[HIGH COURT OF AUSTRALIA.]

BEAR . . . . . APPELLANT;
PLAINTIFF,

AND

LOCKYER AND ANOTHER . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1915.

MELBOURNE, *Feb.* 22.

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

Practice—High Court—Appeal from Supreme Court of State—Appealable amount—Action for non-acceptance of goods—Measure of damages—Judiciary Act 1903-1912 (*No.* 6 *of* 1903—*No.* 31 *of* 1912), *sec.* 35 (1) (*a*) (2).

The plaintiff brought an action against the defendants for refusal to accept certain goods sold by the plaintiff to the defendants at £2 16s. 6d. per ton. The quantity which the defendants were alleged to have refused to accept was about 150 tons, and the plaintiff admitted that it might have been worth in the market about £2 16s. per ton. Judgment having been given for the defendants,

Held, that inasmuch as the measure of damages was the difference between the contract price and the price at which the goods could have been sold by the plaintiff, the plaintiff would not have been entitled to recover more than sixpence per ton, and, therefore, that an appeal did not lie to the High Court without special leave.

Judgment of the Supreme Court of Victoria (*Hodges* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Isaac Bear, trading as N. Bear & Co., against Mary Louise Lockyer and

Emily Elizabeth Edwards, executrices and trustees of the will of Thomas Edwards, deceased, and trading as Thomas Edwards & Co. The plaintiff alleged (*inter alia*) that by a contract in writing dated 20th November 1912 made between the plaintiff and the defendants the defendants agreed to purchase "all the crude arsenic in and outside the flue and in the yard and all that is not sold thereabouts on the Bethanga Mine at the price of £2 16s. 6d. per ton on the mine." It was further alleged that the defendants had accepted and taken delivery of 100 tons of the crude arsenic, but had refused to accept or to take delivery of the remainder, amounting to about 150 tons. The plaintiff claimed £423 18s. damages.

The action was heard by *Hodges* J., who gave judgment for the defendants.

From that decision the plaintiff now appealed to the High Court.

Other facts are stated in the judgment of *Griffith* C.J.

Bryant and *Holroyd*, for the appellant, referred to *Elbinger Actien-Gesellschafft* v. *Armstrong* (1).

McArthur K.C. and *Starke*, for the respondents, were not called upon.

GRIFFITH C.J. The plaintiff thought fit to launch his case as one for not accepting goods, the goods being described as "crude arsenic," which appears to be a deposit from the vaporized fumes of arsenical ore collected in a flue after roasting. The price agreed upon was £2 16s. 6d. a ton. The quantity alleged by the plaintiff as being that which the defendants refused to accept is something less than 150 tons. Assuming, contrary to the opinion which the learned Judge formed at the trial, that the defendants had improperly refused to accept that quantity of crude arsenic, the measure of damages is the difference between the contract price and the price at which the goods could have been sold by the plaintiff. On that point the only evidence which he offered was that the crude arsenic not accepted might have brought

(1) L.R. 9 Q.B., 473.

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£2 16s. a ton in the market. On that evidence it is impossible to affirm that the plaintiff lost more than sixpence a ton by the refusal of the defendants to accept the goods.

The learned Judge thought that none of the material offered to the defendants and which he refused to accept was crude arsenic within the meaning of the contract. I express no opinion on that point. Even if some of it was crude arsenic it would be impossible to make out that the damages amounted to £300. All this appears on the face of the case. The appeal therefore would not lie without special leave, which was refused.

Under these circumstances there is no alternative but to dismiss the appeal.

BARTON J. I agree.

ISAACS J. I agree.

GAVAN DUFFY J. I agree.

Appeal dismissed with costs.

Solicitors, for the appellant, *Evans & Masters.*

Solicitor, for the respondents, *A. Phillips* for *D. Clarke,* Ballarat.

B. L.