[HIGH COURT OF AUSTRALIA.]

SARAH SHANNON . . . . . APPELLANT;
DEFENDANT,

AND

PHILLIP LEE CHUN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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Aug. 15, 16.

Barton, O'Connor and Isaacs JJ.

Practice—Pleading—Amendment—Terms—Amendment raising new case.

An amendment of pleadings should ordinarily be allowed if any harm arising from so doing can be compensated for by the imposition of terms upon the party asking for the amendment.

In an action for money lent and for damages for breach of contract, the plaintiff having obtained a verdict for the whole amount claimed, the Full Court ordered a new trial and that the cost of the first trial should be costs in the cause. On the second trial the plaintiff was allowed to amend his pleadings so as to raise an entirely new case whereby the plaintiff claimed under a new contract alleged to have been substituted for that in respect of the breach of which he had before claimed damages.

The defendant was allowed an adjournment to consider what course she should take.

The plaintiff having again obtained a verdict for the whole amount claimed, the Full Court dismissed a motion for a new trial with costs.

Held, that the amendment was properly allowed, but that its allowance should have been subject to terms as to costs, an adjournment not being a sufficient compensation to the defendant, and special terms were made as a condition upon the dismissal of the appeal.

Held, also, that there was evidence upon which the jury might properly find a verdict for the plaintiff upon the new case made by him.

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Decision of the Supreme Court of New South Wales varied as to costs only and affirmed as varied.

APPEAL fom the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Phillip Lee Chun against Sarah Shannon claiming on two counts, one an *indebitatus* count for money lent, and the other for breach of a contract. The jury having found a verdict for the plaintiff for the full amount claimed, the defendant moved the Full Court for a new trial, which was granted, the Court ordering that the costs of the first trial should be costs in the cause.

At the new trial the jury again found a verdict for the plaintiff, and a motion by the defendant to the Full Court for a new trial was dismissed with costs.

From this decision the defendant now appealed to the High Court.

The facts are sufficiently stated in the judgments hereunder.

Wise K.C. and *Delohery*, for the appellant. The plaintiff having set up one agreement at the first trial should not have been allowed to amend in such a way as to allege that that agreement had been abandoned and another substituted for it. An amendment allowing a party to make an entirely new case should not be allowed unless it is convenient, and unless the party desiring to amend pays all the costs that will be rendered abortive if the amendment is allowed. They referred to *Queensland Investment and Land Mortgage Co. Ltd.* v. *Grimley* (1); *Browne* v. *McClintock* (2); *Tildesley* v. *Harper* (3); *Price* v. *Severn* (4); *Blackmore* v. *Edwards* (5); *Raleigh* v. *Goschen* (6); *E. M. Bowden's Patents Syndicate Ltd.* v. *Herbert Smith & Co.* (7); *Hipgrave* v. *Case* (8); *Cropper* v. *Smith* (9); *Jacobs* v. *Schmaltz* (10).

[ISAACS J. referred to *Steward* v. *North Metropolitan Tramways Co.* (11).]

Alec Thomson (with him *H. Milner Stephen*), for the respondent, was only called upon as to the terms upon which the

(1) 4 Qd. L.J. Sup., 1.
(2) L.R. 6 H.L., 434, at p. 453.
(3) 10 Ch. D., 393, at p. 396.
(4) 7 Bing., 402.
(5) W.N. (1879), 175.
(6) (1898) 1 Ch., 73.
(7) (1904) 2 Ch., 86.
(8) 28 Ch. D., 356.
(9) 26 Ch. D., 700, at p. 710.
(10) 62 L.T., 121.
(11) 16 Q.B.D., 556.

amendment should have been allowed. The order as to costs, so far as it imposes a liability on the defendant to pay the costs of the first trial, should not be interfered with. It was not unjust that the defendant should pay those costs. At most the defendant should only have the costs incurred after the order for a new trial, which were rendered useless by the amendment.

Wise K.C., in reply.

BARTON J. This is an appeal from an order of the Supreme Court of this State refusing a new trial of an action brought on the indebitatus counts for £77 5s. 5d., money lent, and on a special count in respect of the sum of £250. There had already been two trials. At the first of these the plaintiff obtained a verdict for the amount claimed, and that verdict was set aside by the Full Court, who granted a new trial. The sum of £250 which I have mentioned was the subject of a special agreement of 4th July 1910 that the plaintiff should lend the defendant that sum upon terms which were reduced to writing. It is sufficient at present to say in reference to the meaning of those terms that the Full Court held that the sum of £250 was only recoverable out of the profits arising from the sale of bricks manufactured during the currency of the agreement. Then as to the sum of £77 5s. 5d., which represented money lent by the plaintiff after the original £250 had been advanced, the Full Court held that there was not sufficient proof of authority given by the defendant to her husband, who actually borrowed it. On the second trial evidence was tendered by the plaintiff setting up a very different case, namely, that the plaintiff had given up his rights under the agreement of 4th July 1910, including an option to lease or purchase the brick works and a right to be paid out of the profits from the sale of bricks, and had accepted in lieu of his rights the defendant's promise to repay the money the plaintiff had advanced with 5 per cent. interest. At the stage of the trial at which this case was attempted to be made the defendant took objection—which appears to have been well founded—that the evidence tendered was not evidence under the declaration as it stood, so far as the special

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count was concerned, but *Sly* J. admitted the evidence, first giving permission to the plaintiff to make such amendments as were necessary to render the evidence admissible. That involved an alteration in the pleadings so far as the plaintiff was concerned, and of course a corresponding right in the defendant to amend her pleadings if necessary.

On the case so modified the plaintiff again secured a verdict for the full amount claimed—£327 5s. 5d.

One of the grounds of the present motion is that there was no evidence of the substituted contract upon which the plaintiff relied on the second trial.

[His Honor then dealt with the evidence relating to the substituted agreement and continued :] The jury had before them all the evidence which I have read as well as that of the witnesses called for the defendant, and they had the advantage of seeing the evidence tested by cross-examination. They came to the conclusion that they would believe the testimony that the plaintiff had positively relinquished his rights under the original agreement upon the terms that he should receive his money back with 5 per cent. interest. It was quite competent for the jury to have come to the conclusion for which the defendant contends, namely, that the evidence was not sufficiently definite or positive to show that the substitution was made, but they did not do so. It was absolutely within their power to find either way, and I think no Court would disturb the finding at which they arrived.

On that ground, therefore, I think the appeal fails.

The next question is whether the amendment was properly made. As to the principles upon which amendments are allowed to be made there are many cases, of which I will mention only two. The first is the oft quoted case of *Tildesley* v. *Harper* (1), where *Bramwell* L.J. said :—"In my opinion the defendant ought to have been allowed to amend his statement of defence. I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *malâ fide*, or that, by his

(1) 10 Ch. D., 393, at p. 396.

blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." I may add to that what was said by *Bowen* L.J. in *Cropper* v. *Smith* (1). I should first mention that *Bowen* L.J. was the dissenting minority in respect of the judgment then delivered, but the passage I am about to read has often been quoted as distinctly expressing the principle upon which amendments ought to be granted, and there is nothing in the case which detracts from the authority of that enunciation. He said (2):—"Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal, and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. Order XXVIII., r. 1, of the Rules of 1883, which follows previous legislation on the subject, says that 'All such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.' It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right. It was said by Mr. Barber in his very powerful speech to us, 'You are taking away an advantage from the plaintiffs who have got judgment below, by making an amendment at the last moment.' In one sense we should be taking away an advantage from them, but only an advantage which they had obtained by a mistake of the other side, contrary to the true bearing of the law on the rights of the parties.

"The question seems to me to be this, Can you by the imposition of any terms place the other side in as good a position for

(1) 26 Ch. D., 700.

(2) 26 Ch. D., 700, at p. 710.

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the purpose of having the question of right determined as they were in at the time when the mistake of judgment was committed? It does not seem to me material to consider whether the mistake of judgment was accidental or not, if not intended to overreach. There is no rule that only slips or accidental errors are to be corrected. The rule says, 'All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy.' I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs."

The law of this State contains the same provision as, in England, is embodied in Order XXVIII., r. 1, of the Rules of 1883. It is not necessary to cite other cases, for they do not further elucidate the principle, but only illustrate its application. I am of opinion that this amendment was rightly allowed, but whether it was right to allow it without terms is another question. The defendant in fact secured an adjournment in order to decide what course she would take in view of the amendment, but, although it was argued that that was a sufficient allowance to the defendant, I do not think that it can be said that it was such a compensation as would obviate injustice to the party who had to submit to the amendment.

The order of the Supreme Court now appealed from, so far as it deals with costs, relates only to the costs of the second new trial motion. The order made on the first motion for a new trial was that the costs of the first trial should be costs in the cause. That order is not the subject of direct variation by this Court inasmuch as it was not the subject of appeal. But it does not follow that this Court is thereby prevented from doing justice. Although that order was never appealed from, it was competent for *Sly* J. at the trial to allow the amendment conditionally upon the plaintiff consenting to such terms as to costs as might be just, even if such terms would include his relinquishing some of the advantages which he would otherwise gain from the order of the Full Court that the costs of the new trial should be costs in the cause. I am of opinion that such terms should, as a matter of justice, have been imposed by *Sly* J. at the trial. It was competent for the Full Court on appeal to have indicated that, and, with all respect, I am of opinion that they should have done so.

I think, therefore, that, as we are entitled to make such an order as should have been made below, we may prescribe terms on which this appeal should be dismissed. As has been stated, I am of opinion that the verdict of the jury cannot be disturbed, and I think that there was power to allow the amendment, and *Sly* J., having had a very good opportunity of seeing whether the application for amendment was *bonâ fide*, must have been of opinion that it was, and we see no reason for coming to any other conclusion.

The question, then, is what is to be done now. I think that the order appealed from should be varied as to costs, but in all other respects should be affirmed conditionally upon the plaintiff accepting the terms which I will state. The variation which represents what we consider a just condition upon our affirming the refusal of a new trial is as follows:—That there be added to the order that, notwithstanding the order of the Full Court that the costs of the first trial should be costs in the cause, the plaintiff should have his costs of the first trial on the second scale only, less such costs as were solely occasioned by the claim for £250 at the first trial and down to the time of the amendment, which costs are to be allowed to the defendant on the first scale in addition to the costs of the first motion for a new trial, to be set off against the plaintiff's costs. This order to be subject to the plaintiff consenting to these terms.

O'CONNOR J. I am entirely of the same opinion and have very little to add. It is quite clear, upon the principles always acted on in granting amendments—at all events of late years—principles laid down with great clearness by *Bramwell* L.J. and *Bowen* L.J. in the passages quoted by my brother *Barton*—that the amendments ordered by Mr. Justice *Sly* at the second trial were properly allowed. The matter really in controversy between the parties to the dispute was whether the sum of £327 5s. 5d., which the plaintiff had undoubtedly advanced to the defendant, ought to be repaid. That being the real matter in controversy, the plaintiff at the second trial wished to put his case in the most effective way, and it was the duty of the Court to allow him to do so, by means of an appropriate amendment, provided that the amendment could be made without injustice to the defendant.

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There are two ways in which injustice could have been occasioned to the defendant. In the first place, she was taken unawares. The danger of that injustice was met by allowing her the adjournment which she asked for in order to consider her position. But there was another way in which injustice could have been occasioned, and that was by the way in which her position as to costs might be affected. There is no doubt that the position of the defendant was in that respect very seriously affected by the amendment, and that change of position, it seems to me, ought to have been compensated for by costs as a condition of allowing the amendment.

In what way was the defendant's position as to costs affected by the amendment? It was affected in two ways. If the amendment had not been made, she would have been entitled to succeed on the second trial altogether as to the £250. As to the £77 5s. 5d., the amendment deprived her of two substantial defences: first, that that sum was paid by the plaintiff as part of a partnership transaction; secondly, that it was paid as part of the advances made under the agreement of 4th July 1910, and thereby became subject to the condition that it was repayable out of the profits only. The contract which by the amendment was allowed to be set up cut across both these defences. If it were proved, it was impossible to raise either of them effectively because they were got rid of by matter subsequent to the making and breaking of the original contract.

Under these circumstances it appears to me to be impossible to say that justice could be done to the defendant against whom the amendment was made unless some compensation were allowed her in regard to the alteration of her position as to costs which I have pointed out. In my opinion, therefore, the learned Judge at the second trial was right in allowing the amendment but he should have allowed it subject to the condition as to costs which my brother *Barton* has suggested. As he failed to order that condition this Court must now remedy that defect. I agree that the order should deal as suggested with the costs attributable to the £250 both on the first trial and on the second trial, and I assent to the form of order proposed by my brother *Barton*.

I therefore agree that the order of the Supreme Court should

be varied accordingly, but that in other respects it should be affirmed.

ISAACS J. I also agree. With regard to the appeal, so far as it relates to the claim for a new trial, I would only say that, as the evidence was read—and it has been sufficiently referred to by my brother *Barton*—it appeared to me to be really a hopeless task to induce the Court to say that there was no evidence upon which a jury might reasonably come to the conclusion at which they arrived. I think not only that there was sufficient evidence, but that there was a very large body of strong evidence, if the jury believed the witnesses.

With regard to the question of amendment, an amendment of pleading is a matter of practice and procedure. That is itself mere formal machinery for bringing the claims and defences of parties before the Court in order that they may be determined justly in accordance with law.

There is not only a power, but even an imperative duty cast by the legislature on the Court, to let no formality stand in the way of solid justice. The Court is directed to make every amendment, and at all times, so as to enable it to do what is right between the parties, and in the fairest and fullest manner possible to arrive at a determination of the substantial matter in dispute. The Act expresses it thus:—"For the purpose of determining in the existing suit the real question in controversy between the parties." The purpose of the legislature is not fully observed unless regard is paid to the words "in the existing suit." The object is to avoid multiplicity of actions and this would be defeated if the course suggested by the appellant were followed.

Courts have always refused to limit their action under similar provisions so long as *bona fides* exists and no injustice is occasioned. In addition to the cases mentioned during the argument there is one to which I shall refer because it summarizes the position very clearly. In *The Alert* (1), *Sir Francis Jeune* says:—"Two propositions appear to me to be well established. First, that although it may be that the plaintiff was lax or forgetful in not putting his pleading in the form in which it should

(1) 72 L.T., 124, at p. 126.

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have been originally, if any harm arising from that can be compensated for by costs, there is no reason for not allowing him to repair the error. The second proposition appears to me to be equally clear, viz., that if the Judge finds that owing to the mistake, or whatever it may have been, of the plaintiff, in not having put his pleadings right originally, there has been such an injury to the defendant, or such a change in the position of the defendant that he cannot get justice done, then, of course, it is equally clear that such an amendment ought not to be allowed. The cases of *Tildesley* v. *Harper* (1), and *Steward* v. *North Metropolitan Tramways Co.* (2), appear to me to illustrate those propositions. The question, therefore, in this case is, would the defendant be so prejudiced by this amendment that he would not have justice done?"

Of course good faith is an essential condition; but if that exists there is nothing to limit the generality of the first proposition stated by the learned President. The second is simply an extended statement of the principle that one man's rights are not to be sacrificed to those of another. Those are the general principles, and the question is whether the learned primary Judge properly applied them to the present case. If not, was the error in discretion such as to attract the alteration which an appellate Court has always jurisdiction to make? In my opinion it was, and the Full Court should have made that alteration. I think it would be altogether unjust not merely to allow the plaintiff to escape paying the costs of his admitted error, but actually to give him the costs to which, without dispute, as it now appears, he wrongly though mistakenly occasioned to both sides.

In the circumstances I think the order suggested is the correct one.

Appeal dismissed. Order appealed from varied as above stated. Appellant to pay two-thirds of the respondent's taxed costs of the appeal.

Solicitors, for the appellant, *S. F. Blackmore & Son.*

Solicitors, for the respondent, *Priddle & Gosling.*

B. L.

(1) 10 Ch. D., 393.

(2) 16 Q.B.D., 556.