REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1914-1915.

[HIGH COURT OF AUSTRALIA.]

KAUFMAN AND ANOTHER (TRADING AS THE METROPOLITAN DENTAL COMPANY) PLAINTIFFS, } APPELLANTS;

AND

McGILLICUDDY . . . . . DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 28, 29; *Nov.* 2.

Barton, Gavan Duffy and Rich JJ.

Master and Servant—Contract of service—Assault by master—Determination of contract by servant—Restraint of trade—Contract of service with firm—Effect of dissolution of partnership—Injunction.

An agreement entered into by the defendant and a dental firm consisting of the plaintiffs and A, after providing that the defendant was to serve the firm as a dentist for a certain period, contained a stipulation that "after the termination of this agreement" he was not to practise as a dentist within a specified area for a specified number of years from the date of the termination of the agreement. Whilst the defendant was serving the firm under the agreement one of the partners assaulted him without provocation; he thereupon gave notice to the firm, purporting to determine the agreement forthwith, and left the service of the firm. Shortly afterwards A retired from the partnership, having transferred his share and interest therein to the plaintiffs, who

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continued to carry on the business; and the defendant then practised as a dentist in conjunction with A within the area above referred to. The plaintiffs, after receiving the defendant's notice, did not communicate with him in any way until they brought an action for an injunction to restrain him from carrying on business in breach of the stipulated restriction.

Held, that such stipulation formed part of the contract, and that the defendant had ceased to be bound thereby, either because the contract was rescinded by the plaintiffs adopting or assenting to the defendant's determination of it, or because the plaintiffs had, by dissolving the partnership, rendered themselves unable to specifically perform their part of the contract; and that, therefore, the plaintiffs were not entitled to an injunction.

General Billposting Co. Ltd. v. *Atkinson*, (1908) 1 Ch., 537; (1909) A.C., 118; *Measures Brothers Ltd.* v. *Measures*, (1910) 2 Ch., 248; *Brace* v. *Calder*, (1895) 2 Q.B., 253, applied.

Decision of the Supreme Court of Western Australia (*Burnside* A.C.J.), affirmed.

APPEAL from the Supreme Court of Western Australia.

On 23rd March 1908 the plaintiffs, Alfred Kaufman and Albert Egbert Ford had entered into a partnership with one Blitz to carry on a dental business, under the name of the Metropolitan Dental Co., at Perth. On 17th September 1910 the Company entered into a written agreement with the defendant, Edgar H. McGillicuddy, who was a registered dental surgeon, for his services as an operating and prosthetic dentist for a period of three years, with an option to the Company to extend it to five years. This option was exercised by them. The contract also provided that "the said Edgar H. McGillicuddy after the termination of this agreement should not practise his profession as operative and prosthetic dentist either on his own account or as the employee of or in conjunction with any other dentist or dental firm within a radius of twenty miles of the premises of the Metropolitan Dental Co. in Perth, until a period of five years will have elapsed from the date of the termination of this agreement."

On 23rd February 1914, during the continuance of the agreement and whilst the defendant was performing his duties as a servant of the Company, the plaintiff Kaufman was alleged to have assaulted the defendant in his surgery and used insulting and abusive language to him, whereupon defendant gave written

notice purporting to terminate the agreement, and left the Company's service. The plaintiffs made no attempt to bring him back. On 1st April 1914 the partnership between the plaintiffs and Blitz was dissolved, Blitz assigning all his share in the profits, goodwill, trade name, choses in action, &c., to the remaining partners, who thenceforth carried on the business. On or about 4th April 1914 the defendant commenced to practise his profession as a dentist in Perth, in conjunction with the said Blitz.

On 4th May 1914 Kaufman and Ford instituted the present action, and by their statement of claim claimed an injunction to restrain McGillicuddy from practising his profession in breach of the covenant set out above. Among the defences raised (which are set out in the judgment of *Barton* J.) was one alleging assault on the defendant by the plaintiff Kaufman, and this issue of fact was tried before *Burnside* A.C.J. and a special jury of six and decided in favour of the defendant. After hearing argument, his Honor subsequently delivered judgment in favour of the defendant.

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

Pilkington K.C. and *Greif*, for the appellants. As the appeal is direct, appellants are unable to challenge the finding of the jury; but they contend that on the law they are entitled to judgment.

[DUFFY J. How do you propose to proceed without joining Blitz as party ?]

By the assignment of goodwill and choses in action the benefit of the stipulation passes to the assignees, who may sue: *Jacoby* v. *Whitmore* (1).

[RICH J. referred to *Tolhurst* v. *Associated Portland Cement Manufacturers Ltd.* (2).]

No question as to the non-joinder of Blitz can arise as the defendant's case in the lower Court was simply one of confession and avoidance. The defendant alleges assault; but the mere fact of assault is not sufficient. He must allege and prove (1) that the assault was made, and (2) that the assault was such as to

(1) 49 L.T., 335.

(2) (1903) A.C., 414, at p. 420.

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prevent him from carrying on his work. There was no evidence to show that he could not go back to his work: *General Bill-posting Co. Ltd.* v. *Atkinson* (1). The sufficiency or otherwise of the assault as a justification for his leaving the plaintiffs' service was a question for the jury. For circumstances under which a servant may summarily terminate his service, see *Halsbury's Laws of England*, vol. XX., p. 102; also *Priestley* v. *Fowler* (2); *Turner* v. *Mason* (3); *Limland* v. *Stephens* (4); *Edward* v. *Trevellick* (5); *American & English Encyclopædia of Law*, 1st ed., vol. XIV., p. 778, *sub* "Abandonment by Servant—Justification"; *Fitzherbert's Natura Brevium*, p. 102; *Kerr's Blackstone*, p. 397; *Pearce* v. *Foster* (6).

[RICH J. referred to *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (7).]

Haynes K.C. and *Jenkins*, for the respondent. The only question for the jury was as to the fact of assault and provocation; the sufficiency of the assault was a question for the Court: Order XXXIV., rr. 3, 7 (*a*). Assault *per se* does not entitle an employee to determine his contract, but in the present case the assault was committed deliberately under humiliating circumstances, which indicated that the plaintiffs wanted to get rid of the defendant's services. The cases cited in favour of the plaintiffs were decided at a time when flogging was lawful on board ship; there are no recent cases: See *Macdonell's Law of Master and Servant*, 2nd ed., pp. 28, 29; *Winstone* v. *Linn* (8); *R.* v. *Jackson* (9). Furthermore, the stipulation in restraint of defendant carrying on his business is unreasonable: *Mason* v. *Provident Clothing and Supply Co. Ltd.* (10).

[BARTON J. referred to *Brightman* v. *Lamson Paragon Co. Ltd.* (11).]

The dissolution of partnership operated as a wrongful dismissal: *Brace* v. *Calder* (12).

(1) (1909) A.C., 118.
(2) 3 M. & W., 1, at p. 6.
(3) 14 M. & W., 112, at p. 118.
(4) 3 Esp., 269.
(5) 4 E. & B., 59.
(6) 17 Q.B.D., 536.
(7) 39 Ch. D., 339, at p. 365.
(8) 1 B. & C., 460.
(9) (1891) 1 Q.B., 671.
(10) (1913) A.C., 724.
(11) 18 C.L.R., 331.
(12) (1895) 2 Q.B., 253.

Pilkington K.C., in reply. *Brace* v. *Calder* (1) does not apply, as the defendant had already broken his contract.

[RICH J. referred to *Measures Bros. Ltd.* v. *Measures* (2).]

Cur. adv. vult.

Nov. 2.

BARTON J. read the following judgment:—The appellants' statement of claim is founded on an agreement of 17th September 1910 between the Metropolitan Dental Co. (a partnership firm consisting of the appellants and Wolf Blitz) of the one part and the respondent of the other part, whereby the Company agreed to employ the respondent and he agreed to serve them as an operating and prosthetic dentist for three years, a term which by the exercise of an agreed option on the part of the Company was extended to five years, *i.e.* to 17th September 1915. This agreement contained a clause by which until the expiration of five years " after the termination thereof " the respondent agreed that he would not practise as an operating and prosthetic dentist within twenty miles of the Company's premises in Perth. The employment continued until 23rd February 1914, when, it was alleged, " the defendant by notice in writing terminated the said agreement and left the service of the Company." On 1st April 1914 a deed was executed between the appellants and Blitz, whereby Blitz ceased to be a partner, and assigned to the appellants " all his share and interest in the said partnership business and the goodwill and property thereof." The appellants continued to carry on the business under the original firm name. The statement of claim goes on to allege that on 1st April 1914 the respondent, in breach of the clause mentioned, began to practise his profession as an operating and prosthetic dentist at Perth in conjunction with Blitz. The appellants therefore claimed an injunction restraining the respondent from so practising in breach of his agreement.

The respondent's statement of defence raised four answers to the action by the several paragraphs following, viz.:—

1. That the appellant Kaufman was carrying on the business and profession of a dentist, and receiving the profits thereof

(1) (1895) 2 Q.B., 253. (2) (1910) 2 Ch., 248.

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without being a registered dentist and that the agreement was void, inasmuch as the partnership between him and the appellant Ford was illegal as being contrary to and in violation of the Dentist Acts.

2. That if not void for the above reason the agreement was void as being against public policy, since it imposed restrictions upon the respondent's business which were unreasonable as to area and as to duration and unnecessary for the protection of the interests of the Company.

3. (If the agreement was not void) that the appellant Kaufman, while the respondent was engaged in his business on the appellants' premises, assaulted, beat, and abused and insulted him, thus releasing the respondent from all obligation to remain in the appellants' employment or to fulfil the restrictive contract. (To this the appellants replied denying the assault and alleging that it was committed in self-defence.)

4. That the dissolution on 1st April 1914 of the firm as previously constituted put an end to the respondent's agreement of personal service and released him from the restrictive clause.

The first ground of defence was rightly rejected by *Burnside* A.C.J. in his judgment given after the finding which will be mentioned. It was not pressed upon the appeal, and need not be mentioned further.

The second ground of defence was also rejected by the learned Acting Chief Justice, and having regard to the reasoning of the House of Lords in the case of *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (1) and to the judgment of this Court in the case of *Brightman* v. *Lamson Paragon Ltd.* (2), this conclusion also must be regarded as correct. In the last-mentioned case *Mason* v. *Provident Clothing and Supply Co. Ltd.* (3), relied on by the present respondent, was cited at the bar.

The argument was mainly upon the third and fourth grounds of defence. The third was the subject of an order made by *McMillan* C.J., the day next after the delivery of the defence, directing that " the issue raised in par. 3 of the defence to this

(1) (1894) A.C., 535.
(2) 18 C.L.R., 331.
(3) (1913) A.C., 724.

action be tried by a Judge and special jury of six." On the respondent's application for this order the appellants contended that the issue raised by it was irrelevant. They made the same objection at the trial, but *Burnside* A.C.J.—the learned Chief Justice being then absent from the State on leave—ruled that he must try the issue stated in the order. It must be noted that the appellants replied, but did not take any of the courses by which the validity of the defence could be tested under Order XXV., rr. 2 and 4, either by disputing its sufficiency in his pleading or by a specific application. The ground of the objection to this paragraph, as stated by Mr. *Pilkington* before us, is that a mere assault and battery, even if accompanied by words of abuse, was no justification by itself for an abandonment of the service or an attempt to terminate the whole contract. He cited *Halsbury's Laws of England,* vol. XX., par. 199, of which the following are the words material to the present purpose:—"A servant is justified in terminating his engagement, and refusing to go on with his work, (1) if he has a reasonable apprehension of danger to life or of personal injury as a result of continuing the work, . . . or (3) where he is subjected to severe ill-treatment." The cases relied upon in the notes to this passage were cited, and it was not questioned as a correct statement of the law. But it was argued for the appellants that the circumcumstances warranting apprehension of danger to life or of personal injury as a result of further service, or the fact of the severe ill-treatment, must be both alleged and proved, and therefore that, to begin with, the third paragraph of the defence was no answer to the action. The trial of the issues under this paragraph, including the reply, took place as ordered, and evidence was given by both parties.

The respondent's version of the assault was that the appellant Kaufman, after an altercation during which he called the respondent an evil name, struck him on the cheek with his fist, causing a red patch which made his face sore for several days. He said the injury was not a serious one and that the skin was not broken, but that he went to a doctor when his solicitor advised him. After this blow, which, the respondent said, was struck while his hands were in his pockets, the parties were separated.

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It was urged for the respondent that assuming the third defence to be well pleaded, the respondent had made out no case under it: that there was no evidence that he had good reason to apprehend danger to life or personal injury as a result of continuing to perform his agreement, nor had he proved that the appellant Kaufman had severely ill-treated him.

The jury found, in answer to specific questions left to them, that the appellant Kaufman did assault the respondent, and that the respondent did not give him cause by provocation for so doing.

The learned Judge after this finding proceeded with the hearing, with results, as already stated, adverse to the first and second paragraphs of the defence. As to the third he came to the conclusion that as the jury had appeared to have accepted the respondent's version, the respondent must be held, upon their finding, to have been entitled to treat the contract as at an end and to leave the appellants' employment. His Honor fully set out the grounds of his opinion, which, for reasons to be stated, it is not necessary to discuss at length.

It should be observed that, as his decision on the third ground evidently embraced the conclusion that the respondent was released from the restrictive clause as well as from the obligation of further service, his Honor did not discuss the fourth ground, which indeed the respondent, having succeeded in the action, was not called upon to support at that stage.

But upon this appeal the fourth ground has become very material. It does not avail the appellants to show that the third defence, as a pleading, is not sufficient in law, or that the evidence under it and the finding did not warrant the learned Judge in his decision. It is true that if the decision on that defence is right, the appeal fails. But it is not true that otherwise the appellants are entitled to succeed.

In *Brace* v. *Calder* (1) the plaintiff entered into the service of the defendants, a partnership of four members, who agreed to employ him for a certain period. Before that period had expired the partnership was dissolved, two of the partners transferring their business to the other two, who carried it on. The continuing

(1) (1895) 2 Q.B., 253.

partners asserted their right to the services of the plaintiff under the agreement. He denied their right and declined to serve them. He sued them for damages as for a wrongful dismissal, and the Court of Appeal held that the dissolution of partnership operated as such a dismissal. *Rigby* L.J. said (1):—"A contract to serve four employers cannot without express language be construed as a contract to serve two of them." In the present case, then, if the agreement between the appellants and Blitz of the one part and the respondent of the other still subsisted on the 1st April 1914, as the appellants cannot but contend that it did, he was wrongly dismissed by the three partners by reason of their dissolution of partnership on that date.

But *Brace* v. *Calder* (2) only applies to this case in respect of the contract of service. Did wrongful dismissal from the service relieve the respondent from the restrictions of clause 7? On this question the case of *General Billposting Co. Ltd.* v. *Atkinson* (3) may be referred to. There the respondent was manager to a billposting company for some years on the terms that he should hold his office subject to termination at twelve months' notice by either party. The agreement contained a clause providing that the respondent should not, whilst in the engagement or within two years after its termination, carry on a similar business within a certain radius without the company's permission. The company dismissed him without notice, wrongfully that is. He recovered damages for that, and then began to trade for himself as a billposter within the radius. An action against him for an injunction and for damages was held by the Court of Appeal not to be maintainable. In the House of Lords it was argued that two obligations, to give employment subject to notice, and not to engage in another business, were separate contracts independent of each other. Lord *Robertson* held (4) that once the contract of service was "rescinded" the other fell within it. Lord *Collins*, with whom Lord *Halsbury* agreed, held (5) that the true test applicable to the facts (above stated) was laid down by Lord *Coleridge* C.J. in *Freeth* v. *Burr* (6), and approved of in *Mersey*

(1) (1895) 2 Q.B., 253, at p. 263.
(2) (1895) 2 Q.B., 253.
(3) (1909) A.C., 118.
(4) (1909) A.C., 118, at p. 121.
(5) (1909) A.C., 118, at p. 122.
(6) L.R. 9 C.P., 208, at p. 213.

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Steel and Iron Co. v. *Naylor* (1) in the House of Lords—that the true question is " whether the acts and conduct of the party evince an intention no longer to be bound by the contract." There is a necessity in such case for clear, and not merely doubtful, construction to show the stipulations to be separate contracts, and that the one is to survive after the other has been brought to an end; otherwise the inference in such a case as the present is very strong that they depend on each other in the sense that each is the consideration for the other, or part thereof, so that the dissolution which puts an end to the service also puts an end to the restriction. It cannot be said that the employing firm would have agreed to employ the respondent without the restriction, or that he would have consented to the restriction without having as part of his consideration an employment which suited him in salary, duration and otherwise. In *Measures Brothers Ltd.* v. *Measures* (2) the defendant agreed with the plaintiff company, of which he was a director, to hold office for a certain time, they paying him a fixed salary and a share of the profits in certain events. He engaged that so long as he should hold office, and for seven years after ceasing to do so, he would not, either as a principal or as a manager, carry on any business competing with that of the company. Before the terms of service had expired, a receiver and manager was appointed in a debenture holder's action, and the company was ordered to be wound up. The receiver and manager notified the defendant that his services would be no longer required, and ceased to pay him salary. The defendant then began to carry on business for himself in competition with the company. The Court of Appeal held that the receiver, who brought an injunction action in the name of the company against the defendant, could not succeed without performing the clauses which the agreement contained in favour of the defendant, and these of course they could not perform. *Cozens-Hardy* M.R. said (3):—" I do not think it necessary to consider whether the mutual obligations contained in the agreement . . . . are strictly interdependent, although my impression is that they are so. I prefer to base my judgment upon the

(1) 9 App. Cas., 434.

(2) (1910) 2 Ch., 248.

(3) (1910) 2 Ch., 248, at p. 254.

ground that the plaintiffs, who are seeking equitable relief by way of injunction, cannot obtain such relief unless they allege and prove that they have performed their part of the bargain hitherto and are ready and able also to perform their part in the future." The learned Master of the Rolls then stated the consideration which the defendant was to receive for his services from the company, and continued:—"The plaintiffs have not given, and cannot in future give, the defendant this consideration. The contract on their part has been broken. It is not necessary that the breach should be wilful in the sense of being intentional." The decision thus went upon the question of mutual obligations which were considerations moving from the respective parties.

In the present case the agreement gave the respondent three employers, and the dissolution, if he had still been bound, would have left him with only two. Such a withdrawal, without his consent, of the advantages under the contract could not be but a breach. After the dissolution the partnership or the remaining partners could no longer give him the consideration they agreed to give him by performance of their part of the bargain and by readiness and ability to perform it in the future. Hence the appellants are not entitled to the injunction they ask, which, as pointed out by the Master of the Rolls, endorsing what *Joyce* J. had said below, amounted to specific performance.

It is true that in this view of the case the answer to the action rests upon the dissolution, and its consequences, of 1st April, whereas the claim is founded on the occurrences of 23rd February. But that seems to be immaterial. As already pointed out, if the contract was lawfully terminated when the respondent left the service on the earlier date, either by his having and exercising the right to terminate it or by the assent of the appellants to an abandonment of it, the appeal fails, for it rests on the subsistence of the contract; while, if it did subsist, as the appellants contend, it was ended by dissolution on 1st April, and the cases of *General Billposting Co. Ltd.* v. *Atkinson* (1) and *Measures Brothers Ltd.* v. *Measures* (2) show that the maintenance by injunction (as by specific performance) of such a restrictive clause as that in

(1) (1909) A.C., 118; (1908) 1 Ch., 537. (2) (1910) 2 Ch., 248.

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question is hopeless in face of a breach of the stipulations by the appellants which are the respondent's consideration for agreeing to the restriction, and which the contracting partnership could no longer perform on its part, since it had been dissolved.

It should be added that there is ground for thinking that the appellants have failed to constitute the suit properly, by not making Blitz a party to it. But it is not necessary to consider that point.

For the above reasons the appeal must be dismissed with costs.

The judgment of GAVAN DUFFY and RICH JJ. was read by

RICH J. The plaintiffs' case is concisely set out in the statement of claim, which is as follows :—

1. The plaintiff Kaufman is a business manager and the plaintiff Ford is a registered dental surgeon.

2. The defendant is a registered dental surgeon.

3. On and prior to 17th September 1910 the plaintiffs and one Wolf Blitz carried on the business of dentists in partnership under the firm name of the Metropolitan Dental Company in Perth.

4. By an agreement made 17th September 1910 between the Metropolitan Dental Company and the defendant the Company agreed to employ the defendant as operator and prosthetic dentist and the defendant agreed to work for the Company as operator and prosthetic dentist on the terms and conditions in the said agreement contained.

5. It was provided by the said agreement that the term thereof was to be for three years, but at the expiration of such term the said Company were to have the option of extending the agreement for a further period of two years by giving notice of their intention either verbally or in writing to the defendant.

6. The Company exercised the said option and the defendant was employed by the Company until 23rd February 1914.

7. On 23rd February 1914 the defendant by notice in writing terminated the said agreement and left the services of the Company.

8. By the said agreement the defendant covenanted that after the termination thereof he would not practise his profession as

operative and prosthetic dentist either on his own account or as employee of or in conjunction with any other dentist or dental firm within a radius of twenty miles of the premises of the Metropolitan Dental Company in Perth until a period of five years had elapsed from the date of the termination of the said agreement.

9. By an indenture made 1st April 1914 between the plaintiffs and the said Wolf Blitz for the considerations therein mentioned the said Wolf Blitz assigned to the plaintiffs all his share and interest in the said partnership business and the goodwill and property thereof and the said Wolf Blitz ceased to be a member of the said partnership.

10. From 1st April 1914 the plaintiffs have carried on the said business under the said firm name.

11. On or about 4th April 1914 the defendant in breach of the covenants hereinbefore mentioned commenced to practise his profession as operative and prosthetic dentist in conjunction with the said Wolf Blitz under the firm name of the Continental Dental Co. at Hay Street, Perth, within a 100 yards of the plaintiffs' business premises.

The plaintiffs claim an injunction restraining the defendant from practising as operative or prosthetic dentist in breach of his said covenant.

In addition to the facts set out above, the following facts were proved at the hearing:—On 23rd February 1914 the plaintiff Kaufman without provocation assaulted the defendant, who thereupon purported to determine the contract of service by delivering the following notice:—"Take notice that I hereby forthwith determine the contract of service entered into by me with you as from the date hereof." After the service of this notice the defendant ceased to perform any duties under the agreement. The employers did not communicate with the defendant in any way between the receipt of the notice and the issue of the writ in this action.

The defendant contends that the plaintiffs cannot enforce the stipulations which they are seeking to enforce and at the same time treat the contract as at an end: *General Billposting Co. Ltd.* v. *Atkinson* (1); *Measures Brothers Ltd.* v. *Measures* (2); and he

(1) (1908) 1 Ch., 537; (1909) A.C., 118. (2) (1910) 2 Ch., 248.

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says that they are in a dilemma because they either adopted the intimation contained in the defendant's notice of 23rd February and so rescinded the contract of service, or if they did not adopt the intimation then the dissolution of partnership enabled the defendant to rescind the contract, and he in fact did so: *Brace* v. *Calder* (1).

We consider that this contention is correct unless the words "termination of this agreement" contained in the stipulation which the plaintiffs are endeavouring to enforce can be read as equivalent to "termination of service under this agreement," and the stipulation itself treated as an independent contract which binds the defendant as soon as he actually ceases to perform his duties under the agreement of service even if his discontinuance is justified because the contract of service has been rescinded. We need not ask what would be the consideration for such a contract, for we think that this is not the true meaning of the stipulation. In our opinion the whole agreement must be read as one contract containing a number of reciprocal stipulations, and the plaintiffs cannot ask for what is in effect specific performance of one part of the contract while claiming to be exempt from the performance of the duties under another part.

Appeal dismissed with costs.

Solicitor, for the appellant, *Charles Greif.*

Solicitors, for the respondents, *R. S. Haynes & Co.*

A. L. C.

(1) (1895) 2 Q.B., 253.