[HIGH COURT OF AUSTRALIA.]

CUTTS . . . . . APPELLANT;
DEFENDANT,

AND

BUCKLEY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 28; *May* 1.

Rich, Starke, Dixon and Evatt JJ.

Practice—Damages—Two counts in declaration—Misrepresentation and breach of warranty—General verdict for plaintiff—Appeal—Verdict entered for defendant on warranty count—General verdict, therefore, not sustainable—New trial on other count—Costs—Supreme Court Procedure Act 1900 (*N.S.W.*) (*No.* 49 *of* 1900), *sec.* 7.

In an action brought in the Supreme Court of New South Wales for damages the plaintiff declared in two counts, (1) for fraudulent misrepresentation, and (2) for breach of warranty, both of which were based on representations and statements, alleged to have been made on 23rd May 1930 by the defendant to the plaintiff, that the takings of the defendant's hotel were £127 10s. per week, of which amount not more than £4 or £5 was taken in the house, the balance being taken in the bar. Although in the meantime he had been informed by his agent, a broker, that particulars obtained from the Licensing Court and the brewery company concerned indicated that the bar takings were only £98 per week, the plaintiff, on 19th June, signed a contract to purchase the hotel from the defendant. The written contract did not contain the warranty sued upon. The plaintiff claimed that, although he relied to some extent on the broker, he relied principally on the statement which he alleged had been made by the defendant. The trial Judge took a general verdict from the jury upon both counts for an entire sum of damages.

Held that there was no evidence of a warranty, and as the evidence did not support each count the general verdict could not stand: judgment should be entered for the defendant on the count for breach of warranty, and, having regard to the evidence, a new trial should be ordered on the count for misrepresentation.

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The exercise, in the circumstances of the case, of the Court's discretion as to costs considered.

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

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales by Sydney Shaw Buckley against Frederick Cutts for £3,000 damages, the plaintiff declared in two counts, (1) for fraudulent representation; and (2) for breach of warranty, both of which were based upon representations and statements alleged to have been made by the defendant to the plaintiff on 23rd May 1930 in relation to the sale of the defendant's hotel at Richmond, New South Wales.

On 23rd May the plaintiff went to the defendant's hotel to make inquiries with a view to purchase. In conversation the defendant, in answer to a question, stated that the takings, which were not kept separately for the bar, amounted in all to an average of £127 10s. per week. When pressed for the figures relative to the house, as distinct from the bar, he is alleged to have said they were £4 or £5 per week. After some further discussion the plaintiff signed what was described as a provisional contract and paid a deposit of £300. The document so described was not produced in evidence and there was nothing beyond its description to indicate its nature or contents. But apparently the deposit ultimately formed part of the purchase money under the formal contract, which was executed on 19th June in the same year. The transaction comprised a sale not only of the licence but also of the freehold of the premises. No question was raised as to the accuracy of the defendant's statement that the total takings of the hotel averaged £127 10s. per week. The plaintiff admitted that he knew that the ordinary method of checking any statement as to bar takings was to obtain the figures as to purchases and add 100 per cent. Between 23rd May and 19th June figures were obtained by the plaintiff's agent, a broker, both from the brewery company which supplied the liquor to the hotel and from the Licensing Court. Applying the method of adding 100 per cent to either set of figures it was apparent that the liquor sales in the bar did not average £90 per week, and that with sales of soft drinks and tobacco added the

bar takings would not reach £98 per week. These figures were worked out by the agent, and the plaintiff admitted that before he signed the contract on 19th June he was aware of the results shown, and that prior to the signing of the contract he had not said anything to the defendant that in any way suggested that the defendant had told him an untruth. Notwithstanding these admissions, the plaintiff claimed that he had believed what was told to him about the takings by the defendant, and he said that he relied upon the information, although he mostly relied upon the advice given to him by the agent after getting the figures as to the liquor purchases. He said that he had procured the figures as a check upon the defendant's statement in regard to the takings and to use as a guide. The facts relied on in support of each count were practically the same; the case was fought mainly on the allegation of fraud, but both counts were left to the jury without objection, the trial Judge having explained shortly to the jury what must be established before they could find that there was a separate collateral contract of warranty, and that the highest sum that could be awarded as damages under the misrepresentation count was the sum of £1,116, and, under the warranty count, the sum of £2,230. A general verdict was returned for the plaintiff in the sum of £525.

An appeal by the defendant to the Full Court of the Supreme Court was, by a majority, dismissed, on the ground, as to the misrepresentation count, that there was just sufficient material upon which the jury might reasonably have based their verdict; and, as to the second count, that there was probably sufficient matter to leave to the jury on the subject of warranty, but, in any event, the Court should not interfere, because no objection was taken at the trial to the issue being left to the jury by the Judge, and he was not asked to direct a verdict for the defendant, and upon the motion by way of appeal the question was only raised during the argument.

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

Windeyer K.C. (with him *Webb*), for the appellant. The respondent admitted in evidence that he knew that there were at least four paying boarders residing at the hotel, and that as the hotel was

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situate in a tourist district there was a big demand for meals. He must have known, therefore, that the takings in respect of the "house" trade were in excess of £4 or £5 per week. As the respondent agreed with the mathematical calculation made for the purpose of arriving at the takings and profits and also was, prior to the making of the contract, furnished with definite figures obtained from the Licensing Court and the brewery company which were admittedly satisfactory, he cannot claim that he relied upon conversations which took place at the first interview (*Derry* v. *Peek* (1)). If the respondent relied upon such conversations and the representations then made, why did he cause the investigations to be made? His actions are inconsistent with his assertion, and on this point the verdict of the jury cannot be supported.

[EVATT J. referred to *Edgington* v. *Fitzmaurice* (2).]

There is nothing in the evidence to support a warranty. A contract *dehors* the written contract must be established to support the warranty count.

[EVATT J. referred to *Heilbut, Symons & Co.* v. *Buckleton* (3).]

The evidence establishes that the respondent did not rely upon the conversations referred to; therefore the appellant is entitled to a verdict on the warranty count, and, as the evidence was unsatisfactory, a new trial should be granted on the misrepresentation count.

[DIXON J. referred to *Corner* v. *Shew* (4) and *Measures* v. *McFadyen* (5).]

A mere representation standing alone has never been held to evince an intention of warranty.

Watt K.C. (with him *Studdert*), for the respondent. No injustice has been done. The facts were fully and properly placed before the jury, and as the jury was informed by the trial Judge that the facts were the same in respect of both counts, the verdict, being general, can be taken to have been given on both counts. The quantum of damages awarded was not excessive for either count.

(1) (1889) 14 App. Cas. 337.
(2) (1885) 29 Ch. D. 459, at pp. 482, 485.
(3) (1913) A.C. 30.
(4) (1838) 4 M. & W. 163; 150 E.R. 1386.
(5) (1910) 11 C.L.R. 723.

The utmost relief, in the case of a defect of the nature alleged, would be the right to amend the postea by entering up a verdict for the respondent on the misrepresentation count and for the appellant on the warranty count. The evidence shows that the statement as to the house takings was made with a knowledge of its falsity and was clearly fraudulent. All the facts which would be relied upon for the warranty in this case show fraud. The granting of a new trial is a matter within the discretion of the Court (*Cofield* v. *Waterloo Case Co.* (1)). In exercising its discretion the Court should endorse the attitude of the Full Court of the Supreme Court, having regard to the facts, amongst others, that the appellant's counsel did not ask for the warranty count to be withdrawn from the jury, and did not point out at the moment the general verdict was taken that there should be a separate verdict in respect of each count. There is ample evidence of warranty collateral to the main contract. Words may be construed to import warranty. The warranty is established by the fact that the representations were, in the circumstances, acted upon.

[EVATT J. referred to *Bowes* v. *Shand* (2).]

This case is distinguishable from the case of *Heilbut, Symons & Co.* v. *Buckleton* (3) because there the warranty had nothing to do with subject matter. All the elements of warranty enunciated in *Schawel* v. *Read* (4) are present in this case. The statement of the appellant so far as it referred to house trade was descriptive. An illustration of the way in which a representation made at the time of sale is treated as a contract is shown in *Bulloch* v. *Glasson* (5). Here the statement as to takings was made by the appellant at the time of the sale for the purposes of the sale, and was intended to be, and was, acted upon by the respondent: this, in conjunction with the production of his book in support of the statement, is sufficient to constitute a warranty.

Windeyer K.C., in reply. The principles laid down in *Corner* v. *Shew* (6) are applicable to this case. This is a matter in the nature of a defect upon the records, and the appellant is entitled to a new

(1) (1924) 34 C.L.R. 363.
(2) (1877) 2 App. Cas. 455.
(3) (1913) A.C. 30.
(4) (1913) 2 I.R. 64.
(5) (1915) 15 S.R. (N.S.W.) 91.
(6) (1838) 4 M. & W. 163; 150 E.R. 1386.

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trial as a matter of absolute right and not as a matter of discretion (*Measures* v. *McFadyen* (1)). Where there is a general verdict the Court cannot surmise whether it is in respect of one or more of the counts. The measure of damages applied under the misrepresentation count is different from the measure of damages applied under the warranty count; therefore the damages awarded should have been apportioned. Under the provisions of sec. 7 of the *Supreme Court Procedure Act* 1900 (N.S.W.) a verdict should be entered for the appellant on the warranty count, following which a new trial should be ordered in respect of the misrepresentation count.

Cur. adv. vult.

May 1.

The following judgments were delivered:—

RICH J. The declaration in this action contained two counts, a count in deceit and a count for breach of warranty. The plaintiff recovered a general verdict in the action for one sum of damages. The plaintiff was the purchaser of an hotel. The misrepresentation or warranty alleged consisted of a statement by the defendant, the vendor, that, out of the takings which the defendant accurately stated as an average of £127 10s. a week, only £4 or £5 a week was taken in the house, that is, as distinguished from the bar. In the Full Court the verdict was attacked upon the ground that a finding that the plaintiff in entering into the contract relied upon this misrepresentation was unreasonable and that no evidence fit to be submitted to a jury was given of the making of the warranty alleged. In the circumstances of the case, a contract collateral to the main contract is needed to support the count for breach of warranty and, in my opinion, it is clear that no such contract was intended. The second count cannot, therefore, be supported. It follows that the verdict must be entirely set aside. The case is not one in which the damages found must necessarily be the same on each count. *Non constat* that the amount does not represent the damages for breach of contract. The plaintiff must, therefore, show that he is entitled to a verdict on both counts, not on one or the other. For the respondent, Mr. *Watt's* principal answer to this position was that the

(1) (1910) 11 C.L.R. 723.

defendant did not at the trial take the point that there was no evidence of a warranty and did not ask that a verdict on each count should be taken separately. The defendant was, however, permitted in the Full Court to argue that there was no evidence of a warranty, and indeed it is difficult to suppose that so obvious a question was not implicit in the proceedings at the trial, where the Judge left the second count to the jury. It was as much, if not more, the plaintiff's business as the defendant's to see that a verdict was taken severally. In my opinion the contention goes to costs only.

The appeal should be allowed, a verdict entered for the defendant on the second count, and a new trial ordered on the first count only. Notwithstanding the dissenting judgment of *Halse Rogers* J,, it is not possible upon the evidence to accede to the argument that a verdict should be entered for the defendant upon the count in deceit. Possibly the Court might be justified, having regard to the evidence, the summing up, and the amount assessed by the jury as damages, in setting aside the verdict on the first count and ordering a new trial, but the Court did not think it necessary to hear Mr. *Watt* on the subject.

Upon the question of costs of these proceedings we have a difficult discretion to exercise. The trial proved abortive through the failure of all parties to insist that the legal issues were dealt with as the law requires. The appellant's notice of appeal to the Full Court does not take the ground, to which we have given effect, distinctly and clearly. On the other hand, the plaintiff respondent, by including in his declaration a count he could not support, persisting in it up to and beyond verdict, and accepting a verdict which was general and not several, has made a new trial necessary. We have a full discretion over costs. In exercising it we should take into consideration the rules prevailing in the Supreme Court, but they do not bind us. On the whole, I think a just order will be to give the appellant the costs of this appeal and order that the parties abide their own costs of the first trial and of the appeal to the Full Court.

STARKE J. I agree.

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DIXON J. In the course of the negotiations for the sale of his hotel to the plaintiff, the defendant produced for the plaintiff's inspection a book in which his takings were recorded. The book did not distinguish between the takings from the bar and the takings from the house. The plaintiff's case was that, in response to his enquiry how much consisted of takings in the house, the defendant replied, in effect, that the weekly average takings from the house were not more than five or six pounds. It was not disputed that in fact the average weekly takings from the house were greatly in excess of £5, and the takings from the bar consequently less, or that the net profit from house takings in an hotel is much less than from bar takings.

The declaration contained two counts. The first alleged the statement as a fraudulent misrepresentation; the second, as a warranty. In submitting the case to the jury, the learned Judge, who presided at the trial, distinguished between the two causes of action and between the respective measures of damages appropriate to them. But he took a general verdict from the jury upon both counts for an entire sum of damages. The defendant moved to set this verdict aside and to have a verdict entered for him or a new trial ordered on the grounds that the verdict was against the evidence and the weight of the evidence, and that the findings that the representation was made and acted upon were unreasonable. The motion or appeal was heard by *Davidson* J., *Halse Rogers* J., and *Milner Stephen* J. *Halse Rogers* J. was of opinion that the finding, upon the first count, that the plaintiff acted upon the misrepresentation, was unreasonable and that there was no evidence of a warranty to support the second count. He founded his opinion that the finding of inducement was unreasonable upon some admissions made by the plaintiff in the course of his cross-examination to the effect that before he executed the final contract of purchase there had been placed before him the information as to licence fee and liquor purchases upon which a purchaser of an hotel usually estimates returns from the bar. His Honor thought that consistently with this material the plaintiff could not have believed the house returns formed so small a part of the revenue from the hotel. His reason for holding that there was no evidence of a warranty was that the statement

ascribed to the defendant, having regard to the nature and the circumstances in which it was made, could not reasonably be considered contractual. On the other hand, *Davidson* J., with whom *Milner Stephen* J. agreed, arrived at the conclusion on the first point that although the plaintiff when he signed the contract "had very convincing evidence in the form of the purchase figures, there is nothing definite to the effect that he was or reasonably should have been convinced by them" and that there was "just sufficient material upon which the jury may reasonably have based their verdict." Upon the second question, his Honor thought there was probably sufficient matter to leave to the jury on the subject of warranty, but, in any event, the Court should not interfere, because no objection was taken at the trial to the Judge's leaving the issue to the jury and he was not asked to direct a verdict for the defendant, and upon the motion by way of appeal the question was raised only during the argument. Accordingly the appeal was dismissed. In my opinion there was evidence in support of the first count upon which the jury were at liberty to find for the plaintiff. It appeared that on the day when the statement was made to him the plaintiff executed some document called a provisional contract of purchase and paid a deposit. He afterwards obtained the information as to the liquor purchases and the exact licence fee from which he might, and, perhaps, should, have corrected any such statement as he ascribes to the defendant with reference to the amounts of takings derived respectively from the bar trade and the house trade. But he persisted that he relied upon the defendant's statement. However unlikely it may be considered that the plaintiff did act upon the defendant's supposed statement, the facts are not absolutely inconsistent with its continuing to operate as an inducement to him to proceed with the purchase, and it was the province of the jury to determine the question of fact.

But upon the second count I think the plaintiff was not entitled to succeed. The transaction was reduced twice to written form and neither writing contained the warranty sued upon. The statement attributed to the defendant could have no contractual force unless it formed part of a collateral contract and for such a contract no consideration existed, except, possibly, the making of the main

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Dixon J.

contract. The declaration does not plead such a contract and, in my opinion, no such contract could be made out upon the facts of this case. It would be necessary to find in the conversation deposed to by the plaintiff an antecedent promise by the defendant as to the correctness of his estimate of the average house takings, given antecedently to and in consideration of the plaintiff's entering into the contract of purchase and intended to be collateral, extrinsic or supplementary to the main contract as distinguished from being part of it. The circumstances narrated by the plaintiff support no such view of the statement which the plaintiff attributes to the defendant. The defendant was, I think, as a matter of law, entitled to a verdict upon the second count (sec. 7 of the *Supreme Court Procedure Act* 1900). Rule 151B of the *General Rules of the Supreme Court* provides that no direction, omission to direct, or decision as to the admission or rejection of evidence given by the Judge presiding at the trial, shall, without the leave of the Court, be allowed as a ground for a notice of motion for a new trial or to enter judgment unless objection was taken at the trial. It is not clear if, in permitting the question whether there was evidence of a warranty to be argued, the Supreme Court meant to exercise its power under this rule, or if, on the other hand, *Davidson* J. relied upon the rule. There is some doubt whether the rule applies to a case in which the evidence discloses the entire absence of a cause of action recovered upon. But, in any event, I think that in the present case the defendant should be allowed to contend that the verdict was upon the second count unsupported by evidence as well as against the evidence, a contention from which he cannot be precluded (*Banbury* v. *Bank of Montreal* (1)). The result is that a verdict should be entered for the defendant upon this count. The verdict is entire and is applicable to both counts. We do not know what damages are ascribed to the first count. Indeed, the amount assessed by the jury is very difficult to explain consistently with the evidence and with the direction as to damages. A verdict with entire damages upon several counts, which cannot be sustained upon one, cannot be sustained upon any count, because the entire sum is applicable to

(1) (1918) A.C. 626, per Lord *Parker of Waddington*, at p. 706.

all the counts (see *Dadd* v. *Crease* (1); *Leach* v. *Thomas* (2); *Lamb* v. *West* (3); *Hodge* v. *Rudd* (4)).

I agree that there should, therefore, be a new trial upon the first count.

The case is one in which it is not easy to decide how to exercise the Court's discretion as to costs. But I think the costs of the first trial should abide the event of the new trial. I would order that the parties abide their own costs of the appeal to the Supreme Court, but I would order that the defendant, the appellant, should have his costs of the appeal to this Court.

EVATT J. In his action at common law against the appellant for damages the plaintiff, who is the present respondent, declared in two counts, the first for fraudulent misrepresentation, the second for breach of warranty. Both causes of action were based upon representations and statements alleged to have been made to the plaintiff by the defendant about May 22nd, 1930, in relation to the sale of the Commercial Hotel, Richmond, New South Wales. The contract between the parties was not entered into until about twenty-eight days later, on June 19th, 1930.

There was a lengthy trial before *James* J. and a jury. A general verdict was returned for the plaintiff in the sum of £525.

Before discussing the merits of the appeal, it is necessary to touch upon an important preliminary question. In his judgment *Halse Rogers* J. stated: "A general verdict was returned for the plaintiff who is in a case such as this entitled to hold his verdict if the evidence is sufficient to support either count."

This statement of the relevant law and practice cannot, I think, be supported. In my opinion *Davidson* and *Stephen* JJ. adopted the correct method of approach, which was laid down by the Supreme Court of New South Wales many years ago in *Lamb* v. *West* (3). In that case the Court was clearly of opinion that where several counts in a declaration are left to the jury, and the jury return a general verdict for the plaintiff, the verdict cannot stand unless there is evidence to support each count.

(1) (1833) 2 C. & M. 225, per *Bayley* B., at p. 225; 149 E.R. 742, at p. 743.
(2) (1837) 2 M. & W. 427, per *Parke* B., at p. 432; 150 E.R. 824, at p. 826.
(3) (1894) 15 N.S.W.L.R. 120.
(4) (1902) 19 N.S.W.W.N. 119.

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There will, upon occasion, arise exceptional cases where the rule need not be applied. For instance, it may appear that the damages awarded by a general verdict for a plaintiff must be the same under each count, or can be reasonably attributed to one count only. In such cases the insufficiency or absence of evidence in support of one or more counts may not prevent the Full Court from exercising its wide powers by setting aside the general verdict, entering a verdict for the plaintiff for the same damages upon the count or counts which are supported by evidence, and for the defendant upon the count or counts which are not.

But the present case presents no such exceptional features. Here, the jury *may* have been satisfied, on the evidence, that the hotel property was worth very little less than the sum of money the plaintiff paid for it; so that, on the count of fraud, the damages should be small or trifling; so that the sum of £525 awarded may have represented the damages estimated to result from the breach of warranty. Upon this reasoning, if there was no evidence of a warranty, the trial miscarried.

It follows that, in order to retain its verdict, the plaintiff should be able to point to evidence in support of each of the two counts. Proceeding to the count of fraud inducing the contract, the appellant argues that the evidence establishes that, when the plaintiff signed the contract, he was relying, not upon the fraudulent representation alleged, but upon the inferences he drew from the ascertained brewery purchases and licensing returns, and upon the recommendation made to him by his adviser. Undoubtedly there is evidence that the plaintiff placed considerable reliance upon these other matters. But he persisted in affirming that he relied also on the representations made to him by the defendant. It is impossible to say that there was no evidence that, to a substantial extent, the plaintiff was induced to purchase by the representations of the defendant. That being so, the case of *Edgington* v. *Fitzmaurice* (1) applies. *Bowen* L.J. indicated (at p. 482) that a plaintiff can substantiate this part of his cause of action in deceit if the representation "materially contributed to his so acting." And *Fry* L.J. said (at p.

(1) (1885) 29 Ch. D. 459.

485) that if the false statement of fact actually influenced the plaintiff the defendant is liable, even though the plaintiff has also been influenced by other motives.

The appellant next contends that there is no evidence to support the warranty count, and with this contention I agree. This case furnishes a good illustration of a tendency in certain New South Wales tribunals to give a contractual character to representations which merely induce a written contract. The pleader often inserts a second count, as here, in addition to a count based on deceit. And a reference to the form of the second count shows how unsatisfactory it is. It does not, strictly speaking, allege a collateral warranty, the consideration for which is the signing of the main contract. It only alleges certain " inducements " to enter into the main contract by means of representations, described as acts of " warranting." As it fails to allege fraud, it would be demurrable, but for the sanction of long and erroneous usage.

The most favourable way to the plaintiff of regarding the second count is to treat it as alleging a collateral warranty ; upon that assumption, however, it is unsupported by proof.

The contract between the parties was in writing and dealt very elaborately with many matters attendant upon and relating to the subject matter of the hotel and its sale. Clause (*e*), for instance, contained an express warranty as to the absence of marks against the licensee or the hotel. It is true, as Mr. *Watt* pointed out, that a collateral verbal warranty may co-exist with a written agreement containing express warranties upon other matters, providing there is no inconsistency. But it may none the less be a relevant matter to see what area of subject matter the parties were endeavouring to cover with contractual obligations, and in this way the terms of the written agreement may often prove of assistance.

Heilbut, Symons & Co. v. *Buckleton* (1) is the leading case on the subject, and it is unnecessary to repeat the statements of principle there adopted. They are certainly not inapplicable to a case in which representations are made as to the subject of the takings of a hotel in the course of negotiations for sale. This is illustrated by the case of *T. & J. Harrison* v. *Knowles & Foster* (2) where the

(1) (1913) A.C. 30. (2) (1918) 1 K.B. 608.

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Court of Appeal held that written particulars as to the dead-weight capacity of certain ships did not form any part of the total contractual arrangements between the parties, although the seller furnished written particulars to the buyer before the written contract was entered into.

In the present case the words used were " words not of contract but of representation of fact " (per Viscount *Haldane* L.C. in *Heilbut, Symons & Co.* v. *Buckleton* (1)). They were made by way of inducement, I have no doubt, but, having regard to the non-existence of the contract when the alleged warranties were made, the time which elapsed before the contract was made, the elaborate provisions of the contract as to analogous matters, and the complete absence of any suggestion that the statement as to the takings was promissory in character or was intended to be made part of the actual bargain, I conclude that there was no evidence to support the count of collateral warranty.

But this question, the absence of any evidence of warranty, is a question of law. It was not raised by counsel for the defendant at the trial. Nor was it taken as a ground of appeal in the notice of appeal to the Full Court. Under these circumstances rule 151B of the *Regulæ Generales* applies. This rule is in the following terms, namely :—" No direction, omission to direct, or decision as to the admission or rejection of evidence given by the Judge presiding at the trial, shall, without the leave of the Court, be allowed as a ground for such notice of motion unless objection was taken at the trial to the direction, omission, or decision by the party on whose behalf the notice of motion has been filed."

The point involved amounts to an objection that the trial Judge failed to direct a verdict in favour of the defendant on the second count. The Full Court gave no express leave to argue this point of law, but a decision on the question of leave did not become necessary because the majority thought there was sufficient evidence to support the second count.

On the whole I do not think that this Court should refuse leave to the defendant to take advantage of the strict legal position that

(1) (1913) A.C., at p. 36.

there was no justification for a verdict upon the second count. But the question of terms is of importance, and I think that the granting of leave should be conditional upon the imposition of very special terms as to costs as the price of the defendant's obtaining the setting aside of the verdict.

With regard to the costs of the first trial, they should be allowed to the party who succeeds on the new trial, which will be limited to the count of fraud. There are of course costs to which the defendant would ordinarily become entitled in any event by reason of his present success upon the second count. But these costs he should not get unless he succeeds upon the second trial. Looking at the matter fairly, there is some ground for the plaintiff's contention that, had a question been asked of the jury after their return into Court, they would have found for the plaintiff on the first count for the damages actually awarded. Had they done so, the verdict could not have been disturbed in view of our decision that there was evidence to support the first count. If the jury should find fraud upon the second trial there is no reason why the defendant should not have to bear the costs of both trials. And equally, if the defendant succeeds upon the second trial, he should also get his costs of the first trial.

I dissent from the proposed order as to costs, and particularly from the proposal that each party should abide his own costs of the first trial. In my opinion, such an order places an unfair burden upon the party who will be finally successful, and prevents him from obtaining anything approaching the indemnity for which the whole system of costs is designed.

In the result this Court agrees with *Davidson* and *Stephen* JJ., and disagrees with *Halse Rogers* J. as to the existence of evidence to support the count of fraud. It agrees with *Halse Rogers* J., and disagrees with *Davidson* and *Stephen* JJ., that there was no evidence to support the second count. And it agrees with *Davidson* and *Stephen* JJ., and disagrees with *Halse Rogers* J., that, in the circumstances, the absence of evidence to support the second count should invalidate the general verdict in favour of the plaintiff.

The appeal should be allowed, the judgment of the Full Court discharged, the verdict for the plaintiff should be set aside, and a

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verdict entered for the defendant upon the second count and a new trial ordered as to the first count.

Appeal allowed with costs. New trial ordered on first count only. Verdict entered for the defendant on the second count. The parties to abide their own costs of the first trial and the appeal to the Full Court.

Solicitors for the appellant, *F. R. Cowper, Stayner & Wilson.*
Solicitors for the respondent, *R. D. Meagher, Sproule & Co.*

J. B.

[HIGH COURT OF AUSTRALIA.]

SOUTH AUSTRALIAN RAILWAYS COMMISSIONER . . . . . } APPELLANT;
DEFENDANT,

AND

McGLEW AND COMPANY LIMITED . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1933.

MELBOURNE, *March* 16.

SYDNEY, *April* 21.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Negligence—Fire—Goods carried to destination by South Australian Railways—Goods consigned at "owner's risk"—Possession taken by consignee—Goods stacked by consignee in railway yard—Leave and licence—Negligent use of fire by railway employees—Goods burnt on railway premises—By-laws limiting liability of Commissioner—Liability of Railways Commissioner for loss of goods.

The respondent consigned cornsacks to a railway station in South Australia at "owner's risk." When the sacks arrived at their destination, the respondent's agent, the consignee, took possession of them and stacked them in the railway yard near an office which he occupied under a licence from the Railways Commissioner. While there the sacks were destroyed by fire owing to the