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Isaacs J.

monly use it are to be liable to pay at all." Then sub-sec. 2 provides for the persons who get the advantage of the work but are not within sec. 526, not being persons whose premises front, adjoin or abut on the place to be improved. There may, for instance, be the well known foot between their land and the street on which it abuts, and although they got all the advantage of the work they would have none of the responsibility. That would not be fair; and therefore the legislature completes its plan of making those who get the advantage of the work pay for it, by providing that if such an owner commonly uses the street or has the right to use it, and if in the opinion of the council the street is for his advantage or benefit, then he may be included as an owner. This single reference to the "opinion" of the council as to persons liable is notable. Sub-sec. 3 only defines the persons meant by "owners," but the other conditions have to be complied with in order to make them liable.

Sec. 529 is a machinery section. I quite agree that the discretion of the council is absolute as to whether the work should be done, how much it should cost, how it is to be done, which of the possible persons liable are to be actually liable, and how the total cost is to be apportioned among them. But it is only a discretion that is absolute provided that the council act within their jurisdiction. They cannot enlarge their jurisdiction; and, if I am right in saying that the central idea of the scheme is to make those owners who are getting the advantage responsible, the council may think that some of those persons are not getting the advantage of the work and may leave them out. But if only those are to be responsible who are getting the advantage, I cannot see how the words in sec. 527 could include persons who are not getting the advantage. It would not only be an injustice to them but it would *pro tanto* relieve those who are getting the advantage. Whichever way it is looked at, the argument for the appellants is beset with a great many difficulties of construction and reasons of fairness.

I should add that in sec. 536 the use of the word "owner" seems to me to add to the improbability of the appellants' argument being correct.

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For the reasons I have given I agree in the conclusion at which the learned Chief Justice has arrived, and I think the judgment of the majority of the Full Court is correct.

GAVAN DUFFY J. I agree in the result at which the Chief Justice has arrived, for the reasons stated by him.

POWERS J. I agree.

Appeal dismissed with costs.

Solicitors, for the appellants, *Toohey & Wimpole.*
Solicitors, for the respondent, *Abbott & Beckett.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CAIL . . . . . APPELLANT;
PLAINTIFF,

AND

REA . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1914.

MELBOURNE, *April* 3.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

The appeal turned on questions of fact, and did not involve any point of law.

Hayes, for the appellant.

Mann, for the respondent, was not called upon.

THE COURT dismissed the appeal with costs.

Appeal dismissed with costs.

B. L.

[HIGH COURT OF AUSTRALIA.]

COLES AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

ADENEY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1914.

MELBOURNE, *March* 26, 27.

Griffith C.J., Isaacs, Gavan Duffy and Powers, JJ

Practice—High Court—Appeal from Supreme Court of State—Action heard before Judge—Question of fact—No evidence called for defendant—Grounds for disturbing finding.

An appeal by the plaintiffs to the High Court from the decision of a Judge of the Supreme Court of Victoria giving judgment for the defendant in an action to recover commission at the rate of 15 per cent. on a sale of land, where all the evidence was oral and no evidence was called for the defendant, was dismissed, the Court holding that there was evidence upon which the Judge might have found as he did.

Decision of the Supreme Court of Victoria (*Hood* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Albert Phipps Coles and Sydney Thurston Haynes against Alexander William Adeney, in which the plaintiffs alleged that on or about 10th August 1912 it was verbally agreed between them and the defendant that in consideration of the plaintiffs introducing to the defendant a purchaser for certain land of the defendant he would pay them a commission at the rate of 15 per cent. of the amount of the purchase money; and that the plaintiffs thereafter introduced to the defendant a certain person to whom the defendant afterwards sold the land. The plaintiffs claimed commission

at the rate of 15 per cent. upon the amount of the purchase money, or alternatively damages for breach of the agreement whereby the plaintiffs were prevented from earning the commission.

The action was heard before *Hood* J., and after evidence had been called for the plaintiffs he gave judgment for the defendant.

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

The material facts are stated in the judgments hereunder.

McArthur K.C. and *Bryant*, for the appellants. This Court has to say what upon the evidence was the contract between the parties. This Court is in as good a position as the Court of first instance to determine that question. The demeanour of the witnesses does not enter into the matter, for the learned Judge has not said that he disbelieved the evidence.

[They referred to *Luke* v. *Waite* (1); *Toulmin* v. *Millar* (2); *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.* (3).]

Mann and *Walker*, for the respondent, were not called upon.

GRIFFITH C.J. This is an appeal from a judgment of *Hood* J. after the trial of an action before him without a jury on oral evidence. The claim was for commission for bringing about a sale of land for the defendant, and the commission is claimed under an alleged special contract that it should be at the rate of 15 per cent. on the price realized. The case depended entirely upon oral evidence, principally that of one of the plaintiffs. The learned Judge came to the conclusion that the real bargain between the parties was that the plaintiffs should be employed as agents to sell the land, and that in the event of the land being sold for £8 an acre, but not otherwise, commission should be paid at the rate of 15 per cent. Although the case was not tried before a jury the principles applicable are not different. When a contract is sought to be made out by oral evidence the question is what is the effect of that evidence. In order to answer that question the

(1) 2 C.L.R., 252.
(2) 58 L.T.N.S., 96.
(3) (1910) A.C., 614.