. 6. Sec. 2 authorizes the Governor to proclaim certain districts at which a Court, to be called the Circuit Court of such district, is to be held. Section 4 gives the Statutory Court its necessary attributes; makes them Courts of Record, gives them a seal and offices, makes them Courts of Oyer and Terminer and General Gaol Delivery for all gaols within the district, and for the trial of issues in the Court and the assessment of damages, and enacts that they shall stand in the same relation to the Supreme Court, as Courts of Oyer and Terminer and General Gaol Delivery and *nisi prius* in England stand to His Majesty's Court at Westminster. The *Third Judge and District Courts Act* (1858, No. 13) sec. 2, empowers the Governor to issue a Commission, directed to one of the Judges of the Supreme Court, authorizing him to hold a session of the Circuit Court. The *Supreme Court Act* (South Australia) 1878, No. 117, sec. 4 provides that the several jurisdictions previously exercised by the Supreme Court or any Judge thereof shall, so far as regards procedure and practice, be exercised by the said Court and every Judge thereof in the manner provided. This section is founded upon, but materially differs from the English *Judicature Act* 1873, sec. 22, which transfers the jurisdictions and practice of existing Courts to the High Court of Justice and Court of Appeal. Sec. 12 of the South Australian Act provides that "any Judge of the said Court may exercise in Court or in Chambers all or any part of the jurisdiction by this Act vested in the said Court in all such

(1) 2 C.L.R., 315.

causes, . . . as before the passing of this Act might have been heard in Court or in Chambers respectively by any single Judge of the said Court," &c. The *Judicature Act* 1873, sec. 39, contains the additional provision that "in all such cases, any Judge sitting in Court shall be deemed to constitute a Court."

The judgment sought to be appealed from is founded on the verdict of the jury. It has never been the practice of the Privy Council to entertain such appeals. *The Supreme Court Act* (South Australia) 1878 No. 116, sec. 15, provides that new trial motions are to be heard before the Full Court, and that no appeal shall lie from any judgment founded upon and applying a verdict "unless upon motion made to such Court or other proceeding taken therein to set aside or reverse such verdict or the judgment founded thereon." In *Angas* v. *Cowan* (1), the question arose as to the right of appeal to the Privy Council from a judgment of the Chief Justice in a case tried by him without a jury. The Supreme Court there laid down the rule that no appeal lay to the Privy Council as of right until the appellant had first appealed to the Full Court of the State. Sec. 16 of the *Supreme Court Act* provides that "every order or direction made by a Judge of the said Court, whether in Chambers or in Court, may be set aside or discharged by the Full Court, and an appeal shall also lie to the Full Court from any refusal of any Judge to make any order." In *Giles* v. *Wooldridge* (2), it was decided that an appeal lay direct to the Privy Council from a decree of the Primary Judge, unless the decree was appealed against to the Full Court. This however leaves untouched the decision in *Angas* v. *Cowan* (1), as it has always been recognized that a judgment of the Primary Judge in Equity is the same for purposes of appeal to the Privy Council as a judgment of the Full Court. The *Equity Act* 1866-7, No. 20, sec. 9, provides that every decree or order of the Primary Judge shall unless appealed from be as valid effectual and binding . . . as if such decree or order had been pronounced and made by the Court. Circuit Court trials were merely inquests. The Judge who presided could not enter judgment. He returned to the Court the verdict, and on the fourth day of term the verdict was entered

(1) 17 S.A. L.R., 110. (2) 13 S.A. L.R., 185.

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on the record in the postea, and on that the Court in *banc* gave judgment. *Encyclopædia of the Laws of England*, vol. III., p. 26, shows the history of jurisdiction of Circuit Courts and Assizes. The *Judicature Act* 1873, sec. 16, transfers the jurisdictions of various Courts, including those created by Commissions of Assizes and Oyer and Terminer, to the High Court. By sec. 29 of the same Act express authority is given to issue commissions of assize, &c., as to any jurisdiction capable of being exercised by the High Court. The policy of the English *Judicature Act* seems to have been to embrace all the jurisdictions previously existing in the High Court, while the South Australian Act kept the Circuit Courts distinct, though following the English legislation in other respects. [He cited *Wharton's Law Lexicon*, p. 531, on the jurisdiction of the Courts at *nisi prius*.] Before the *Common Law Procedure Act* a practice had become established by which the Court in *banc* would entertain a motion, if made within the first four days of term, to stay the postea, and if it were made out that there had been any miscarriage at the trial, to set aside the proceedings at *nisi prius* and grant a new trial. The trial, therefore, at *nisi prius* was nothing more than an inquiry as to fact, and no judgment could be entered except by the Court in *banc*: *South-Eastern Railway Co.* v. *Smitherman* (1); *Dublin, Wicklow and Wexford Railway Co* v. *Slattery* (2). It happened that *Gordon* J., who tried the case, was a Supreme Court Judge, but it might have been tried by any practitioner of not less than seven years' standing. There is no judgment of the Circuit Court here, but only a verdict, which stands until set aside in the proper way. Neither The Constitution nor the *Judiciary Act* authorizes an appeal to the High Court from a verdict of a jury.

In *Tronson* v. *Dent* (3) the objection was taken that the appeal was an application to set aside the verdict of a jury, and should not therefore be entertained, and their Lordships held that they would not entertain an appeal to set aside a verdict unless there had been a previous application for the purpose to the Court in which the trial took place (4); *Dargnino* v. *Bellotti* (5); *Nathoob-*

(1) 47 J.P., 773.
(2) 3 App. Cas., 1155, *per Blackburn* L.J., at p. 1205.
(3) 8 Moo. P.C.C., 419.
(4) 8 Moo. P.C.C., 419, at p. 446.
(5) 11 App. Cas., 604.

hoy Ramdass v. *Mooljee Madowdass* (1); *Mushadee Mahomed Cazum Sherazee* v. *Meerza Ally Mahomed Shoostry* (2); *Santa Cana* v. *Ardevol* (3); *Stace* v. *Griffith* (4). "A judgment founded on a verdict of a jury can only be assailed on appeal" (to the Privy Council) "on the ground that, on the facts found by the jury it is erroneous, and further the verdict of a jury is not the the judgment of the Court": *Parkin* v. *James* (5).

Starke for appellants. In form this is a judgment of the Supreme Court of South Australia, and the objection is not open on the record. The judgment on the record is in the following form: "This action having . . . been heard before His Honour Mr. Justice Gordon a judge of this Court . . . and Mr. Justice Gordon having ordered that judgment be entered for the defendants . . . therefore it is adjudged," &c. The jurisdiction of the Circuit Courts is concurrent with that of the Supreme Court, which has jurisdiction to hear cases all over the State. The jurisdiction of the Supreme Court is conferred by Act No. 31 of 1855-6, sec. 7 (South Australia). The *Circuit Courts Act* 1868-9, No. 6, sec. 6, shows that a mere transference of venue is all that is necessary to transfer an action from the Supreme Court to a Circuit Court. It requires the name of the circuit district to be stated in the margin of the declaration, and that shall be taken to be the venue. Sec. 7 enables the Supreme Court or a Judge to order a change of venue. Sec. 4 makes all Circuit Courts Courts of Record for the trial of issues in the Supreme Court and the assessment of damages.

[O'CONNOR J.—The section goes on to say "and such Courts . . . shall stand to the Supreme Court in the same relation as Courts of Oyer and Terminer and General Gaol Delivery and *nisi prius*, in England, stand to Her Majesty's Court at Westminster."]

The venue could have been changed back to Adelaide, and it is not correct therefore to say the cause was transferred. If the cause were transferred to the Circuit Court at Mount Gambier, then the record would show the various transferences. If it is

(1) 3 Moo. P.C.C., 87.
(2) 8 Moo. P.C.C., 90, at p. 112.
(3) 1 Kn., 269.
(4) 6 Moo. P.C.C. (N.S.), 18; L.R. 2 P.C., 420.
(5) 2 C.L.R., 315, at p. 339.

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a judgment of the Supreme Court, an appeal may be brought from it. The issues were tried by the Circuit Court as and for the Supreme Court. In the *Circuit Courts Act* there is no provision for appeal or new trial. It is a Court of Gaol Delivery, and must therefore have a very considerable jurisdiction in which it can enter judgments. Respondents' argument must be that there is no jurisdiction to hear an appeal except on matters of law; but by the decision in *Parkin* v. *James* (1), "order" under sec. 73 of The Constitution means any order. If a Judge trying a case without a jury wrongly finds something as a fact, of which there is no evidence, an appeal lies. Yet the Judge there merely takes the place of the jury. In all cases it is a necessary consequence of *Parkin* v. *James* (1), that there is an appeal from the finding of the jury. It may be shown that the judgment proceeds upon a wrong finding of fact. If an appeal lies from a judgment or order it may be shown that such judgment or order is wrong upon any ground. The Privy Council authorities cited on behalf of the respondents are met by sec. 73. This Court is bound by sec. 73, which must be interpreted without reference to the procedure of any other Court not controlled by a similar section. Here the judgment appealed from is the direction of the Judge which really constitutes the judgment: *Brown* v. *Lizars* (2). Reference to what the Privy Council have done in other cases, and on a jurisdiction not raised by sec. 73, is not relevant.

[GRIFFITH C.J.—The cases cited by Mr. Parsons deal with the question of what is a "judgment," and sec. 73 uses that word in giving this Court its appellate jurisdiction.]

This was in substance a nonsuit. The Judge directed the jury to find a verdict for defendant. It was directed entirely on the evidence of the plaintiffs and not on the strength of the defendants' case. Being thus in effect a judgment of nonsuit, an appeal will lie from it to this Court.

Parsons, in reply. If the direction of a Judge to the jury amounts to a judgment where is the line to be drawn? No authority can be cited for such a proposition.

(1) 2 C.L.R., 315. (2) 2 C.L.R., 837.

The Circuit Court and the Supreme Court are distinct tribunals. The preamble to the *Circuit Courts Act*, 1868-9 (No. 6), contains the words "to make further provision for the trial of causes . . . at places remote from the Supreme Court." Sec. 2 provides that "The Governor . . . shall . . . appoint a place, and fix the time . . . at which a Court to be called the Circuit Court of such district shall be held."

Per Curiam. We think we had better follow the course adopted by the Privy Council in *Tronson* v. *Dent* (1) and hear the whole matter. That does not presuppose that the objection is overruled.

[The appeal was argued accordingly. But, as appears from the judgment of the Court, the Court upheld the objection as to jurisdiction. The arguments on the points of law arising on the evidence are therefore omitted.]

Cur. adv. vult.

Nov. 25.

GRIFFITH C.J. read the judgment of the Court as follows:— This is an appeal from a judgment of the Supreme Court of South Australia. The action, which was an action for damages for breach of contract for the sale of goods and for conversion, was tried in a Circuit Court, when the jury, by direction of the presiding Judge, *Gordon* J., gave a general verdict for the defendants, upon which judgment was signed in the ordinary course. The appellants now desire to object to the direction. The judgment is in the usual form of a judgment after verdict, reciting that the action was heard before *Gordon* J. and a special jury, at Mount Gambier, that the jury had found a verdict for the defendants, and that the Judge had ordered that judgment be entered for the defendants. Then followed the award of judgment. This is undoubtedly a judgment of the Court, and, as the amount of the claim exceeded the appealable amount, an appeal lies from it to this Court. The judgment is not, however, on the face of it, open to any objection.

Before the merits of the case were opened, counsel for the respondents took the preliminary objection that the appeal was, as in

(1) 8 Moo. P.C.C., 419.

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truth it was, in effect an application for a new trial on the ground of misdirection, and that such an application cannot be made to the High Court, under the guise of an appeal, when no application for a new trial has been made to the State Court. In support of this objection, they referred to several cases before the Judicial Committee of the Privy Council, and to the Statute law of South Australia, as well as to the case of *Parkin* v. *James* (1), in which this Court intimated an opinion in favour of their contention. The point did not, however, arise for decision in that case, and was not referred to in argument, otherwise than incidentally. The respondents took the further point that, even if an appeal, in the nature of an application for a new trial, after a verdict of a jury, would lie in the case of an action tried in the Supreme Court, the verdict in the present case was given in a Circuit Court, which, they contended, was under the law of South Australia a separate and independent Court. The point is one of great importance, as affecting the respective functions of this Court and the Supreme Courts of the States. It has been very fully and ably argued, and we will proceed to give our reasons at length for the conclusion at which we have arrived.

An Act passed in 1858, and called *The Third Judge and District Courts Act* (22 Vict. No. 13), empowered the Governor in Council, from time to time, to issue a commission to a Judge of the Supreme Court, authorizing him to hold a Court of Oyer and Terminer, and of Gaol Delivery, at a time and place to be named in the commission, for the trial of felonies and misdemeanours, and for the trial of issues in the Supreme Court, and the assessment of damages in civil cases, and declared that "the Court so holden" should stand to the Supreme Court in the same relation as Courts of Oyer and Terminer and General Gaol Delivery stand to His Majesty's Court at Westminster. The Act No. 6 of 1868-9, commonly called the *Circuit Courts Act*, authorizes the Governor in Council, by proclamation, to constitute circuit districts, and to appoint a place, and fix the time in each district at which "a Court to be called the Circuit Court of such district" shall be held (sec. 2). Sec. 3 provides that, after the declaration of a circuit district, all commissions issued under the Act of 1858, "shall be holden" at

(1) 2 C.L.R., 315, at p. 339.

the several places and times mentioned in the proclamation made by virtue of the Act. Sec. 4 provides that Circuit Courts shall be Courts of Record, having a seal and officers, that every Circuit Court shall be the Court of Oyer and Terminer and General Gaol Delivery for the district, and that "such Courts so holden," shall stand to the Supreme Court in the same relation as Courts of Oyer and Terminer and General Gaol Delivery and *nisi prius* stand to His Majesty's Court at Westminster. The *Supreme Court Act* 1878 provides (sec. 10), that commissions under the *Third Judge and Districts Courts Act*, and *Circuit Courts Act*, may be issued to practitioners of seven years' standing, who may thereupon proceed to "hold such Courts," according to the tenor of the commission, and that the "Court so holden" shall have all the attributes of a Circuit Court under those Acts. Sec. 15 of the same Act provides that it shall be lawful for the Full Court, in any cause or matter in which a verdict has been found by a jury, or by a Judge without a jury, or by a Judge sitting with assessors, or in which a nonsuit has been entered or refused, to vary or set aside the verdict, or enter or set aside the verdict, or reduce the damages, and that any objection which might formerly have been taken by motion in arrest of judgment, or to enter judgment *non obstante veredicto*, shall be taken on such motion, and that no appeal shall lie from a judgment founded on a verdict, or from any order or determination of a Judge of the Court in any matter whatsoever, unless a motion has been made before the Full Court to set aside or reverse the judgment, "in which case an appeal shall lie to such Court, and in such manner, and on such conditions as appeals now lie from judgments or determinations of the said Court or Judge." This last provision evidently refers to appeals to the Sovereign-in-Council, and to the Court of Appeal consisting of the Governor and Executive Council of South Australia, and was intended to prevent a direct appeal to either tribunal without a prior application to the Full Court. How far it would have been effectual, so far as regards the Royal prerogative, assuming it to extend to such cases, and how far it is affected by the Constitution of the Commonwealth, it is not now necessary to consider. But it is clear that it was intended to operate, as a pronouncement by the legislature, that a verdict on facts should,

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as a matter of the practice of the Court, be regarded as a matter merely preliminary to judgment, and not as a judgment of the Court. Sec. 16 of the same Act provides that, any order or direction of a Judge may be set aside or discharged by the Full Court, and that an appeal shall lie to the Full Court from any refusal of a Judge to make any order.

The question whether a direct appeal lies from a verdict to the Sovereign-in-Council has been several times considered by the Judicial Committee. In the case of *Nathoobhoy Ramdass* v. *Mooljee Madowdass* (1) decided in 1840, a motion was made to dismiss the appeal, so far as it was an appeal from a decision of the Supreme Court of Bombay, on its common law side, in the nature of a verdict on an issue directed on the equity side of that Court. *Parke* B., who delivered the opinion of the Judicial Committee, said (2):—"But then it is said that this finding of the Court on its common law side, in the nature of a verdict, is a 'determination,' which may be directly appealed from. Undoubtedly such a verdict, in a common law suit, might be indirectly appealed from, in an appeal against the judgment in that suit, which is founded on that verdict, the evidence, as well as the finding, being brought up as part of the proceedings, and included in the transcript. But the verdict only, prior to judgment being given, could not be appealed from in a common law suit; nor can this verdict on an issue directed from the equity side, as a *determination* in a common law suit.

"There is, indeed, no common law suit. In trying the issue, the Court of law is merely ancillary to the Equity Court: it investigates facts, and pronounces its opinion on them, merely in order to ground some further proceedings in the equity suit: the verdict itself is no proceeding in the equity suit, it only becomes so when it is adopted and acted upon in that suit. It stands on the same footing as the finding of a jury in a distinct common law Court, analogous to the case of a reference to the Master, which when confirmed by the Court, and not before, is the subject of appeal. If a party objects to such a report, he must except to it, and the overruling that objection and confirming the report, opens the whole question of the propriety of the finding of the facts con-

(1) 3 Moo. P.C.C., 87. (2) 3 Moo. P.C.C., 87, at p. 96.

tained in it, to the review of the Court above; but if there be no exception, the report is not open to such revision. In the present case, the appellant meaning to object to the finding of the Court on the facts, should have applied to the equity side for a new trial, as a verdict against evidence; and having brought all the evidence before the Court, the refusal of a new trial, and consequent adoption of the finding, as one of the grounds for a decree, would then have been the subject of appeal; and the propriety of the decision on the facts would be considered and decided in a Court of Appeal. But as the appellant did not pursue that course, he must be taken to have made no objection to the finding, and the verdict on the issue, of which the *postea* is the only evidence, is to be treated as one proof of the truth of the facts in the cause involved in it, and may be acted upon accordingly. I say as *one* proof—not a conclusive proof, because it might happen that in the opinion of the Court of Appeal, the evidence in the cause was so strong that no finding of a jury, or the finding of the Court below itself, ought to weigh against it."

In *Tronson* v. *Dent* (1), decided in 1853, leave had been granted by the Supreme Court of Hong Kong to appeal from a verdict of a jury before the judgment had been signed. The respondents objected that the appeal was incompetent, as being in effect an application to the Court of last resort, to set aside the verdict of a jury, which was contrary to the practice of the English Courts, by which the proceedings of the Supreme Court of Hong Kong were regulated. The Judicial Committee allowed the case to be argued on the merits, and, after deciding that there was no error on the record, proceeded to deal with this objection. Their Lordships' opinion was delivered by *Sir John Patterson*, who said on this point (2):—"Now, the next question we come to is, whether or no an appeal will lie in such a case as this? The objection to the jurisdiction of this Court is raised on the part of the respondents, without any express notice in the reasons which are given in their printed case, and the point, as it seems to us, is one of very considerable importance, because, if appeals are to be brought here from the verdict of a jury, without any attempt having been made in the Court below to obtain a new trial, either upon the ground

(1) 8 Moo. P.C.C., 419.

(2) 8 Moo. P.C.C., 419, at p.440.

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that such verdict was against evidence, or that it was grounded on the misdirection of the Judge, it is in truth and effect neither more nor less than moving in this, the appellate Court, for a new trial; which, if permitted, would be a most inconvenient practice, contrary as well to the usual course of this Court, as of the Courts in England, where, even after a motion for a new trial made and refused, or the rule discharged, if the objection does not appear on the face of the record, the Courts, being Courts of Error, will not entertain such an application." After referring to the local ordinances under which an application for a new trial might have been made, he proceeded (1):—"Let us see, then, whether it be possible that there can be such an appeal consistently with the ordinances. What is it that is appealed against? It is the judgment of the Court. Now, the judgment of the Court is manifestly a right judgment, so long as the verdict remains. If the verdict stands, no other judgment can be given, and, therefore, the judgment which is given by the Judge appears to be the only act of the Court, and it is only against an act of the Court that an appeal lies. There is no other act of the Court; the verdict is not the act of the Court; the verdict is the act of the jury, and I do not find anywhere in the Ordinances that anything is said about an appeal against the verdict of the jury. If that intervening step had taken place which I before alluded to, namely, that a motion had been made for setting aside the verdict and granting a new trial, then the refusal so to do on the part of the Court, would have been an act of the Court, and there would have been an appeal against that act; but I cannot see anywhere upon the face of these proceedings, or on the facts which are brought before us, how there is any appeal against any act of the Court, otherwise than against a judgment of the Court; then, if that be so, what is this appeal? Why, it is nothing more nor less than an application for a new trial; not an appeal against an act of the Court, but an application to have the verdict of the jury set aside, and a new trial granted." And again (2):—"The judgment, as I have already said, cannot be appealed against, while the verdict stands, and this is in effect and in truth neither more nor less than an appeal professing to

(1) 8 Moo. P.C.C., 419, at p. 442. (2) 8 Moo. P.C.C., 419, at p. 446.

be an appeal against a judgment, but, in truth, an appeal by way of motion to set aside the verdict, and to have a new trial. We think, therefore, that we cannot encourage such a proceeding, and that it would be very desirable to have it fully understood that no such application can be made by way of appeal to Her Majesty in Council, to set aside a verdict, and to have a new trial, unless there has been a previous application made to the Court in which the trial took place, to have the verdict set aside and a new trial granted, on whatever grounds that motion might proceed.

"Still, as this is a case probably of the first impression, and as it may not have been fully understood that this is or ought to be the rule on which appeals are to be allowed here; and we think the respondents ought to have applied to quash this appeal on that ground, and as they seem to have conceded the question from the course they have taken, that this Court had jurisdiction, we should have been very unwilling to have acted on what, we hope it will be understood, we mean to lay down as the rule on future occasions; for if we saw that the justice of the case was strongly in favour of the appellant, we should have been somewhat astute in endeavouring to find some mode by which we might recommend Her Majesty that the case should be sent back to Hong Kong; or, that in some way or other, the appellant should have an opportunity of applying in the proper quarter to have the verdict set aside and a new trial granted."

Their Lordships then dealt with the merits of the case, on which their opinion was adverse to the appellant, and concluded (1): —"We think the appeal does not lie under the circumstances; as it is, in effect, an appeal against the verdict, and not an appeal against any act of the Court," and the appeal was dismissed with costs.

In *Stace* v. *Griffith* (2), decided in 1869, the Judicial Committee granted special leave to appeal from a judgment of the Supreme Court of St. Helena, founded upon a verdict for the plaintiff in an action of libel. The respondent appeared on the application for leave, but did not then object that the appeal would not lie.

(1) 8 Moo. P.C.C., 419, at p. 459.

(2) 6 Moo. P.C.C. N.S., 18; L.R. 2 P.C., 420.

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On the hearing of the appeal the objection was taken, but the case of *Tronson* v. *Dent* (1), does not appear to have been cited. Their Lordships overruled the objection, on the ground that, as the application for leave had been granted after full argument on both sides without the objection being taken, it was too late to take it at the hearing of the appeal. They thought that there had been a complete failure of justice in the case, a complete misunderstanding on the part of the Judge of what his duty was, and a complete misleading of the jury, and they recommended that the judgment should be arrested—not, however, on the ground of any error on the face of the record, but, apparently, as the only way of doing justice. It is difficult to reconcile this case, in which the Judicial Committee actually exercised jurisdiction with *Tronson* v. *Dent* (1), where they held that such an appeal did not lie.

In *Dagnino* v. *Bellotti* (2), decided in 1886, the objection was taken that an appeal would not lie from a judgment of the Supreme Court at Gibraltar, founded on a verdict of a Judge and assessors. The practice of that Court as to granting new trials was practically the same as in the Courts at Westminster. The opinion of the Judicial Committee (consisting of Lord *Watson*, Lord *Hobhouse*, *Sir Barnes Peacock*, and *Sir R. Couch*) was delivered by *Sir Barnes Peacock*. He said (3):—"In the present case it is contended that the judgment was wrong, because it gave effect to a verdict which was not warranted by the evidence. If the verdict was not warranted by the evidence, the case fell within the rule which has just been read, which states that the party may move for a new trial. The proper course for the appellant to have adopted was, if he considered that the verdict was not warranted by the evidence, to move the Court for a new trial. He has not exhausted the remedies which the rules and practice of the Court directed should be observed in cases where a verdict of the Judge and assessors is objected to upon the ground that it is not warranted by the evidence. It would be very inconvenient if parties, without moving the Court for a new trial, could be at liberty to

(1) 8 Moo. P.C.C., 419.
(2) 11 App. Cas., 604.
(3) 11 App. Cas., 604, at p. 606.

ask Her Majesty in Council to set aside the judgment upon the ground that the verdict was wrong, without having taken that course which is pointed out by the rules made in pursuance of the charter to be adopted in the case of an objection to a verdict. . . . Her Majesty cannot alter the verdict or set it aside, and their Lordships are of opinion that they cannot advise Her Majesty to direct a new trial, the parties not having applied to the Court in the regular course instead of coming here."

We think that the fair result of all these cases is, that it was the settled rule of the Judicial Committee that an appeal did not lie to the Sovereign-in-Council from a verdict of a jury, or from a judgment of the Court founded upon it, unless there had been a previous application to the Supreme Court for a new trial. And we think that the provisions of the Constitution of the Commonwealth, conferring appellate jurisdiction upon the High Court, should be read in the light of this rule, and that, if they are so read, an application for a new trial after verdict, upon whatever ground, does not fall within the words "appeals from all judgments decrees orders and sentences" of Federal Courts or Supreme Courts.

Independently of authority, we are led to the same conclusion by a consideration of the nature of the jurisdiction exercised by the common law Courts in granting new trials. Mr. Parsons directed our attention to a very interesting and instructive historical summary of the law and practice of new trials contained in Lord *Blackburn's* speech in the case of *South-Eastern Railway Co.* v. *Smitherman* (1). He said: "At common law all trials by jury were before the Court in *banc* as trials at bar now are. The Court took the verdict according to what they thought the effect of the findings of the jury before themselves, and gave what they thought the proper judgment. When trials at *nisi prius* were introduced, at first only in the country, before justices of assize, and, at a much later period, in Middlesex and London where there were no assizes, before the Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Chief Baron, the verdict was taken by the Judge who tried the case at *nisi prius*, according to what he thought the legal effect of the findings, but

(1) 47 J.P., 773.

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he could not enter judgment. He returned to the Court the verdict, and, on the fourth day of term, the verdict, as he returned it, was entered on the record in what was called the postea, and on that the Court in *banc* gave judgment. A practice began at least as early as the beginning of the 17th century, by which the Court in *banc* could entertain a motion, if made within the first four days of term, while the proceedings were, as it was called, in paper only, to stay the postea, and if it was made out that there had been any miscarriage at the trial to set aside the proceedings at *nisi prius* and grant a new trial. But they could do no more. However clearly it appeared that the verdict ought to have been entered for the other party, the Court in *banc* could not enter it. The Judge who tried the cause at *nisi prius* might by his notes amend the postea, but not the Court. This defect was partially cured by a practice which grew up, by which the Judge, by the consent of the parties, for he could not do it without, reserved leave to move in *banc* to enter the verdict the other way." From this it appears that the jurisdiction to set aside a verdict and grant a new trial, could only be exercised before judgment was actually signed, and that the application for a new trial was not regarded as an appeal from a judgment, but as an application to the controlling power which the Court exercised over its own proceedings to prevent injustice, the time within which the Court would entertain such an application being strictly limited. Moreover, no appeal lay from the order of the Court on such an application. A party who did not take advantage of his right within the time limited, the first four days of term, was in effect estopped, by acquiescence, from disputing the correctness of the verdict. The reason may, perhaps, be put on the analogy of the rule which requires an objection for irregularity to be taken promptly, or on the analogy of a limited time for bringing an appeal. But, whatever was the original reason, the rule was firmly established, that no sort of appeal lay from an ordinary verdict, except by application to the quasi-discretionary power of the Court, and such an application was not regarded as an appeal. The word "appeal," indeed, seems to import, *primâ facie*, recourse to another or a different tribunal.

The rule was the same, whether the objection to the verdict was founded on the misdirection of the Judge, the erroneous reception or rejection of evidence, or the perversity of the jury. In either case the party was prevented, by his delay and acquiescence, from taking any objection to the verdict itself.

It follows that, according to the practice of Courts of common law, which, in the case of South Australia, is emphasised by the provisions of sec. 15 of the Act of 1878, the only way of taking exception to a verdict of a jury was by application for a new trial, and that a party who did not adopt that method was not in a position to dispute the facts as found by the jury. The verdict in the present case, which was a general verdict for the defendants, must be read as if the specific facts which established their freedom from liability had been found by the jury. By those findings this Court is bound, and, as upon them the judgment is right, the appeal fails.

In this view it is not necessary to consider the point as to the Circuit Court being an independent Court distinct from the Supreme Court, since, on the assumption that it is in effect a branch of the Supreme Court, the appellants are equally bound by the verdict.

Nor is it necessary to express any opinion on the interesting and difficult points of law arising on the facts of the case. But it may be a satisfaction to the parties to know that we think that, even on the most favourable view of the law which we could take, the appellants could not have recovered damages in excess of the amount paid into Court (£250); and the case is not one in which we should have been disposed, even if we had the power, to give special leave to appeal.

Appeal dismissed with costs.

Solicitors for appellants, *Grundy & Pelly*, agents for *Lynch & McDonald*, Melbourne.

Solicitors for respondents, *Glynn & Parsons.*

H. E. M.