[HIGH COURT OF AUSTRALIA.]

SHEPHERD . . . . . APPELLANT;
PLAINTIFF,

AND

FELT AND TEXTILES OF AUSTRALIA LTD. RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 1, 2; *June* 4.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Principal and Agent—Contract of agency—Contract terminated by principal—Discharge by breach—Facts justifying termination subsequently coming to knowledge of principal—Evidence—Jury's verdict for agent set aside—Verdict entered for principal—Entitled thereto "as a matter of law"—Supreme Court Procedure Act 1900-1924 (*N.S.W.*) (*No.* 49 *of* 1900—*No.* 42 *of* 1924), *sec.* 7*.

Stamp Duties—Unstamped and insufficiently stamped instruments—Stamping after execution—Duty and fine paid in Court—Retroactive effect—Validity inter partes—Adhesive stamp—Cancellation—Evidence—Stamp Duties Act 1920-1924 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 32 *of* 1924), *secs.* 22, 25, 27, 29.*

1. The termination of an agreement may be justified by proof of circumstances existing prior to such termination but of which the party terminating the agreement was unaware until subsequently thereto.

* The *Supreme Court Procedure Act* 1900-1924 (N.S.W.) provides, by sec. 7 (1), that "In any action, if the Court in Banco is of opinion that the plaintiff should have been nonsuited, or that upon the evidence the plaintiff or the defendant is as a matter of law entitled to a verdict in the action or upon any issue therein, the Court may order a nonsuit or such verdict to be entered."

* The *Stamp Duties Act* 1920-1924 (N.S.W.) provides, by sec. 22, that "(1) An instrument the duty on which is required or permitted by law to be denoted by an adhesive stamp is not to be deemed duly stamped unless the person who first executes the instrument cancels the stamp at the time of the execution of the instrument by him, by writing or impressing or marking in ink on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, so that the stamp may be effectually cancelled and rendered incapable of being used for any other instrument. (2) If there are several parties to any such instrument, the cancellation shall be deemed effectual if made in manner aforesaid by any one of the parties thereto." Sec. 25 provides that "(1) Except where other

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2. Where on uncontradicted facts an action or an issue in an action must be determined in favour of one party, then sec. 7 of the *Supreme Court Procedure Act* 1900-1924 (N.S.W.) authorizes the Court to direct a verdict in favour of that party.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

3. Instruments which are stamped under sec. 25 of the *Stamp Duties Act* 1920-1924 (N.S.W.), or in respect of which unpaid duty and fine payable are under sec. 27 paid to the appropriate officer in Court during the course of a civil proceeding, are outside the operation of sec. 29, and such instruments, upon such stamping or payment, are as efficacious from their execution as if they had never fallen within the operation of sec. 29.

Wagga Finance Co. v. *Lever*, (1929) 30 S.R. (N.S.W.) 76, disapproved.

Electricity Meter Manufacturing Co. v. *Manufacturers' Products Pty. Ltd.*, (1930) 30 S.R. (N.S.W.) 422, considered.

APPEAL from the Supreme Court of New South Wales.

In an action tried before *Street* C.J. and a jury in the Supreme Court of New South Wales the plaintiff, Sidney Herbert Shepherd, claimed £5,000 damages from the defendant, Felt and Textiles of Australia Ltd., felt manufacturer, for the wrongful termination of an agreement in pursuance of which the plaintiff was employed as the defendant Company's representative in Sydney and suburbs for the sale of its products on a commission basis. In its defence the defendant, after denying the agreement generally, alleged in

express provision is made by this or any other Act any instrument may be stamped after the first execution thereof subject as follows:— . . . (*b*) Where the instrument is not duly stamped within one month after . . . execution . . . on payment of the duty payable thereon and a fine of twenty per centum on the amount of the duty. (*c*) Where the instrument is not duly stamped within two months after . . . execution . . . on payment of the duty payable thereon and a fine of not exceeding one hundred per centum on the amount of the duty" &c. Sec. 27 provides that "(1) On the production of an instrument chargeable with stamp duty as evidence in any Court of civil judicature, the officer whose duty it is to read the instrument shall call the attention of the Judge to any omission or insufficiency of the stamp thereon; and if the instrument is one which may legally be stamped after execution it may, on payment to such officer of the amount of the unpaid duty and the fine payable by law, be received in evidence, saving all just exceptions on other grounds. (2) Such officer shall detain and immediately transmit to the Commissioner the instrument, together with the duty and fine so paid thereon, and the payment thereof shall be denoted on such instrument accordingly." Sec. 29 provides that "Except as aforesaid, no instrument executed in New South Wales or relating (wheresoever executed) to any property situate or to any matter or thing done or to be done in any part of New South Wales, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity for any purpose whatsoever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

its 2nd, 3rd and 4th pleas that prior to the alleged breach of the agreement the plaintiff misconducted himself in the service of the defendant (1) by wilfully disobeying reasonable orders given by the defendant to him in the said service, (2) by habitually neglecting his duties in the said service and failing to perform the same and (3) by absenting himself from the said service without the permission of the defendant on many occasions and for long periods of time, and it therefore dismissed the plaintiff from its service, which was the alleged breach. The 5th plea was as follows: "And for a fifth plea the defendant Company says that it was a term and condition of the said contract that the plaintiff should use his best endeavours to obtain orders for the defendant Company and influence business on its behalf and the defendant Company did not excuse the performance by the plaintiff of the said term and condition yet the plaintiff did not use his best endeavours as aforesaid wherefore the defendant Company rescinded the said contract and dismissed the plaintiff from its service which is the alleged breach." By the particulars given of the defences it was alleged that throughout the plaintiff's employment the defendant had repeatedly verbally instructed him to attend at its office as far as possible every day, and in any case frequently, at convenient hours to discuss the business in hand and to receive directions, but such instructions had been disobeyed, and on two occasions an interval of four weeks elapsed between his attendances at the office although he was in Sydney at the time; also that, although on many occasions verbally instructed by both the managing director and the chairman of the defendant Company not to depart from Sydney and the State without giving reasonable notice thereof to the defendant, the plaintiff had made several departures from the State and remained absent therefrom for long periods without notifying the defendant of either his departure or return. Further allegations in the particulars were that on many occasions during his employment the plaintiff had, whilst in Sydney and elsewhere, absented himself from the defendant's service without permission for several periods averaging four weeks in duration, and that he had neglected to attend to correspondence sent to him by the defendant.

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The agreement between the parties was made on 3rd February 1928 and, so far as material, provided substantially as follows:— "(1) The said Sidney Herbert Shepherd shall for the term of five years from 3rd February 1928 act as the representative of the Company in the city of Sydney and its suburbs for the sale of the products of the Company as set out in the Company's letter of even date . . . and at the prices and on the terms therein mentioned and he undertakes to use his best endeavours to obtain orders for the Company and influence business on its behalf within the scope of his appointment. (2) The said Sidney Herbert Shepherd shall obey and observe all instructions of the Company in relation to the Company's said business and shall furnish regularly a detailed account of all business transacted. The Company shall not be obliged to accept or execute any order forwarded by the said Sidney Herbert Shepherd. . . . (4) The remuneration of the said Sidney Herbert Shepherd shall be a commission of 5 per cent on the net amount received by the Company in respect to all orders executed by it whether such orders are influenced by Sidney Herbert Shepherd or placed independently in the home market for the Commonwealth of Australia. . . . (10) If by 3rd February 1930 the said Sidney Herbert Shepherd shall not have succeeded in obtaining for the Company the trade of Messrs. Beard, Watson & Co. Ltd. and Messrs. Grace Bros. Ltd. in the productions of the Company to an amount of at least £6,000 per annum between the two firms combined, that is to say, if the sales by the Company to the said two firms between 3rd February 1929 and 3rd February 1930 do not amount to £6,000 in the aggregate then the agreement may be terminated by the Company forthwith."

The letter by which the defendant informed the plaintiff of the termination of the agreement bore date 2nd December 1929, and, so far as material, was as follows:—"We regret to have to notify you that we are so dissatisfied with your services that we find ourselves compelled to terminate the agreement of 3rd February 1928. We do not wish to embark upon an extensive recital of complaints. Neither do we think it would serve any purpose: you must surely realize for yourself that you have flagrantly neglected our interests. One illustration will suffice. Refer to ours of 30th

July 1929. Upon receiving that letter you called upon us, and both our chairman and our managing director separately warned and begged you not to repeat the extraordinary performance of leaving Sydney on an extended absence without warning us, and of returning to Sydney without getting in touch with us for weeks. You have repeated it exactly. You left Sydney sometime during September, and we knew nothing about it; you returned four weeks ago to-day and we have not yet seen you or heard from you except a note in answer to ours of 22nd November, which is worse than nothing. It says that you had made an appointment with Mr. A. N. Thompson for the afternoon of the 26th, since when no further advice. We regret exceedingly being driven to terminate your appointment, but we do so definitely. It is not so much that we object to paying for no service as that we absolutely need the best service, which we have ceased to hope for from you."

At the hearing the tender of the agreement in evidence on behalf of the plaintiff was objected to on the ground that it was not stamped in accordance with the provisions of the *Stamp Duties Act* 1920-1924 (N.S.W.). The agreement had affixed to it an adhesive duty stamp of the value of 1s. upon which appeared a deeply waved line. The plaintiff stated in evidence that he signed the agreement at the office of the defendant Company in the presence of Joseph Kentigern Heydon, its chairman of directors; but neither the plaintiff nor Heydon could recollect whether the stamp had been affixed at the time they signed the agreement or what, if anything, was done as regards its cancellation; they were, however, certain that the marks appearing on the stamp were not their respective initials. *Street* C.J. said that he was not satisfied on the evidence that the document was stamped with an adhesive stamp at the time of execution as required by sec. 22 of the *Stamp Duties Act*, but he was prepared to allow counsel for the plaintiff to pay the amount of duty and necessary fine and then to tender the agreement, such payment to be indicated not by means of an adhesive stamp, but by an impressed stamp. Counsel for the plaintiff accordingly paid to his Honor's associate, in Court, the sum of 1s. 3d. representing duty and fine; whereupon *Street* C.J. admitted the agreement in evidence despite objection thereto on behalf of the defendant.

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During the course of the cross-examination of the plaintiff at the trial it transpired that on 15th October he sent a letter to Mr. Perry (who was the principal buyer for Beard, Watson & Co. Ltd.), which, after setting out the contents, or the effect thereof, of certain telegrams, continued substantially as follows :—" My price quoted to you from Launceston, i.e., 3s. 7d., stands good and a rebate of 2d. per yard will be credited to you from my Sydney office. In the meantime I need your support, as I have no faith whatever in my Company's treatment of their representatives and with your assistance I can get the agreed commission. I am exceedingly sorry that I have to bring this matter before you, but please take it as my privilege of years of trusted business relationship with your respected Company. Unfortunately, whatever their attitude, I cannot at the moment afford to give them the sailor's farewell, as their productions are good, but their business morale is not of the highest standard. Van de Velde " (the managing director of the defendant Company) " rang me up this morning conveying the information of your cancel, to which I replied I knew nothing. I just informed him that I had quoted and accepted 3s. 7d., and the contract, if you are agreeable, has to go through. On the 'phone he informed me that he fully convinced you that it could not be accepted under 3s. 9d., to which I do not in any way subscribe. If I have to forgo a portion or all of my commission you are going to be supplied at the price I accepted. Good friends are so hard to find and so easy to lose. . . ."

The jury found a verdict for the plaintiff in the sum of £1,600, and judgment was accordingly entered for the plaintiff for that sum and costs.

The defendant appealed from that judgment to the Full Court of the Supreme Court on the grounds (*inter alia*) that (1) the verdict was against the evidence and the weight of the evidence ; (2) there was no evidence proper to be considered by the jury to support the verdict ; (3) the plaintiff was not entitled to a verdict as on the evidence a cause of action was not proved ; and (4) the agreement between the parties, dated 3rd February 1928, was not stamped in accordance with the provisions of the *Stamp Duties Act* 1920-1924 and, therefore, no action could be founded upon it, nor should it have been admitted in evidence.

The Full Court, holding that the jury should have been directed to find a verdict for the defendant Company on the ground that the admitted and proved conduct of the plaintiff entitled it to such a verdict as a matter of law, allowed the appeal and, pursuant to the powers conferred upon that Court by sec. 7 of the *Supreme Court Procedure Act* 1900-1924 (N.S.W.), entered a verdict for the defendant.

From the decision of the Full Court the plaintiff now appealed to the High Court.

Other material facts appear in the judgments hereunder.

W. J. V. Windeyer, for the appellant. The Full Court of the Supreme Court held in effect that the misconduct of the plaintiff was so clear as to amount to a justification in law of the termination of the agreement between the parties. If that misconduct is so clear, then a direction to that effect to the jury should have been asked for at the trial, and, as the point was not so taken, an appeal on such ground was not competent. Even in cases where a new trial has been ordered by the Supreme Court this Court has said that the point should have been taken at the trial (*Mutual Life Insurance Co. of New York* v. *Moss* (1); *Ryan* v. *Horton* (2)). In the opinion of the Full Court the only question which arose was in relation to the transaction between the plaintiff and Beard, Watson & Co., that is, the withholding by the plaintiff of certain information from his principal was misconduct sufficient to warrant the termination of the agreement. The evidence shows that the defendant Company feared competitors and anticipated that the price would have to be reduced below 45d., and was agreeable to such reduction in order to retain and obtain business. The evidence does not show that Beard, Watson & Co. would have purchased large quantities at the price of 45d.; and it could only be suggested that the plaintiff was working against his principal if it could be assumed that that firm would buy large quantities at a price higher than 43d. The two questions for the jury should have been (1) was the conduct of the plaintiff wrongful, and (2) was it so wrongful as to justify the termination of the agreement? The case of

(1) (1906) 4 C.L.R. 311, at p. 322. (2) (1911) 12 C.L.R. 197, at p. 203.

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English and Australian Copper Co. v. *Johnson* (1) is distinguishable, because that was an obvious case of fraud and there could be no question as to the justification for the dismissal of the servant. The case of *Adami* v. *Maison de Luxe Ltd.* (2) also is distinguishable as being a " master and servant " case, and also because the servant there concerned definitely refused to perform his duties. Here a reasonable interpretation of the plaintiff's conduct is that he thought the Company was trying to deprive him of some part of the commission to which he was entitled under the agreement and he thought himself entitled to withhold some information as to the full negotiations until the matter of his commission had been concluded. In the absence of evidence that the major order could be secured at a price higher than 43d. it has not been shown that his principal was actually prejudiced. The termination of an agreement of this nature can be justified only by a radical breach thereof (*Adami* v. *Maison de Luxe Ltd.*).

[RICH J. referred to *Clouston & Co.* v. *Corry* (3).]

In that case the relationship was that of master and servant; the case shows, however, that what the Full Court should have done, if it thought the verdict too unreasonable to stand, was to grant a new trial. This action has been treated in the pleadings and summing-up as a wrongful dismissal by a master of a servant. At the trial it was pointed out on behalf of the plaintiff that the relationship was not that of master and servant. " The relation of master and servant differs in important respects from other contracts," but an action of wrongful dismissal is " a mere illustration of the general legal rule that an action will lie for unjustifiable repudiation of a contract " (*In re Rubel Bronze and Metal Co., and Vos* (4)). What would perhaps be a reasonable cause for dismissing a servant would not necessarily be reasonable in the case of a person who is in the position of an agent as here (*English and Australian Copper Co.'s Case* (5)). Considering the quantity involved and the long period covered, it was not improper for the plaintiff to ask Beard, Watson & Co. to place the order through him. In his actions in respect of this order he did not misconduct himself as the defendant's agent,

(1) (1911) 13 C.L.R. 490, at p. 498.
(2) (1924) 35 C.L.R. 143.
(3) (1906) A.C. 122.
(4) (1918) 1 K B. 315, at pp. 320, 321.
(5) (1911) 13 C.L.R. 490.

for as regards this order the terms of his retainer as agent were never agreed upon. The defendant isolated this matter from the plaintiff's general duties as selling agent and wished him to make special terms in regard to it. If as reasonable men the jury could, on the evidence, arrive at one conclusion only, they should have been directed that that was the only finding they could make. When the facts are susceptible of but one inference, the matter ceases to be a matter of fact and becomes a matter of law, and the jury should be directed to find the particular verdict. The trial Judge was not asked to direct the jury to bring in a verdict for the defendant, nor was any objection taken to the summing-up. It is for the jury to say whether the breach is of such a character as to go to the root of the agreement; and if, having all the facts before them, the jury find a verdict for the plaintiff, it should not be disturbed on appeal. The distinction between a radical breach and an ordinary breach in a "master and servant" case is shown in *Fillieul* v. *Armstrong* (1). It cannot be said that the breach was necessarily of such a nature as to be incompatible with the further carrying on of the contractual relationship. The defendant was not entitled to justify the dismissal on facts which it did not know at the time of the dismissal.

Flannery K.C. (with him *Gain*), for the respondent. The Full Court treated the agreement between the parties on the basis of an implied contract that the plaintiff should render loyal and faithful service, and this is the proper way of treating it. The plaintiff was wrong in withholding full information of business negotiations from his principal (*Price* v. *Metropolitan House Investment and Agency Co.* (2)). Although pointed out on behalf of the plaintiff that it was not a "master and servant" case, the jury treated it as akin to that type of case. There is no essential difference between such a case and this case. It is always permissible for a Judge to leave a matter entirely to the jury. Any analysis of the evidence must result in the conclusion that the plaintiff was, at a certain stage in the course of negotiations with Beard, Watson & Co., acting in a manner adverse to his principal, and that he had, in the course

(1) (1837) 7 Ad. & E. 557, at pp. 563-564; 112 E.R. 580, at pp. 582-583.
(2) (1907) 23 T.L.R. 630.

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of such negotiations, suppressed certain important information from his principal. The Full Court was, therefore, right in its decision. So long ago as 1907 it was decided that sec. 7 of the *Supreme Court Procedure Act* 1900 gave the Court, in addition to the right of setting aside a perverse verdict, the right to enter in such a case a verdict for the defendant (*Heydon* v. *Lillis* (1)). The Court determines on the facts whether a certain right is in one or other of the parties: that is a question of law.

[DIXON J. referred to *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (2).]

The Court of Appeal has always had the power to set aside a perverse verdict in addition to the powers conferred by sec. 7 (*Skeate* v. *Slaters Ltd.* (3)).

[RICH J. referred to *Banbury* v. *Bank of Montreal* (4).]

Sec. 7 was intended to bring the law in New South Wales into conformity with that obtaining in England and elsewhere. That section gives an additional power of procedure to the Court of appeal. If on examining the evidence a question of law arises, the Court is entitled, under such power, to enter a verdict for the defendant. Here the question of law that emerged was that the plaintiff failed to render loyal and faithful service to the defendant, his principal. The verdict of the jury was a perverse one because no reasonable men could, on the evidence, arrive at such a verdict.

[DIXON J. referred to *Banbury* v. *Bank of Montreal* (5).]

There must be an issue in order to permit the Judge to give a direction.

The agreement between the parties was not stamped within the proper time and the requirements of sec. 22 of the *Stamp Duties Act* were not complied with. The Commissioner of Stamp Duty ruled that the maximum fine should have been tendered in Court, and, as this had not been done, the agreement was not "duly" stamped within the meaning of sec. 29 of the Act. Being improperly stamped, the plaintiff was unable to plead on the agreement (*Wagga Finance Co.* v. *Lever* (6)). That case, which followed

(1) (1907) 4 C.L.R. 1223.
(2) (1878) 3 App. Cas. 1155.
(3) (1914) 2 K.B. 429, at pp. 436-437.
(4) (1918) A.C. 626, at p. 706.
(5) (1918) A.C., at p. 705.
(6) (1929) 30 S.R. (N.S.W.) 76.

the general principles laid down in *Dent* v. *Moore* (1), was an application of the plain words in sec. 29, which forbid anyone relying on an unstamped document. Such document, being improperly stamped, was inoperative and could not be used by the parties (*Electricity Meter Manufacturing Co.* v. *Manufacturers' Products Pty. Ltd.* (2)). Being insufficiently stamped at the time it was tendered, it was not admissible in evidence, even assuming it could be pleaded upon. As the agreement was ineffective by virtue of the *Stamp Duties Act*, no rights could arise from it. Sec. 27 of the Act deals only with admissibility in evidence, and not as to the effectiveness of the instrument. Nothing that took place at the trial could render the document effective. Even though that may work a hardship, it is the law and must be given effect to.

W. J. V. Windeyer, in reply. *Wagga Finance Co.* v. *Lever* (3) was wrongly decided. It is not properly distinguishable from *Electricity Meter Manufacturing Co.* v. *Manufacturers' Products Pty. Ltd.* (2), which correctly states the effect of the *Stamp Duties Act*. In *Dent* v. *Moore* (4) *Isaacs* J. said the document is struck with sterility unless and until the public requirement of taxation has been complied with. Full effect must be given to the words "except as aforesaid" in sec. 29. They refer to secs. 25 and 26. The words "pleaded or given in evidence, or admitted to be good" &c. in sec. 29 appear in the English Stamp Acts from the time of William and Mary until 1870. If any special meaning is to be given to "pleaded" the explanation is that formerly written pleadings had to be stamped. All the early English cases recognize the retroactive effect of stamping after payment of fine. Here the fine was not short paid because there was nothing to indicate it would be more than 20 per cent of the duty (sec. 25 (*b*), (*c*)). Moreover, the fine is only a percentage of the duty remaining to be paid. Here the full amount of the duty was paid in the first instance. The Act requires that certain duties shall be paid and payment denoted in a particular way (sec. 6). The stamp here was not properly cancelled, and the payment of duty was, therefore,

(1) (1919) 26 C.L.R. 316.
(2) (1930) 30 S.R. (N.S.W.) 422.
(3) (1929) 30 S.R. (N.S.W.) 76.
(4) (1919) 26 C.L.R. at p. 324.

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not correctly denoted. But the proper duty had, in fact, been paid to the revenue.

The power of the Full Court under sec. 7 of the *Supreme Court Procedure Act* is only a power to do what the trial Judge should have done (*Heydon* v. *Lillis* (1)). Here the trial Judge was never asked to give any direction, which fact is also relevant on the question of costs of the two appeals. *Price* v. *Metropolitan House Investment and Agency Co.* (2) puts the duties of an agent far too high (see *Bevan* on *Negligence*, 4th ed., p. 1325).

Cur. adv. vult.

June 4.

The following written judgments were delivered :—

RICH J. I agree with the conclusion arrived at by the Supreme Court. In contracts of the kind in question, there is an implied condition that faithful service shall be rendered and that if such service is not rendered the principal may elect to determine the contract, and the determination takes place on that implied condition. The material evidence in the case is undisputed. It is contained in the telegrams and letters sent by the plaintiff, particularly the letter of the 15th October 1929. No facts remain to be found or inference to be drawn by a jury. Any analysis of the evidence discloses a course of conduct which is necessarily incompatible with continued service ~~not~~ As being prejudicial to the principal's business. The plaintiff's conduct was a breach of an express term of his contract and of the implicit condition to which I have referred, of faithful and loyal discharge of duty towards the employer. In such circumstances the rights of the principal do not depend on the caprice of the jury or of the tribunal which tries the question. There being a breach of this term and condition, the right of the principal to determine the contract follows as matter of law (*Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (3)).

The suggestion faintly made that, because the defendant was unaware of the plaintiff's misdeeds in this matter until after the termination of the contractual relationship, they could not constitute

(1) (1907) 4 C.L.R. 1223. (2) (1907) 23 T.L.R. 630.
(3) (1888) 39 Ch. D. 339, at pp. 363, 365.

a defence, is an ancient heresy to which I am surprised to find any surviving adherent. In 1838 *Tindal* C.J. expressed the view that when a party is discharged and a reason is assigned at the time, another reason may afterwards be proved (*Baillie* v. *Kell* (1)); and repeated statements to the like effect have been made, the latest of which is that of *Greer* J. (as he then was) in *Taylor* v. *Oakes Roncoroni & Co.* (2). The question is whether the defendant was entitled to do what it did, not whether the reason why it exercised the rights it in fact had was a good or bad one (cf. *Hansson* v. *Hamel & Horley Ltd.* (3)).

The matter then being resolved into "a matter of law," the Supreme Court was right in holding that the defendant Company was entitled to a verdict and in exercising the power conferred on the Court under sec. 7 of the *Supreme Court Procedure Act* 1900.

Before parting with the case I think it desirable to state my opinion upon the stamp objection, fully argued by Mr. *Flannery*. I find myself quite unable to agree in the decision of the Full Court of New South Wales in *Wagga Finance Co.* v. *Lever* (4); but I agree with the observations in the judgment delivered by *Street* C.J. for the Full Court in *Electricity Meter Manufacturing Co.* v. *Manufacturers' Products Pty. Ltd.* (5), save in so far as that judgment concedes the correctness of the first-named judgment and distinguishes it. I fail to understand how the decision in *Dent* v. *Moore* (6), or anything that was said in that case, tends to support the conclusion reached in *Wagga Finance Co.* v. *Lever*.

For these reasons I am of the opinion that the appeal should be dismissed with costs.

STARKE J. By an agreement in writing made in 1928 between the appellant Shepherd and the respondent the Felt and Textiles of Australia Ltd., it was agreed that the appellant should for the term of five years act as the representative of the respondent in the city of Sydney and its suburbs for the sale of certain products of the Company, and the appellant undertook to use his best endeavours

(1) (1838) 4 Bing. (N.C.) 638, at p. 650; 132 E.R. 934, at p. 939.
(2) (1922) 127 L.T. 267, at p. 269.
(3) (1922) 2 A.C. 36, at p. 42.
(4) (1929) 30 S.R. (N.S.W.) 76.
(5) (1930) 30 S.R. (N.S.W.) 422.
(6) (1919) 26 C.L.R. 316.

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Starke J.

to obtain orders for the respondent and influence business on its behalf within the scope of his appointment. The respondent in 1929 terminated the agreement, and the appellant brought an action against it for damages for wrongfully terminating the agreement and dismissing him as its representative. By its fifth plea the respondent justified the termination of the agreement and the dismissal of the appellant for that he did not use his best endeavours to obtain orders for and influence business on behalf of the respondent in accordance with the agreement. But at the trial of the action the parties fought a broader issue, namely, whether the appellant had been guilty of misconduct justifying the termination of the agreement and his dismissal, and they must now abide by their conduct of the trial (*Browne* v. *Dunn* (1)). Apart from the express stipulation of the agreement that the appellant would use his best endeavours to obtain orders for the respondent, there is no doubt that the appellant was bound to render faithful and loyal service to the respondent, and not to do anything inconsistent with the continuance of confidence between them. (Cf. *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (2) ; *Pearce* v. *Foster* (3).) The Supreme Court has stated very fully the uncontroverted facts of the case, and I need not recapitulate them. But they show that the appellant quoted a price to a customer of the respondent and accepted an important order from that customer at a price which was contrary to his express instructions, and also suppressed the facts of the transaction from the respondent. Further, he endeavoured to persuade this customer not to deal with the respondent at any other price, and to support him against the respondent, whose business morale he described as not of the highest standard. Such conduct is in breach of the agreement, and undoubtedly strikes at the root of that agreement, and it is also wholly inconsistent with the continuance of confidence between the parties to it. But the action was tried before a jury, and, despite this uncontroverted evidence, a verdict was given for the appellant for no less a sum than £1,600. The respondent moved to set aside this verdict, and that a verdict and judgment might be entered for it. The Supreme Court acceded

(1) (1893) 6 Rep. 67.
(2) (1888) 39 Ch. D. 339.
(3) (1886) 17 Q.B.D. 536.

to this motion, and set aside the verdict and directed that a verdict be entered for the respondent.

If reasonable men might find the verdict which was found in this case, then no Court ought to disturb a decision of fact which the law has confided to juries and not to Judges (*Metropolitan Railway Co.* v. *Wright* (1)). It is plain, however, on the facts above stated, that no reasonable men might find the verdict; and it was therefore rightly set aside. But was the Supreme Court right in taking the further step of entering a verdict for the defendant, or should it have remitted the action for a new trial? That question depends, I think, upon the provision of the *Supreme Court Procedure Act* 1900, sec. 7: "In any action, if the Court in Banco is of opinion that . . . upon the evidence the plaintiff or the defendant is as a matter of law entitled to a verdict in the action or upon any issue therein, the Court may order . . . such verdict to be entered." Where on the uncontroverted facts the action or an issue must be determined in favour of one party, then, as a matter of law, that party is entitled to the verdict in the action or upon the issue. And it is necessarily wrong to leave any conclusion or inference in such circumstances as a question of fact to the jury. In such a case a direction should be given to the jury that as a matter of law the verdict must be for the party entitled to succeed—here the respondent (cf. *Cawley* v. *Furnell* (2); *Cuthbertson* v. *Parsons* (3); *Morgan* v. *Savin* (4)). The fact that the appellant's misconduct was unknown to the respondent at the time of the termination of the agreement is quite immaterial. If there were, in fact, any circumstances in existence at the time of the termination of the agreement which could have justified the respondent in so terminating it, then it may justify the termination by subsequent proof of those circumstances (*Smith's Law of Master and Servant*, 5th ed., p. 107; *Taylor* v. *Oakes Roncoroni & Co.* (5); *Swale* v. *Ipswich Tannery Ltd.* (6)).

Another ground was relied upon in support of the judgment of the Supreme Court, namely, that the agreement was not stamped upon its production in evidence at the trial in accordance with the

(1) (1886) 11 App. Cas. 152.
(2) (1851) 12 C.B. 291; 138 E.R. 915.
(3) (1852) 12 C.B. 304; 138 E.R. 921.
(4) (1867) 16 L.T. 333, 457.
(5) (1922) 27 Com. Cas. 261, at p. 266.
(6) (1906) 11 Com. Cas. 88, at p. 98.

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provisions of the *Stamp Duties Act* 1920-1924. The point does not call for decision in the view I take of the case, but as the matter was argued at length and is said to be of great importance in New South Wales, and I have had the opportunity of reading the opinion of my brother *Dixon* upon it, perhaps it is permissible to say that I concur in his opinion and have nothing to add.

Starke J.

The appeal should be dismissed.

DIXON J. The appellant carries on a business as a manufacturers' agent, and the respondent Company, which manufactures felt, appointed him its selling agent in Sydney for a period of five years. By an agreement in writing he engaged to act as the respondent's representative in the city of Sydney and its suburbs for the sale of the goods, to the customers, at the prices and upon the terms described in some letters which had passed between the parties, and the respondent agreed to give him a remuneration of five per cent of the net amount received by it in respect of all orders which it executed, obtained in the home market whether as the result of the appellant's exertions or not. The appellant undertook to use his best endeavours to obtain orders for the respondent and to "influence business on their behalf within the scope of his appointment" and to observe all instructions of the respondent in relation to its business. Before two years were completed of the period of the appellant's agency, the respondent terminated his appointment because it was dissatisfied with his services. He thereupon brought an action for damages upon the agreement and obtained a verdict for £1,600. The Full Court of the Supreme Court of New South Wales set aside this verdict and entered a verdict and judgment for the respondent upon the ground that, because of the appellant's own conduct, the respondent had become lawfully entitled to determine the agreement. Being of opinion that upon the evidence the respondent was as a matter of law entitled to a verdict in the action, the Full Court exercised the power conferred upon it by sec. 7 of the *Supreme Court Procedure Act* 1900, and ordered such a verdict to be entered. The questions upon this appeal are whether the verdict for the appellant should have been set aside, and, if so, whether a new trial should have been directed or the defendant was "as a matter of law entitled to a verdict" so

that the case fell within the statutory power to order such a verdict to be entered. The conduct on the part of the appellant which appeared to the Supreme Court to justify the termination of his agency took place during his temporary absence in Tasmania. While he was there he received from the respondent a telegram informing him, as the fact was, that an important customer whom he had secured for it had called for tenders for the supply of a large quantity of felt. The telegram asked the appellant if he would return to Sydney, and alternatively what suggestion he had to make, and it ended with a statement to the effect that a reduction in the price of more than 3d. a yard meant a loss to the respondent. The respondent's price then stood at 45d. a yard. The appellant telegraphed a confident reply that with equal prices he would obtain the contract, but he reminded the respondent of the price of a previous tender by a competitor and suggested that he should be allowed to submit a price of 42d. a yard, and he requested the respondent to telegraph to him in Tasmania its lowest acceptable prices. The appellant's commission upon a price of 42d. would be a little over 2d. a yard. The respondent answered in a telegram which suggested that if the appellant considered it necessary to reduce the price to 42d. a yard he should contribute half the reduction to the extent of his commission, but stated the opinion that if he returned to Sydney he could "by his personal touch" obtain the contract without a reduction of price. The appellant replied that he was awaiting a letter from the buyer of the customer inviting tenders and if the letter was unsatisfactory he would return to Sydney. Some communications which were not given in evidence appear already to have passed between the appellant and this buyer, with whom he was well acquainted, and in the course of them the appellant proposed a price of 43½d. for his principal's felt, but he did not disclose this fact to the respondent. Whether the appellant received the letter for which he said that he would wait does not appear, but he did receive from the buyer a telegram which ran: "No need for you to return to Sydney will close at 43d."; and he replied "Many thanks accept please delay informing my Company" (*scil.*, the respondent) "until you receive my letter Monday."

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He did not inform the respondent of what he had thus agreed upon, but he at once sent it a telegram: "Will you accept 43d. paying usual commission competitors quoting 42d. cable here urgent." Unless he was prepared to contribute out of his commission half the difference between 45d. and 43d. a yard, when he agreed to a price of 43d. a yard, he had acted in opposition to the instructions given by the respondent's telegram to him. The explanation which the appellant gave in his evidence was, in effect, that he believed the respondent knew it could not obtain the contract for the sale of its felt at 45d., and it was endeavouring to force him to reduce his commission; that he considered he was entitled to resist this endeavour: that he knew he could secure the contract for it at a proper price, and that he desired to do so for his own credit's sake. In answer to his telegram asking if it would accept 43d., the respondent telegraphed to the appellant that the price left it no reasonable profit, and it would agree to it only if he contributed part of his commission as it had previously telegraphed, and it urged him to return and endeavour to obtain the contract at the existing price. The appellant answered the respondent by a telegram that he could secure the contract definitely at 43d. a yard but the commission must be usual, and that it was not essential to return to Sydney as he was in continual communication with the customer's buyer. At the same time he telegraphed to the buyer as follows:—"Require your assistance. Company consider my quotation too low. Suggest me accept half commission which wish avoiding. You will probably be approached to increase prices. Will you favour me by allowing contract to go through me only. I will guarantee their acceptance of 43 pence." Later in the same day the appellant received a telegram from the respondent declining to reduce the price of 45d. per yard unless he contributed, and saying it would interview the buyer next day; and during the day the appellant and the respondent exchanged further telegrams maintaining their respective positions. Next day the appellant received a telegram from the respondent saying that it had arranged to supply the customer's requirements for the next three months at full prices and instructing the appellant to suspend further negotiations, if any, for the time being. The transaction to which this telegram refers was not in writing, and

the jury may not have accepted the oral evidence of it which described how at first the buyer gave an order for 50 pieces of felt at the unreduced price and later cancelled this order. But when the appellant received the telegram he at once wrote a lengthy letter to the buyer in which he narrated what had taken place between himself and the respondent and set out this telegram. The letter then went on:—"My price quoted to you from Launceston, i.e. 3s. 7d., stands good and a rebate of 2d. per yard will be credited to you from my Sydney office. In the meantime I need your support as I have no faith whatever in my Company's treatment of their representative and with your assistance I can get the agreed commission. . . . Unfortunately, whatever their attitude, I cannot at the moment afford to give them the sailor's farewell, as their productions are good, but their business morale is not of the highest standard." The appellant went on to say that he did not subscribe to the respondent's view that the contract could not be undertaken at less than 45d. per yard, and that even if he had to forgo a portion or all of his commission, the customer would be supplied at the price he had accepted. Ultimately the contract was negotiated between the respondent and the customer directly and without any more of the appellant's doubtful assistance.

When the respondent terminated his agency it was not aware of the contents of the telegrams and the letter which he had sent to its customer's buyer, and it acted upon other grounds. It is well established, however, that a servant's dismissal may be justified upon grounds on which his master did not act and of which he was unaware when he discharged him (*Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1); *Spotswood* v. *Barrow* (2); *Willets* v. *Green* (3); *Mercer* v. *Whall* (4); *Ridgway* v. *Hungerford Market Co.* (5)). It is true that the agreement between the appellant and the respondent does not amount to a contract of service. But the rule is of general application in the discharge of contract by breach, and enables a party to any simple contract who fails or refuses further to observe its stipulations to rely upon a breach of conditions,

(1) (1888) 39 Ch. D. 339.
(2) (1850) 5 Ex. 110; 155 E.R. 48.
(3) (1850) 3 Car. & K. 59; 175 E.R. 462.
(4) (1845) 5 Q.B. 447, at p. 466; 114 E.R. 1318, at p. 1325.
(5) (1835) 3 Ad. & E. 171; 111 E.R. 378.

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committed before he so failed or so refused, by the opposite party to the contract as operating to absolve him from the contract as from the time of such breach of condition whether he was aware of it or not when he himself failed or refused to perform the stipulations of the contract. "It is a long established rule of law that a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not" (per *Greer* J., *Taylor* v. *Oakes Roncoroni & Co.* (1); see, too, per Lord *Sumner* in *British and Beningtons Ltd.* v. *North Western Cachar Tea Co.* (2) and per *Starke* J. in *Henry Dean & Sons (Sydney) Ltd.* v. *P. O'Day Pty. Ltd.* (3)).

In considering whether the appellant's conduct amounted to a breach of the conditions of his contract of agency, it must first be ascertained what material conditions the contract contained. The express promise of the appellant to use his best endeavours to obtain orders for the respondent and to influence business on its behalf necessarily includes an obligation not to hinder or prevent the fulfilment of its purpose. Moreover, the contract established a relation between the parties intended to subsist for a period, and it involved some degree of mutual confidence and required a continual co-operation. Its object was the increase of the sale of the respondent's manufactures, and to that end the extension of the respondent's business connection. Such an agreement inevitably imported a tacit condition that the appellant should perform the services faithfully which he contracted to give the respondent, and should not endeavour to impede or defeat the respondent in the sale of its manufactures at the prices it might think proper to ask. By their verdict the jury must be taken to have found that the appellant's conduct did not amount to a breach of this condition. No more favourable explanation can be placed upon his communications with the customer who invited tenders for the supply of felt than that to which the appellant himself deposed. Yet, allowing that his motives were those he claimed, he first agreed to a price for the sale

(1) (1922) 127 L.T., at p. 269; 27 Com. Cas., at p. 266.

(2) (1923) A.C. 48, at p. 71.

(3) (1927) 39 C.L.R. 330, at p. 359.

of a large quantity of his principal's goods which was entirely unauthorized save upon conditions with which he refused to comply, he next concealed the transaction from his principal with a view to persuading it to authorize such a price unconditionally, and he then sought to prevent it dealing with the customer lest it should effect a sale at a higher price. A finding that this conduct was no breach of condition appears to me to be unreasonable, and one which ought not to be allowed to stand. I am therefore of opinion that the Supreme Court was right in setting aside the verdict obtained by the appellant.

Without statutory authority the Court could not enter a verdict in lieu of that set aside, unless empowered to do so by a reservation made at the trial with the consent of the parties actual or implied (cf. *Dewar* v. *Purday* (1); *Minchin* v. *Clement* (2); *Mathews* v. *Smith* (3); *Rickets* v. *Burman* (4), and *Tippets* v. *Heane* (5)). The statutory power of the Supreme Court of New South Wales to enter a verdict is much less extensive than that conferred upon the Court of Appeal in England by Order LVIII., r. 4, and is confined by the terms of sec. 7 of the *Supreme Court Procedure Act* 1900 to cases in which upon the evidence the party is, as a matter of law, entitled to a verdict. Such a case arises when a party upon whom the burden lies of proving an issue fails to adduce evidence sufficient to discharge the onus. For the insufficiency of evidence to support an issue is a matter of law, upon which the Court must direct the jury. But it is not always a question of law whether evidence adduced in support of an issue is not only sufficient to discharge the burden of proof but so conclusively establishes the issue that a finding to the contrary should be set aside. Indeed, more often than not, it is a question whether, having regard to the great probative force of the evidence, the Court in Banco, in the exercise of its control, ought to set aside the verdict as perverse. (See the discussion by *Cussen* A.C.J. in *Driver* v. *War Service Homes Commissioner* [*No.* 1] (6).) But sometimes the facts from which a legal conclusion arises in favour of the party who has the onus of proof

(1) (1835) 3 Ad. & E. 166; 111 E.R. 376.
(2) (1818) 1 B. & Ald. 252; 106 E.R. 93.
(3) (1828) 2 Y. & J. 426; 148 E.R. 985.
(4) (1836) 4 Dowl. 578.
(5) (1834) 4 Tyr. 772; 149 E.R. 1074.
(6) (1924) V.L.R. 515; 46 A.L.T. 102; 30 A.L.R. 375.

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appear in a manner which entitles or requires the Court to notice and act upon them. This may be because facts are admitted or undisputed, or because the question turns upon the interpretation or effect of documents. In *Morgan* v. *Savin* (1) *Willes* J. decided that when the circumstances of the engagement and the dismissal are all proved by written documents in evidence, the question whether the dismissal was justified is one of law for the decision of the Court and not for the jury. In the present case the contract is in writing and the justification for its termination is found in the telegrams and the letter of the appellant the despatch of which is undisputed. In my opinion the jury could not adopt any explanation or modification of these documents which is compatible with a due observance on the part of the appellant of the condition of his contract of agency. I therefore agree with the Supreme Court in thinking the respondent was, as a matter of law, entitled to a verdict.

The respondent relied upon a further ground in support of the order directing that a verdict should be entered for it. At the trial it was objected on the respondent's behalf that the agreement upon which the appellant sued, although liable to a stamp duty of 1s. as an agreement under hand within the Second Schedule of the *Stamp Duties Act* 1920-1924, was not duly stamped, because the stamp for 1s. which it bore had not been cancelled by the person who first executed the instrument as required by sec. 22 of that Act. The appellant thereupon sought to overcome the objection by paying, pursuant to sec. 27, to the officer whose duty it was to read the instrument, what he considered the "unpaid duty and the fine payable by law." The document was then received in evidence notwithstanding the respondent's objection. It is now contended that it ought not to have been received in evidence because sec. 27 does not apply to a case in which an instrument has been stamped but the stamp has not been cancelled, and because, even if it did so apply, the appellant had misconceived what he was required to pay by way of penalty and, therefore, did not comply with sec. 27. It is further contended that if the instrument did become admissible in evidence, yet it remained true that when the alleged breach of contract was committed the instrument was not duly stamped and

(1) (1867) 16 L.T., at p. 334.

by reason of sec. 29 was not good, useful, or available in law or in equity so that a refusal to perform the contract it contained could not be wrongful. For this proposition the decision of the Supreme Court in *Wagga Finance Co.* v. *Lever* (1) was relied upon. In my opinion the order directing a verdict for the respondent could not be supported upon any of these contentions, and, in the circumstances, I think it is desirable to give reasons for this opinion.

In the first place, I do not agree with the view that sec. 27 is confined to instruments which bear no stamp, or a stamp of insufficient amount, and does not extend to cases in which a sufficient stamp is uncancelled or has not been regularly cancelled. It is true that, in referring to "unpaid duty" and to "any omission or insufficiency of the stamp thereon," the provision uses terms appropriate rather to unstamped and insufficiently stamped instruments. But the language is by no means incapable of including other cases of failure to comply with the requirements of the stamp laws. The provision contained in sec. 27 has its origin in secs. 28 and 29 of the English *Common Law Procedure Act* 1854. It was enacted so that stamp objections might be cured without the necessity of sending the instrument to the Stamp Office during a trial, a practice then often adopted which is illustrated by the reports of *Beckwith* v. *Benner* (2) and *Dudley* v. *Robins* (3). In sec. 27 of the New South Wales *Stamp Duties Act* 1920-1924 it is evident that the provision serves the same purpose, and it appears reasonable to place upon it a meaning which will include every case where an instrument might be made admissible by stamping under sec. 25 and payment of a penalty. Moreover, in *Allen* v. *Pullay* (4) the Privy Council overruled a like contention upon a provision enabling the Collector to stamp an instrument executed without being properly stamped, and, although the provision was not expressed in the same terms, many of the reasons given for assigning a meaning to it wide enough to embrace all the defects which might arise from non-compliance with the stamp laws apply with even greater force to sec. 27.

(1) (1929) 30 S.R. (N.S.W.) 76.
(2) (1834) 6 Car. & P. 681; 172 E.R. 1417.
(3) (1827) 3 Car. & P. 26; 172 E.R. 307.
(4) (1882) 51 L.J. P.C. 50.

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In the next place, I think the contention that sec. 27 was not exactly pursued because less than the full penalty was paid to the officer in Court, even if it be correct, ought not to lead to a verdict being entered for the respondent. No doubt, if the document were rejected as evidence, the appellant would have no case, but the proper course would be to order a new trial in order to enable the appellant to pay the proper fine and have the instrument duly stamped with a particular stamp denoting the amount of the duty and fine paid. The view appears to have been adopted that the Court in Banco must give effect to an objection taken at the trial, although after the trial and before the proceedings in Banco the instrument has been duly stamped (*Prudential Mutual Assurance Investment and Loan Association* v. *Curzon* (1)). The provisions of sec. 31 of the *Common Law Procedure Act* 1854 which provide that no new trial shall be granted by reason of a ruling that a document is insufficiently stamped or requires no stamp do not appear to have been adopted in New South Wales, but the decisions upon this enactment show that it operated to preclude all appeals from such rulings because it would not be right to reject the document and enter judgment when the evidence which might have been available was not exhausted (see *Blewitt* v. *Tritton* (2) ; *Siordet* v. *Kuczynski* (3)). It would not be in accordance with these views to reject a document the duty and fine for which were intended to be paid at the trial, and then enter judgment for want of evidence.

There remains the contention that, conceding the application of sec. 27 to an instrument bearing a sufficient but uncancelled stamp, and conceding the payment of the correct amount of "the unpaid duty and the fine payable by law," nevertheless the document was not efficacious at the time of the alleged breach, which therefore could not be wrongful. This argument depends upon sec. 29 of the *Stamp Duties Act*, the material words of which are: "Except as aforesaid, no instrument . . . shall . . . be pleaded or given in evidence, or admitted to be good, useful, or available in law or in equity for any purpose whatsoever, unless it is duly stamped in accordance with the law in force at the time when it was first

(1) (1852) 8 Ex. 97, at p. 104; 155 E.R. 1275, at p. 1278.

(2) (1892) 2 Q.B. 327.

(3) (1855) 17 C.B. 251; 139 E.R. 1067.

executed." The words "except as aforesaid" qualify the whole section, and it is evident that whatever is comprised within them is not vitiated by its provisions. The words refer to the preceding sections, including sec. 25, which allows instruments to be stamped after execution and upon payment of a fine if more than a month has elapsed, and sec. 27, which authorizes the reception in evidence of an instrument although there is some omission or insufficiency of the stamp thereon, if the amount of the unpaid duty and the fine payable by law is paid to the officer of the Court. Further, the condition expressed in the section upon which the usefulness of the instrument is made to depend is not introduced by the word "until" but by the word "unless." It is not to be pleaded or given in evidence or admitted to be good, useful or available unless it is duly stamped. The expressions "pleaded," "given in evidence" and "admitted" refer to the use or the recognition of the document or of its operation in judicial proceedings or otherwise, and, I think, would naturally be understood as intending that when by due stamping it had become pleadable, receivable in evidence and admissible as good, useful and available, then its validity and operation as from the beginning were to be construed as unaffected by the enactment. It is to be noticed too that the words "duly stamped" include late stamping under sec. 25. There is, perhaps, a little difficulty in applying them literally to the payment in Court of duty together with fine under sec. 27 because the officer does not stamp the instrument. But it is his duty at once to transmit the instrument to the Commissioner to be stamped. These considerations without more, in my opinion, combine to require an interpretation of the provisions of the *Stamp Duties Act* 1920-1924 which allows an instrument to receive its full force and effect *ab initio*, if it is stamped under sec. 25 or if duty and fine are paid under sec. 27. But when to these considerations is added the history of the provisions now standing as secs. 25, 27 and 29 and of their interpretation, it is impossible to doubt that instruments which may legally be stamped after execution, upon due stamping or payment under sec. 27 of duty and fine become in contemplation of law as efficacious from their execution as if they had never fallen within the operation of sec. 29. Sec. 29 takes its origin in sec. 11 of 5 Will. & M. c. 21, and

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in sec. 59 of 9 & 10 Will. III. c. 25; and upon those statutes, in 1725, the Court of Kings Bench said: "It is every day's practice, that upon payment of the duty and penalty, the writing is made good" (*R.* v. *Bishop of Chester* (1)). For the course of legislation since that time, it is enough to refer to sec. 19 of 31 Geo. III. c. 25; secs. 10 and 11 of 35 Geo. III. c. 55; sec. 6 of 43 Geo. III. c. 126; sec. 8 of 55 Geo. III. c. 184; secs. 12 and 14 of 13 & 14 Vict. c. 97; secs. 28 and 29 of 17 & 18 Vict. c. 125 (*Common Law Procedure Act* 1854); secs. 15, 16 and 17 of 33 & 34 Vict. c. 97 (*Stamp Duties Act* 1870), and the New South Wales *Stamp Duties Act of* 1880, sec. 14. Throughout this course of legislation the Courts have uniformly acted upon the view that instruments which may upon payment of a fine be stamped at any time are to be received in evidence and enforced although duly stamped after the commencement of the proceedings. In 1805 Lord *Eldon* said that it "is the judgment of the law; that, where a paper can be stamped, paying the penalty, it is no objection, that it has not been stamped before the commencement of the suit. . . . If the agreement is one, upon which no action is to be brought unless it is stamped, it must be stamped before action brought: but if it is an agreement, which you may get stamped, paying the penalty, there pending the action it may be stamped; and a cause has been allowed to stand over here upon that distinction. The consequence is, that, if the Court is not to act, where there has not been an observance of the revenue laws, neither is it to turn the party round, if, before the suit is over, those laws are complied with" (*Huddleston* v. *Briscoe* (2)). In *Rogers* v. *James* (3) *Gibbs* C.J. said that numberless instances have occurred in which a party has been nonsuited because the deed under which he claimed a right of action has had an insufficient stamp; but it has never been contended that after a valid stamp has been put upon it he has not by retrospection a good right of action. In *Chervet* v. *Jones* (4) Sir *John Leach* V.C. directed that a suit upon an unstamped instrument should go on, but that before the decree was delivered the instrument should be produced to the Registrar stamped. The principle was

(1) (1725) 8 Mod. Rep. 364; 88 E.R. 260.
(2) (1805) 11 Ves. 583, at p. 595; 32 E.R. 1215, at p. 1219.
(3) (1816) 2 Marsh. 425 (reported also 7 Taunt. 147); 129 E.R. 59.
(4) (1822) 6 Madd. 267; 56 E.R. 1093.

applied in *Burton* v. *Kirkby* (1), in *Rose* v. *Tomblinson* (2) and in *Clarke* v. *Jones* (3). It was recognized by *Coleridge* J. in *Rankin* v. *Hamilton* (4), by Lord *Campbell* C.J. in *Alcock* v. *Delay* (5) and by *Martin* B. in *Whitehouse* v. *Hemmant* (6). In *Wagga Finance Co.* v. *Lever* (7) the Supreme Court decided that an action of detinue could not be maintained by a plaintiff who depended for his title to the goods he claimed upon an assignment from the former owner which was not stamped until after the commencement of the action. In *Electricity Meter Manufacturing Co.* v. *Manufacturers' Products Pty. Ltd.* (8) *Street* C.J., in whose judgment *Ferguson* and *James* JJ. concurred, distinguished this decision and confined its application within narrow limits. Whether the distinction was well taken it is unnecessary for me to consider because I do not think the decision in *Wagga Finance Co.* v. *Lever* can be supported, but otherwise I agree with the judgment of *Street* C.J.

The present appeal, in my opinion, fails not because of the *Stamp Duties Act* 1920-1924, but because the respondent was entitled, by reason of the manner in which the appellant behaved, to terminate his agency.

Accordingly I think the appeal should be dismissed with costs.

EVATT J. The substantive command contained in sec. 25 of the New South Wales *Stamp Duties Act* 1920-1924 is that, subject to certain conditions, "any instrument may be stamped after the first execution thereof," on payment of the proper duty and possibly a fine. Sec. 27 deals with the situation created when a document chargeable with stamp duty is tendered in evidence in a civil Court. The proper officer is directed to call the attention of the Judge to any omission or insufficiency of the stamp on the document. If the instrument comes within the description of sec. 25, and may legally be stamped after execution, then, upon payment of the unpaid duty and fine, it may be received in evidence. Sec. 29 of the Act next provides: "Except as aforesaid, no instrument executed in New South Wales or relating (wheresoever executed) to any

(1) (1816) 2 Marsh. 480; 7 Taunt. 174; 129 E.R. 70.
(2) (1834) 3 Dowl. 49.
(3) (1834) 3 Dowl. 277.
(4) (1850) 15 Q.B. 187, at p. 196; 117 E.R. 429, at p. 433.
(5) (1855) 4 El. & Bl. 660, at p. 664; 119 E.R. 243, at p. 245.
(6) (1858) 27 L.J. Ex. 295.
(7) (1929) 30 S.R. (N.S.W.) 76.
(8) (1930) 30 S.R. (N.S.W.) 422.

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property situate or to any matter or thing done or to be done in any part of New South Wales, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity for any purpose whatsoever, unless it is duly stamped in accordance with the law in force at the time when it was first executed." The effect of this section is to set up a general rule that documents unstamped or insufficiently stamped shall not be made use of or treated as having any legal efficacy in any civil proceedings in the State. But the section commences with the words " except as aforesaid." Both the stamping of an instrument after its execution, which is allowed under the conditions set out in sec. 25, and the stamping during the course of a civil proceeding under the circumstances set out in sec. 27, are obvious instances to which the prohibition of sec. 29 is inapplicable. The reason why sec. 29 does not " strike with sterility " (*Dent* v. *Moore* (1)) documents which, belonging to the class which may legally be stamped after execution, are discovered at the trial to be unstamped or insufficiently stamped but are receivable in evidence on payment of the unpaid duty and the legal fine, is that sec. 29 does not " strike at " such documents at all.

What is known as the *Wagga Finance Case* (2) was based on the view that sec. 29 of the *Stamp Duties Act* debars a document unstamped or insufficiently stamped at the time of its tender in a civil action from having any efficacy whatever until the very moment when the full stamp duty is paid. " The new section provides that this document shall not be pleaded or given in evidence or admitted to be good, useful or available in law or equity for any purpose whatsoever until it is duly stamped. It seems to me that I am compelled by the decision to which I have just referred to hold that that means that until it was stamped it was not an effective document, that it conferred no rights of any kind and was entirely inoperative. Therefore at the time when this action was brought there was no effective assignment in existence from which the plaintiffs took any rights. It seems to me, therefore, that no amendment would help the plaintiffs and that the plaintiffs must be nonsuited " (*Wagga Finance Case* (3)).

(1) (1919) 26 C.L.R., at p. 324.
(2) (1929) 30 S.R. (N.S.W.) 76.
(3) (1929) 30 S.R. (N.S.W.), at p. 82, per *Halse Rogers* J.

It may be pointed out that the word used in sec. 29 itself is not "until," as might be supposed from the remarks quoted, but "unless." The broader answer to the view expressed is that the whole of sec. 29 is preceded and conditioned by the words "except as aforesaid," and the *Wagga Finance* (1) decision omits to give effect to the statutory exceptions.

In my opinion the subsequent decision of the Full Court of the Supreme Court in *Electricity Meter Manufacturing Co.* v. *Manufacturers' Products Pty. Ltd.* (2) is irreconcilable with the *Wagga Finance Case* (1) and the latter should now be considered as overruled. Unfortunately, the *Wagga Finance* decision caused many difficulties in the administration of justice in New South Wales. It suddenly brought to an end the recognized practice of stamping documents during the hearing of a case. Actions which had been commenced before the promulgation of the decision were abandoned or, if continued, were defeated by the stamp objection. Amendment of pleadings after payment of duty was of no avail because of the view that the instrument remained a nullity until stamping. It was therefore void at the time of the breach of any obligation alleged to have been created by it. The cause of action, consequently, never came into existence. Payment of stamp duty could not operate as from the prior point of time when the cause of action was supposed to have arisen.

The irony of the situation thus created by judicial decision was that the defendant who took the fatal stamp objection at a trial was, as often as not, primarily liable to stamp the document. Having failed to perform that duty, he successfully cheated the revenue a second time. For the plaintiff had no inducement whatever to pay duty and fine at the time of trial when payment could avail him nothing.

It is not surprising that some Judges sought, more or less successfully, to distinguish the *Wagga Finance Case* (1), when confronted with it during a trial. But the learned Chief Justice, during the hearing of the present case, interpreted secs. 27 and 29 of the *Stamp Duties Act* correctly when he allowed the further stamping of the agreement between the parties, and the admission of the document

(1) (1929) 30 S.R. (N.S.W.) 76. (2) (1930) 30 S.R. (N.S.W.) 422.

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in evidence. The judgment of *Street* C.J. (for the Full Court) in the *Electricity Meter Case* (1) was delivered shortly after his present ruling at nisi prius. It states the legal position fully and precisely with the single addition that (as the learned Chief Justice undoubtedly considered) the *Wagga Finance Case* (2) was wrongly decided.

It may still be possible for aggrieved parties to enforce their rights notwithstanding their first failure by reason of the *Wagga Finance* (2) decision. In most cases nonsuits only were granted, and actions may be recommenced without further miscarriage upon this ground.

The respondent's objection based upon sec. 29 of the *Stamp Duties Act* to the allowance in evidence of exhibit A (the agreement between the parties) therefore fails. It becomes necessary to consider the merits of the appeal.

The appellant succeeded at the trial in an action founded upon the breach by the respondent of the agency agreement dated 3rd February 1928. The jury assessed damages at £1,600. In its pleadings justifying the breach, the fifth plea of the respondent was: "And for a fifth plea the defendant Company says that it was a term and condition of the said contract that the plaintiff should use his best endeavours to obtain orders for the defendant Company and influence business on its behalf, and the defendant Company did not excuse the performance by the plaintiff of the said term and condition yet the plaintiff did not use his best endeavours as aforesaid wherefore the defendant Company rescinded the said contract and dismissed the plaintiff from its service which is the alleged breach."

The matters relied on by the respondent to prove this plea were certain acts of disloyalty on the part of the appellant during the month of October 1929 in relation to negotiations he was then carrying on with a view to making a contract between his principal and Beard, Watsons Ltd. By clause 2 of the agreement the appellant expressly undertook "to use his best endeavours to obtain orders for the Company and influence business on their behalf within the scope of his employment." Clearly it is this obligation upon the breach of which the respondent relied in the justification. The

(1) (1930) 30 S.R. (N.S.W.) 422. (2) (1929) 30 S.R. (N.S.W.) 76.

termination of the agreement took place in December 1929 but the disclosures as to the appellant's conduct in the previous October were not made until September 1930, during the progress of the present trial.

It is, therefore, not true to say that the respondent rescinded the agreement because of the misconduct in relation to the "Beard, Watson" contract. It follows that the fifth plea was not made out as pleaded. (Cf. *Mercer* v. *Whall* (1).) Counsel for the appellant might have asked the learned Chief Justice to withdraw the plea from the jury, but he did not do so.

On the other hand, counsel for the respondent did not ask the learned Chief Justice to amend the pleadings or to nonsuit the plaintiff or to direct a verdict in his favour upon the submission of law made later to the Full Court with success. This submission was that the admitted conduct of the appellant was a breach of condition and constitued a legal justification for the dismissal. Every opportunity was given at the trial to raise this submission. Other contentions of law were raised. I think that the Chief Justice was impliedly invited to treat the question of misconduct as one of degree only and therefore proper for final determination by the jury. In his summing-up to the jury he said :—

"I do not think that on that part of the case there is anything further that I need say to you, except to remind you again that disobedience and misconduct, to amount to justification for dismissal, must not be merely disobedience or misconduct of a trifling character, but something in the nature of wilful disobedience to reasonable orders, and there must be something in the nature of misconduct which is inconsistent with the proper discharge by the person employed of the duties which he was employed to carry out. I think, Mr. *Hammond*, that is substantially the ground upon which you rely on that part of the case."

Mr. *Hammond*: "Yes, Your Honor, coupled, of course, with the action in Victoria and Tasmania, and those letters and telegrams."

His Honor: "I am coming to those."

(To the Jury:—) "Then, gentlemen, there are other aspects of the case. You have heard what happened while the plaintiff was absent in Tasmania and Victoria, in connection with the obtaining of an order from Beard, Watson's Ltd. Well, I am not going to discuss that; I am not going to say anything more concerning it than has already been said to you by counsel. The telegrams are there and have been read to you over and over again. You have heard the examination and cross-examination of the witnesses with regard to

(1) (1845) 5 Q.B., at p. 466; 114 E.R., at p. 1325.

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them, and you have heard the comments upon them by counsel. It will be for you to consider how far in that respect the plaintiff acted in disregard of his duty to the defendants or in breach of his obligations to them."

Later on, dealing with the letter sent by the appellant to Beard, Watson's employee, the Chief Justice said :—

"Well, as I say, gentlemen, it is for you to consider what justification that letter affords to support the action taken by the defendant Company last December in dismissing the plaintiff."

Where a litigant conducts a case before a Judge and jury, and allows an issue of fact to be remitted to the jury with directions in point of law, and makes no submission in a contrary sense to these directions, he should not be encouraged after the jury decide adversely, to scrutinize the summing-up for the purpose of detecting or spelling out some misdirection or non-direction and of grounding thereon an application for a second trial. Even in such a case, no doubt, jurisdiction is often conferred upon Courts of appeal or review in sufficiently wide terms to empower them to order a new trial. But instances where such a jurisdiction should fairly be exercised will necessarily be rare. The control over the costs of the proceedings is not always sufficient to remove the great mischief involved in the rehearing of an action before a jury. It should be remembered that the proper time to raise objections or criticisms of a legal nature to a Judge's charge is at the trial. (Cf. *Wilson* v. *United Counties Bank* (1).)

What I have said is subject to the terms of any special rules governing the practice and procedure of the Courts in question. Moreover, directions as to the proper measure of damages have often been treated as belonging to a special category where the trial Judge is said to direct "at his peril." And exceptional cases may arise where, in spite of failure to object or suggest, the jurisdiction to order a new trial should justly be exercised.

In the present case the Full Court did allow the question of law to be argued before them in spite of the conduct of the trial by the respondent. The learned Judges were, no doubt, impressed by the fact that the point went to final judgment, so that no retrial was involved. They acted within their jurisdiction and exercised their discretion (*Banbury* v. *Bank of Montreal* (2)). I think special

(1) (1920) A.C. 102, at pp. 123, 127-128, 137-138. (2) (1918) A.C. 626.

terms as to costs might well have been imposed upon the respondent because the Chief Justice would, presumably, have upheld its later submission and nonsuited the plaintiff. In the result, some of the costs of the action and most of the costs of the appeal to the Supreme Court have been thrown away. But no complaint in respect of the Full Court order as to costs was made in the notice of appeal to this Court.

Is the respondent's submission well founded? I must say that for a time I was inclined to the opinion that the question of misconduct in relation to the Beard, Watson contract was one of fact—the question for the jury being whether the actions of the appellant in the peculiar circumstances of the case, particularly the respondent's unjustifiable attempt to compel the appellant to agree to a diminution of the commission provided for by the contract, were inconsistent with his duty to render loyal service to the respondent.

On further consideration, however, I see no answer to the reasoning of the judgment prepared by my brother *Dixon*. The question of misconduct in relation to this matter arises from undisputed facts and documents, emerges as one of law and must be resolved in favour of the respondent. I think that this conclusion finds support in the judgment of Lord *Atkinson* in *Federal Supply and Cold Storage Co. of South Africa* v. *Angehrn* (1), which was not referred to during argument.

In these circumstances the entry of a verdict for the respondent is authorized by sec. 7 of the *Supreme Court Procedure Act* 1900, and the appeal must, accordingly, be dismissed.

McTIERNAN J. I have had the advantage of reading the judgment of my brother *Dixon*, and, for the reasons stated by him, I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Sly & Russell.*

Solicitors for the respondent, *Heydon & McNevin.*

J. B.

(1) (1910) 80 L.J. P.C. 1.