[HIGH COURT OF AUSTRALIA.]

EDMOND WEIL INCORPORATED . . . APPELLANT;
PLAINTIFF,

AND

RUSSELL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A 1936.

SYDNEY, *May* 1, 4, 5.

MELBOURNE, *June* 9.

Starke, Dixon and Evatt JJ.

Practice—Action—Specific questions answered by jury—Jury discharged without finding formal verdict—Verdict to be entered—Conformity with jury's answers—Duty of judge.

Where a jury answers questions and is discharged without finding a formal verdict the court should enter that verdict which flows in law from the answers. To enable a trial judge to set aside or ignore findings made by the jury and enter a verdict inconsistent with them, the positive consent of the parties must have been obtained, either by an express reservation of power made with their assent, or in some other manner.

So *held* by *Dixon* and *Evatt* JJ.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales, by Edmond Weil Incorporated, of New York, United States of America, importers and exporters of hides and skins, against William H. Russell, of Sydney, New South Wales, hide and skin merchant, to recover certain moneys upon a balance of account in connection with certain trading transactions between them. Particulars of the claim and of the defence were filed by the respective parties. In his particulars the defendant denied indebtedness except as to the sum of £178 13s. 6d.

Pursuant to an order made on the application of the plaintiff, pleadings were dispensed with, and the cause was heard as a commercial cause before *Halse Rogers* J. with a jury. One of the issues directed for trial was whether the plaintiff was entitled to recover from the defendant in respect of certain transactions any, and if so what, amount in excess of £178 13s. 6d. One of these transactions (referred to as the Brodsky transaction) involved a shipment of 150 Queensland wet salted hides, which after some considerable delay were sold in a defective condition and produced but a small return. The plaintiff credited the defendant's account with the net proceeds. The defendant, however, claimed that he was entitled to be credited with the invoiced price of the hides, that is, the sum of £508 3s. 1d.

Included among a number of questions left by the trial judge to the jury was the following: "Is the defendant entitled to charge the plaintiff and to deduct from its account, £508 3s. 1d. in respect of 150 Queensland hides (the Brodsky transaction)?" The jury answered the question: "Yes." The other questions, which are not material for the purposes of this report, were answered in favour of the defendant. Thereupon it was agreed that the jury should be discharged so that the trial judge might direct what the verdict should be. Argument ensued, after which the judge, on the ground that there was no evidence upon which the jury could answer the question in respect of the Brodsky transaction in favour of the defendant, directed that a verdict should be entered in favour of the plaintiff for £508 3s. 1d. in respect of that transaction notwithstanding the jury's answer to the question. His Honour said:—"I am of opinion that notwithstanding the findings of the jury on the questions, if I am satisfied that there was no evidence to support any particular finding I should still at this stage direct the jury to find a verdict. In other words, I am of opinion that, where a judge sitting at nisi prius or in a commercial cause leaves any question to be determined by a jury, he still has control of the case to the extent that he can enter a nonsuit in a proper case, or direct a verdict, if on a consideration of the whole of the evidence and what has taken place during the trial he is of opinion that in law such a course is necessary. I indicated this view during argument, and, although"

H. C. OF A. 1936. EDMOND WEIL INCORPORATED v. RUSSELL.

counsel for the defendant "still maintained his claim, it was agreed that there was no difference between my directing the jury to find a verdict and my entering a verdict after their discharge, and, accordingly, the parties agreed that the jury should be discharged, the question as to the way the verdict should be entered being entirely unaffected by the fact that they had so agreed."

The defendant appealed to the Full Court of the Supreme Court for a reduction in the amount of the verdict, or, alternatively, for a new trial. That court held that there was evidence to support the finding of the jury in respect of the Brodsky transaction and that the verdict directed by the trial judge should be reduced accordingly.

From that decision the plaintiff appealed to the High Court.

Further facts appear in the judgments hereunder.

Pitt K.C. and *Cook*, for the appellant.

Flannery K.C and *Gain*, for the respondent.

Cur. adv. vult.

June 9. The following written judgments were delivered :—

STARKE J. The appellant is an American corporation which imports and exports hides and skins. The respondent carries on, in New South Wales, the business of an exporter of hides and skins. The American corporation (called the corporation) brought an action against the respondent claiming to recover certain moneys, on a balance of accounts, in connection with certain transactions between them. The action was tried as a commercial cause by *Halse Rogers* J. with a jury. An order was made dispensing with pleadings, but directing certain issues for trial, one of which was whether the corporation was entitled to recover from the respondent in respect of certain transactions any and if so what amount in excess of £178 13s. 6d. One of these transactions is called the Brodsky transaction. The learned judge submitted to the jury certain questions, including the following :—"Is the defendant" (the respondent here) "entitled to charge the" corporation "and to deduct from its account £508 3s. 1d. in respect of 150 Queensland hides

(the Brodsky transaction) ? " And the jury answered the question: " Yes." Some misunderstanding arose as to the course that should be pursued after the jury had answered the questions submitted to them. But, by consent, the jury were discharged, and it was agreed that the learned judge should enter the verdict. He said that his recollection of the agreement between counsel for the parties was not clear. But he was of opinion that, notwithstanding the findings of the jury on the questions, he was at liberty to direct a verdict if he were satisfied that there was no evidence to support any particular finding. " In other words " said the learned judge " I am of opinion that where a judge sitting at nisi prius or in a commercial cause leaves any question to be determined by a jury, he still has control of the case to the extent that he can enter a nonsuit in a proper case, or direct a verdict, if on a consideration of the whole of the evidence and what has taken place during the trial he is of opinion that in law such a course is necessary. I indicated this view during the argument, and though " counsel " still maintained his claim it was agreed that there was no difference between my directing the jury to find a verdict and my entering a verdict after their discharge, and accordingly the parties agreed that the jury should be discharged." After argument, and upon further consideration, the learned judge held that there was no evidence to support the finding of the jury as to the Brodsky transaction. He therefore directed that a verdict should be entered for the corporation for £508 3s. 1d. in respect of that transaction. An appeal was taken by the defendant, the respondent here, to the Supreme Court of New South Wales, and a new trial was also sought. The learned judges on appeal held that there was evidence to support the finding of the jury in respect of the Brodsky transaction, and that the verdict directed by the trial judge should be reduced accordingly. An appeal is now brought to this court by the corporation against this decision, and it has been limited to the Brodsky transaction. The respondent has not on this appeal challenged the authority of the trial judge to enter a verdict for the corporation in respect of the Brodsky transaction, notwithstanding the finding of the jury, if there be no evidence to support that finding. The critical question is whether there is any evidence to support it.

H. C. OF A. 1936. EDMOND WEIL INCORPORATED v. RUSSELL. Starke J.

The evidence was voluminous, and the jury must be taken to have found the facts generally in accordance with the version of the defendant, the respondent here, unsatisfactory and unintelligible though it was to the learned trial judge. So to the respondent's evidence I turn. But to abridge it is not possible or even desirable. The following, which I regard as the substance of the evidence, is extracted from the transcript :—[His Honour set out the evidence, and proceeded : —]

The respondent in this action sought to make the corporation liable for the amount of the invoice charge, £517 9s. 7d., for the 150 hides. But it was conceded that an item in that account, "Your allowance £9 6s. 6d.," could not be supported. No claim was made or suggested against the appellant that it had converted the hides to its own use, or deprived the respondent of the use and possession of the same. The claim was based upon a sale of the hides to the corporation, or upon the ground, to use the language of *Davidson* J. in the Supreme Court, that the corporation "was placed in the position under its agreement with the respondent of having to take the goods and provide the credit in payment." It is true "that there is no magic" in the words "agency" or "representative" ; the words are "often used in commercial matters where the real relationship is that of vendor and purchaser" (*Ex parte White* ; *In re Nevill* (1) ; *W. T. Lamb & Sons* v. *Goring Brick Co. Ltd.* (2)). Also, it is true that some inconvenience results if privity of contract is established between the constituents of the corporation and the respondent. But there is no presumption that the corporation is responsible as a buyer of the respondent's goods—its liability depends upon the contract between it and the respondent (*Armstrong* v. *Stokes* (3) ; *Harper & Sons* v. *Keller, Bryant & Co.* (4) ; *Miller, Gibb & Co.* v. *Smith & Tyrer Ltd.* (5) ; *Flatau, Dick & Co.* v. *Keeping* (6)). I gather that the same principle is acted upon in the United States of America (See *Restatement of the Law* (1933), vol. II., p. 710, "Agency," sec. 320 (*d*), "Foreign Principals"). All the learned judges in the Supreme Court rejected the view that the relationship between the corporation and the respondent was that of buyer and seller. In

(1) (1871) L.R. 6 Ch. 397, at p. 399.
(2) (1931) 37 Com. Cas. 73.
(3) (1872) L.R. 7 Q.B. 598.
(4) (1915) 20 Com. Cas. 291.
(5) (1917) 2 K.B. 141.
(6) (1931) 36 Com. Cas. 243.

this I agree. The parties, according to the evidence, contemplated three classes of transaction: The consignment of goods to the corporation as an agent for sale; adventures on joint account; and transactions in accordance with the respondent's conversation with Cahn, already set out, and which I shall call commission transactions. The Brodsky transaction was not a consignment to the corporation as an agent for sale, nor was it a joint adventure with that corporation. *Halse Rogers* J. was of opinion that it was a transaction entirely apart from the arrangement made with Cahn. "When the evidence" said the learned judge, "is looked at carefully, it becomes perfectly apparent that the arrangements he" (the respondent) "made as to guarantee were arrangements in regard to buyers whom the" corporation "found, and that in any such transaction the" corporation, "having found a buyer for the defendant" (the respondent), "had undertaken to guarantee that the defendant should receive the full invoiced price. But this was a transaction entirely apart. It was not the case of a sale made by the defendant through the" corporation, "it was not a case in which they had found a buyer for him, it was a case in which the defendant had made his own arrangements and was sending forward a sample, and I do not think that although the defendant said that he looked to the" corporation "for the price under their guarantee there is any evidence that they accepted that position in regard to this particular transaction. . . . The real position was that the defendant sent these hides forward in fulfilment of an agreement that he had made with a buyer whom he had met in the" corporation's "office, that he sent them forward to the" corporation "as his agent for them to make delivery to that buyer, and that it was a transaction in no way covered by the guarantee which has been mentioned." But I rather think the learned judge is there assuming the function of the jury. According to the evidence of the respondent, Cahn was "to see to the contract," and that it was forwarded to Australia. The invoice, and the letters of March 1928 indicate that the transaction was regarded by the respondent as on the commission basis. The item "Your allowance" in the invoice points to this conclusion, and so do the statements in the letters requesting a credit to cover the shipment and referring to the hides as a "sample of hides as ordered by one of your tanners."

H. C. OF A. 1936. EDMOND WEIL INCORPORATED v. RUSSELL. Starke J.

The question, to my mind, is what obligations the corporation assumed in transactions on the commission basis. Its obligation was to find buyers for the respondent's goods, and for so doing it was to receive a commission. It may be that it could establish the relationship of seller and buyer between the respondent and its constituents or customers, or that it could establish such a relationship as between its customers and itself. But the arrangement did not contemplate or stipulate that the corporation should itself buy from the respondent, or that the relationship of seller and buyer should be established between them. The corporation was bound, no doubt, to exercise due care, skill and diligence in procuring buyers of the respondent's goods, and to arrange that the buyers "put up a credit" for the goods. If the respondent were dissatisfied with the credit "put up" by the buyers, then he could call upon the corporation "to put up a credit," and for which, if it did so, a further charge of $\frac{1}{2}$ per centum was payable. It was admittedly not a *del credere* but a special arrangement. The corporation is not charged with any want of care, skill or diligence in connection with the Brodsky transaction, but simply that it agreed to "put up a credit" for, or to pay, the amount stated in the invoice forwarded to it. But, in my opinion, the obligation of the corporation to "put up a credit" only arose when it had procured a buyer, and when that buyer's credit was refused, or was unsatisfactory to the respondent. The evidence is that Brodsky was willing to try out a pitfull of hides, and this is borne out by a cable which the respondent sent to Australia directing his representative "to buy 150 Queensland Meat Works hides as a sample." The respondent did not even remember the name of the supposed buyer. No price was ever fixed, though the respondent, according to his own evidence, told the tanners (presumably Brodsky and his partner) whom he met in the offices of the corporation that he "would do his absolute best" and "did not want to make a profit out of a paltry line like this." Cahn's evidence and Brodsky's declaration support the view that the respondent should make a trial or sample shipment of 150 hides. The hides shipped were, however, "ticky," and were unsuitable, so far as Brodsky was concerned, both as to condition and as to price. He, in these circumstances, declined to try them out, or to take any

further interest in the shipment. But there is no evidence—or perhaps I should say no evidence fit to be submitted to the jury—that Brodsky, either through the corporation or otherwise, ever bought or ordered the hides.

Some reliance was placed upon the correspondence between the corporation and tanners (Graton Wright & Co.) who tanned the hides on the order of the corporation, to prevent further loss on the shipment, which was deteriorating. In this correspondence, the corporation speaks of having paid 13¼d. plus expenses for the hides, and of having "promised ourselves a much better hide than you have found." Statements, however, to third parties, whether accurate or inaccurate, for the purpose of inducing them to keep down costs, cannot control, modify or alter the terms of the arrangement between the corporation and the respondent, once they are ascertained, or are explicit, as I think they were.

In my opinion, therefore, the obligation of the corporation to "put up a credit" never arose. No buyer had been procured for the 150 hides, and no buyer had "put up a credit" that could be refused or regarded as unsatisfactory by the respondent.

The appeal should be allowed, and the verdict entered by the learned trial judge as to the Brodsky transaction restored.

The result is that a verdict should be entered for the plaintiff in this action for the sum of £694 1s. This amount represents the verdict entered by *Halse Rogers* J., £882 1s. 9d., less a deduction of £188 0s. 9d. agreed upon between the parties. The deduction is the proceeds of the 150 Queensland hides in America, $882.03, less customs and other charges in America $120.23, converted at par $4.86 and exchange. A sum of £200 has been paid, so we were informed, since the verdict was entered by *Halse Rogers* J. But that cannot be deducted from the amount for which the verdict is entered, though judgment entered upon that verdict should not be executed in respect of the sum of £200 which has been paid.

DIXON AND EVATT JJ. The defendant, a hide and skin merchant carrying on business in Sydney, visited New York at the end of the year 1927. There he opened business relations with the plaintiff corporation. He arranged with Mr. Sigmund Cahn, its vice-president

H. C. OF A. 1936.

EDMOND WEIL INCORPORATED v. RUSSELL.

Dixon J. Evatt J.

and general manager, that it should represent him in the United States and Canada for the sale of hides and skins. He and Mr. Cahn now disagree as to the terms upon which the business was to be conducted and the only document which appears then to have been exchanged, a meagre letter of 26th January 1928, is silent upon the points that have come to matter. But the result of the transaction between them was that at the beginning of 1930 the plaintiff made a claim against the defendant for $4,532. In course of time this claim, subject to some immaterial modifications, was prosecuted in the Supreme Court of New South Wales as a commercial cause. Among the credits given by the plaintiff in the account producing the amount claimed were the net proceeds of a shipment of 150 Queensland wet salted hides. The hides had been disposed of by the plaintiff in the United States in July 1929 after some difficulty and had produced but a small return. They had been shipped by the defendant in February or March 1928. According to the defendant he became entitled to receive from the plaintiff the full sum at which he invoiced the hides and, therefore, he ought to have been credited in the account with that amount and not the much smaller sum obtained from the disposal of the hides. The validity of this contention, which is the question raised by the present appeal, depends upon the nature of the arrangement made by the defendant with Mr. Cahn and upon the application of that arrangement to the circumstances affecting the particular shipment of hides.

The rival versions of the relevant parts of the arrangement may be reduced to a brief statement.

According to Mr. Cahn, the plaintiff was to effect sales at a commission of 2 per cent on hides, if the conditions of sale imposed on the buyers the obligation of opening a foreign credit in the defendant's favour to cover the price. If a buyer objected, as some might, to opening such a credit, the plaintiff would do so itself, but, in that case, the commission charged would be $2\frac{1}{2}$ per cent. The plaintiff would also receive shipments of skins on consignment. It would open credits in the defendant's favour for eighty per cent of the value shipped computed at market rates and account for the balance after the sale of the goods. The commission to be charged on consignments was $2\frac{1}{2}$ per cent.

The defendant's version of the arrangement did not differ from that of Mr. Cahn in reference to consignment goods. But when the defendant made a sale of hides to be shipped then, according to him, the plaintiff undertook that it would procure the buyer to establish a credit in his favour for the price, and that if he, the defendant, disapproved of the credit established or proposed by the buyer, then the plaintiff would itself establish one, and, further, that it would always guarantee the invoiced value.

Perhaps it is uncertain whether the defendant meant to convey that the guarantee of the invoiced value extended to goods shipped on consignment, but we do not think his evidence of what actually passed between himself and Mr. Cahn is reasonably open to such an interpretation. He agreed that, when the buyer provided the credit, the plaintiff's commission was to be 2 per cent, and when the plaintiff did so, $2\frac{1}{2}$ per cent.

The shipment of the parcel of 150 Queensland hides arose out of a chance meeting between the defendant and two persons who had dealings with the plaintiff corporation. The defendant says that when his visit to the United States drew to a close, he called at Mr. Cahn's office in New York to say good-bye to him. Mr. Cahn, too, was leaving New York. On that or the next afternoon he sailed for Europe, where he was to remain for many months. It happened that, when he called, Mr. Cahn was receiving two persons interested in hides, a tanner and fellmonger the defendant says they were. He was introduced to them and seized an opportunity to press upon them the merits of Queensland hides. The opportunity occurred because they complained of the high cost of heavy sole leather hides from the Argentine and New South Wales. The upshot was that he offered to ship a sample parcel to them, and, after a little discussion, it was agreed that he should ship 150 hides. No price was named, but he said that he told them he would do his best and seek to make no profit; it would be a penny or a penny half-penny or thereabouts below the current rate for Argentine hides. He said he would cable to Australia and Mr. Cahn told him to ship as soon as he could. He requested Mr. Cahn to see that the contracts went out to Australia, and to this the latter assented. But the defendant either did not learn or failed to remember the identity of

H. C. OF A. 1936.

EDMOND WEIL INCORPORATED v. RUSSELL.

Dixon J. Evatt J.

the persons with whom he had made the arrangement. Mr. Cahn left for Europe and no record of the transaction was made.

On his return to Australia, the defendant shipped 150 Queensland hides to the plaintiff at New York. He preceded the shipment by cables stating that he was about to consign them and requested the plaintiff to telegraph a credit immediately. The invoice described them as sold to the plaintiff and contained charges to the port of discharge, including an "allowance" for the plaintiff approximating 2 per cent. In an accompanying letter of advice, the defendant informed the plaintiff that unfortunately he did not notice the name of the buyers of the sample, but he felt sure Mr. Cahn would have done so. He gave no clue to the identity of the supposed buyers, but he requested the plaintiff to let him have a credit to cover the shipment as he would be out of funds until such time as the plaintiff could "arrange the necessary document."

The plaintiff's officers were quite in the dark about the hides and were unable to obtain from Mr. Cahn, to whom they cabled, any light enabling them to identify anybody as buyer. In answer to a letter from the plaintiff telling him this, the defendant gave a few faint particulars of the transaction and said :—"Perhaps from this meagre description you may be able to find them. At any rate, it will be as well to dispose of the shipment." Later he cabled to the plaintiff instructing it to send the 150 hides to London unless they were able to sell them at about a shilling a pound. The defendant's account with the plaintiff was in debit and his instructions evoked only an inquiry about expenses. He wrote explaining that he referred only to the Queensland parcel and said he trusted that the plaintiff had either sold or shipped them.

By this time, six months had passed since the defendant had consigned them to New York. At length, Mr. Cahn appears to have cabled his corporation in New York that he thought tanners named Jacob Brodsky & Son of Philadelphia had been interested in a small parcel of hides to be consigned by the defendant. Brodsky & Son refused to accept them and said they were "ticky." Whether they were the buyers or consignees whom the defendant had met in Mr. Cahn's office is anything but certain. Mr. Cahn and they both say that the defendant visited them in Philadelphia and arranged,

in effect, to consign a sample for their approval. He says that he was never in Philadelphia. But whatever the truth may be, the plaintiff, on the return of Mr. Cahn, bluntly included in its next letter to the defendant the following paragraph :—" 150 Queensland hides : These hides were ordered by Brodsky who refused to accept them, saying that they are not of the kind that should have been sent them. We are trying to dispose of the hides elsewhere." The defendant, whose account with the plaintiff had run much against him, cabled that he insisted on Brodsky taking delivery. The plaintiff answered that the hides had been disapproved and there was no sale. He replied that he would not allow a cancellation by Brodsky and wrote that he was not responsible for storage and charges as the skins were sold.

A full year had now elapsed and finally the plaintiff disposed of the hides through a tannery. The tanners reported very adversely upon the poor and ticky condition of the hides and gave a very low price for them.

Upon these facts the defendant claims to be credited with the full invoiced price or value of the hides.

The cause was tried with a jury. The learned judge who presided left to the jury a question whether the defendant was entitled to charge the plaintiff and to deduct from its account an amount which was equal to the invoiced value (less the allowance of nearly 2 per cent shown on the invoice) in respect of the 150 Queensland hides. This question the jury answered : Yes. They were then discharged, and the learned judge heard the parties upon the question what verdict and judgment should be entered. He decided that there was no evidence upon which the jury could answer the question in favour of the defendant, and, accordingly, ordered that a verdict should be entered for the plaintiff for an amount arrived at upon the footing that the defendant was not entitled to be credited with the full invoiced value of the 150 hides. He expressed the opinion " that where a judge sitting at nisi prius or in a commercial cause leaves any question to be determined by a jury, he still has control of the case to the extent that he can enter a nonsuit in a proper case, or direct a verdict, if on a consideration of the whole of the

H. C. OF A. 1936.

EDMOND WEIL INCORPORATED v. RUSSELL.

DIXON J. EVATT J.

evidence and what has taken place during the trial he is of opinion that in law such a course is necessary."

This proposition appears to us to be too widely stated. Where questions are left to a jury, and, after answering them, the jury is discharged without giving a verdict, we should have thought that the parties ought to be taken tacitly to agree that the court shall enter that verdict which upon the answers the law requires and the jury are taken to authorize that verdict. When the judge proposes such a course it is incumbent upon the parties to express any dissent. But this does not seem to enable a judge at the trial, after findings have been made by the jury, to set them aside or ignore them and enter a verdict inconsistent with them. To authorize him to do this we should have thought the positive consent of the parties must have been obtained, either by an express reservation of power made with their assent, or in some other manner. The practice at common law was to reserve for the court in banc, not for the trial judge, the question whether a nonsuit should have been entered or a verdict directed, and other like questions, the decision of which might override the actual verdict or finding of the jury. Before there was statutory authority enabling the court in banc to enter a nonsuit or verdict, such a reservation was based on the consent of the parties and of the jury. By long convention their consent was implied, if in open court a reservation was proposed or agreed to by the trial judge and no objection was made. (See *Mead* v. *Robinson* (1); *Kemp* v. *Strafford and Tickhill* (2); *Moyse* v. *Cocksedge* (3); *Minchin* v. *Clement* (4); *Treacher* v. *Hinton* (5); *Attwood* v. *Small* (6); *Mathews* v. *Smith* (7); *Marrack* v. *Ellis* (8); *Seaton* v. *Benedict* (9); *Shepherd* v. *Bishop of Chester* (10); *Tippetts* v. *Heane* (11); *Dewar* v. *Purday* (12); *Rickets* v. *Burman* (13); *Brown* v. *Lizars* (14).)

(1) (1744) Barnes 451; 94 E.R. 999.
(2) (1745) Barnes 455; 94 E.R. 1001.
(3) (1749) Barnes 459, at p. 460; 94 E.R. 1003, at pp. 1003, 1004.
(4) (1818) 1 B. & Ald. 252; 106 E.R. 93.
(5) (1821) 4 B. & Ald. 413, at pp. 416, 417; 106 E.R. 988, at p. 989.
(6) (1827) 1 Man. & Ry. 246, at p. 261, note *a*.
(7) (1828) 2 Y. & J. 426; 148 E.R. 85.
(8) (1827) 1 Man. & Ry. 511.
(9) (1828) 2 Moo. & P. 301, at p. 303; 130 E.R. 969.
(10) (1830) 4 Moo. & P. 130, at pp. 136, 137.
(11) (1834) 4 Tyr. 772; 149 E.R. 1074.
(12) (1835) 3 Ad. & E. 166; 111 E.R. 376; 4 N. & M. 633; 1 H. & W. 227; 4 L.J. K.B. 164.
(13) (1836) 4 Dowl. P.C. 578.
(14) (1905) 2 C.L.R. 837.

But the very nature and terms of the reservation made it plain that its purpose was to empower the court in banc to supersede the jury's verdict. Where a jury answers questions and is discharged without finding a formal verdict, the implication seems rather to be that the court should enter that verdict which flows in law from the answer.

In the present case, however, the course taken by the learned judge ceased to be important by reason of what afterwards occurred in the Full Court. The defendant moved by way of appeal to set aside the verdict entered by the judge at or after the trial. It was, of course, open to the plaintiff, upon a proper notice given in due time, to move to set aside the jury's finding. Although the plaintiff gave no such notice, the question was argued before the Full Court without objection whether the jury's answer could or could not be supported upon the evidence. The jurisdiction of the Full Court extends to entering any verdict to which a party is upon the evidence entitled as a matter of law (sec. 7 of the *Supreme Court Procedure Act* 1900). The procedural objection that the plaintiff did not file a notice of motion by way of appeal is not one which the defendant can now rely on nor does he seek to do so.

The Full Court arrived at the conclusion that the jury's finding should be allowed to stand and that a verdict and judgment in accordance with it should be entered.

We are unable to agree in this view of the case. We are prepared to concede that, notwithstanding the commercial difficulties implicit in the arrangement to which the defendant says that Mr. Cahn committed the plaintiff corporation, the jury was at liberty to act on his version of the terms of the agreement or arrangement between them. Even so, we do not think it could reasonably be found that the shipment of 150 Queensland hides fell within that part of the agreement relating to the sale of hides for shipment to buyers, or imposed upon the plaintiff an obligation to furnish a credit for or otherwise bear the invoiced price or value of the shipment.

The plaintiff had found no buyer and had made no contract of sale. The negotiations deposed to by the defendant between himself and the unnamed and unidentified fellmonger and tanner did not

H. C. OF A. 1936.

EDMOND WEIL INCORPORATED v. RUSSELL.

Dixon J Evatt J.

amount to a sale. No price was fixed. No details were settled. No contract was signed. The transaction took more the form of an experimental consignment. When he shipped the goods, he did not name or describe a buyer in a way which would restrict the transaction to the account of a specific person. He knew that Cahn was going on an extended holiday and he was not entitled to treat him as a potential source of information from which the plaintiff was bound to supply the deficiency in his own advices to it. On the contrary, as soon as it appeared that the alleged buyer could not be found, he elected to regard the hides as consignment goods and gave instructions for their disposal. The plaintiff's subsequent attribution of the hides to Brodsky & Son of Philadelphia cannot bring the transaction under the category imposing an obligation on the plaintiff to provide the invoiced price. Indeed it was scarcely open to the jury to find that Brodsky was one of the two men whom the defendant met in Cahn's office in New York and that he there agreed to take 150 Queensland hides, and, moreover, to do so however " ticky " they might be.

The arrangement set up by the defendant could not call upon the plaintiff to find the invoiced price unless a definite sale had been made which would determine that price and would define the buyer who in the first instance would be looked to for the establishment of the credit. None of these conditions was fulfilled in reference to the 150 Queensland hides.

The question is whether the plaintiff is liable for a liquidated sum under a special contract to pay ascertainable amounts of money in given conditions. The answer is that the conditions were not fulfilled which would impose such a liability. We, therefore, think the appeal should be allowed. Errors were made at the trial in calculating the amount of the verdict which ought to be entered for the plaintiff. It is now agreed that, disregarding the sum paid into court by the defendant, the amount of the verdict would be £694 1s.

In our opinion the order of the Full Court should be discharged. In lieu thereof it should be ordered that the first finding of the jury be set aside and that a verdict for the plaintiff be entered for the

sum of £694 1s. with costs. The defendant should be ordered to pay the plaintiff's costs of the appeals to the Full Court and to this court.

Appeal allowed. Order of the Supreme Court of New South Wales dated 15th November 1934 set aside other than the order that the sum of £200 paid into court by the defendant be paid out of court to the plaintiff or to its solicitors. Order that the verdict and judgment in this action be entered for the plaintiff—the appellant—in the sum of £694 1s. Order that the defendant—the respondent—do pay to the plaintiff—the appellant—the costs of the motion of appeal to the Supreme Court and the costs of its appeal to this court. Costs of the trial to follow the verdict and judgment.

Solicitors for the appellant, *Minter, Simpson & Co.*
Solicitors for the respondent, *Norton, Smith & Co.*

J. B.