H. C. OF A. 1922. FELL v. FELL.

Appeal allowed. Order appealed from discharged. Declare that the persons mentioned in the will as beneficiaries are entitled to participate in the estate of the testator in equal shares. Costs of all parties of the proceedings in the Supreme Court and of this appeal as between solicitor and client to be paid out of the estate.

Solicitors, *A. J. McLachlan & Co.*

B. L.

[HIGH COURT OF AUSTRALIA.]

W. R. CARPENTER AND COMPANY LIMITED . APPELLANT; DEFENDANT,

AND

ATKINS AND OTHERS . . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922.

SYDNEY, *Dec.* 5, 6, 12.

Isaacs, Gavan Duffy and Starke JJ.

Practice—High Court—Appeal from Supreme Court of State—Facts insufficient for determination of questions raised—New trial—Form of order—Evidence already given to stand—Liberty to parties to supplement evidence.

On an appeal from the Supreme Court of a State to the High Court, the evidence being insufficient to enable the Court to decide the question involved,

Held, that a new trial should be ordered, that the evidence given at the previous hearing should stand, and that both parties should be at liberty to supplement that evidence.

Mudie v. *Strick & Co.*, (1909) 14 Com. Cas., 227, followed.

Decision of the Supreme Court of New South Wales, reversed.

H. C. OF A. 1922.

W. R. CARPENTER & CO. LTD. v. ATKINS.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by George Herbert Atkins, Clifton A. Kroll and David Haddon Atkins, trading as Atkins, Kroll & Co., against W. R. Carpenter & Co. Ltd., to recover damages for breaches of certain contracts. The action was tried as a commercial cause by *Ferguson* J. without a jury, and he returned a verdict for the plaintiffs for £15,286. The defendant then moved before the Full Court to set aside the verdict and to enter a nonsuit or a verdict for the defendant or, in the alternative, for a new trial. The Full Court dismissed that motion with costs.

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

The facts, so far as they are necessary for this report, appear in the judgment of the Court hereunder. As the Court expressed no opinion upon the questions raised by the appeal, the arguments are not reported.

Broomfield K.C. (with him *H. E. Manning*), for the appellant.

Evatt (*Holman* K.C. with him), for the respondents.

Cur. adv. vult.

Dec. 12.

THE COURT delivered the following written judgment:—

This is an appeal from the Full Court of New South Wales, refusing to set aside a verdict for plaintiffs given by *Ferguson* J., who tried the case as a commercial cause.

The action was brought upon three contracts, and of these there is only one now in controversy, namely, a contract by which the appellant promised to supply a cargo of freight at Sydney to the respondents' vessel the *Minnie A. Caine*. Originally there was a contract, the result of four written communications in 1918, and dated 16th March, 22nd March, 25th March and 1st April. In consequence of governmental action on the part of the Shipping Board of the United States of America, the contract was cancelled in June 1918. But on 19th August 1918 a new proposal was made by the respondents and accepted by the appellant on 11th September. One of the terms related to the time of loading in Sydney. It was

H. C. OF A. 1922. W. R. CARPENTER & CO. LTD. v. ATKINS.

in contest between the respondents, who claimed that the time of loading was "about January-February," and the appellant, who contended it was "January-February."

On 28th February the appellant gave notice of cancellation of agreement on the ground that the ship was still in Melbourne and therefore could not fulfil the engagement. Respondents contested this, and stated that the vessel would be tendered on arrival at Sydney. On 10th March the ship arrived in Sydney, and the appellant was notified of arrival and that it was expected to load a full cargo. Nothing more took place until 17th March, when appellant cabled the respondents in these terms:—"Schooner *Minnie A. Caine*. Captain states ready to load 17th March. Shall we endeavour to obtain cargo or will you appoint other agents? Await your reply." The reply on the same date was insistence on appellant supplying a full cargo as per agreement. It did not supply any cargo, and this action resulted. The amount of damages, if there be liability, is agreed on at £6,333 17s. 6d.

The learned trial Judge held that the agreed time of loading was "about January-February," and that the time of actual tender was within that time; and he entered a verdict for respondents. On motion to set aside the verdict and enter a nonsuit or, alternatively, for a new trial, the motion was dismissed. It appeared to us, during the argument upon the appeal, that both parties at the trial so far concentrated their attention on the issue as to whether the agreed time of loading contained, or was free from, the word "about" that the very much more difficult question of the construction of the contract with the word "about" did not receive the consideration necessary to determine satisfactorily the rights of the parties. For instance, the highly important points—(1) the condition of the ship on 10th March with reference to her readiness to load, (2) the real circumstances of the captain's statement as to 17th March, and whether that was a tender on that day or whether it was a reply to a question having another bearing, (3) whether appellant is responsible for any portion of the delay from 28th February to 17th March and (4) whether the appellant dispensed with the tender of the ship for loading—have been left in a purely conjectural state. Learned counsel were not agreed as to the exact

understanding at the trial with respect to 10th March or 17th March.

After very careful consideration we do not think any safe or just conclusion can be arrived at for either party on the materials as they stand, and we are of opinion that there should be a new trial. On the whole, we think it undesirable to enter upon any discussion of the law of the case further than to direct attention to the case of *Dimech* v. *Corlett* (1).

We think a very apposite precedent for the proper course to be taken in this case is found in *Mudie* v. *Strick & Co.* (2). There, on appeal from Lord *Sterndale* (then *Pickford* J.), the Court of Appeal (Lord *Cozens-Hardy* M.R., *Farwell* L.J. and *Kennedy* L.J.) intimated that in their opinion the evidence was insufficient to enable them to decide the question involved; and in the result a new trial was ordered, the evidence given at the previous hearing to stand, and to be supplemented by additional evidence.

We adapt that order to this case and direct that the order dismissing the appeal be discharged, and that, in lieu thereof, the verdict be set aside and a new trial ordered before a Judge of the Supreme Court without a jury, the evidence given at the previous trial to stand, and both parties to be at liberty to supplement it. The costs of the trial, of the motion in the Full Supreme Court and of this appeal to be costs in the cause. Case remitted to the Supreme Court to be dealt with consistently with this judgment.

Order accordingly.

Solicitors for the appellant, *Ernest Cohen & Linton.*

Solicitors for the respondents, *Sly & Russell.*

B. L.

(1) (1858) 12 Moo. P.C.C., 199.

(2) (1909) 14 Com. Cas., 227.