[HIGH COURT OF AUSTRALIA.]

PHILLIPS . . . . . APPELLANT;
PLAINTIFF,

AND

ELLINSON BROTHERS PROPRIETARY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 10;

SYDNEY, *Nov.* 21.

Rich, Starke, McTiernan and Williams JJ.

*Practice* (*Vict.*)—*Power of trial judge to enter judgment contrary to verdict of jury* —*Rules of Supreme Court* 1928 (*Vict.*), *Order XXXVI.*, *r.* 32; *Order XL.*, *r.* 5; *Order LVIII.*, *r.* 4.

*Contract—Entire and indivisible—Partial performance—Statute of Frauds—Oral variation—Statute of Frauds* (29 *Car. II. c.* 3), *sec.* 4.

Upon an appeal from a judgment of the Supreme Court of Victoria ordered by the trial judge to be entered for the defendant notwithstanding a verdict for the plaintiff returned by the jury:—

*Rich* and *McTiernan* JJ. were of opinion that, except upon application made pursuant to leave reserved to move for judgment, a trial judge has no power to order judgment to be entered contrary to the verdict of the jury, and that the appeal should therefore be allowed;

*Starke* and *Williams* JJ. were of opinion that a trial judge has power to order judgment to be so entered where there was no evidence to support the jury's verdict, that in the present case there was no such evidence, and that therefore the appeal should be dismissed.

The court being equally divided, the decision of the Supreme Court of Victoria (*Martin* J.) was affirmed.

*Per Starke* and *Williams* JJ.: Where the obligations of a contract of service are entire and indivisible, and the contract is required by the Statute of Frauds to be evidenced in writing, remuneration cannot be recovered for services rendered under it not amounting to a complete performance although there has been a subsequent oral arrangement to accept such sums as a sufficient performance; such an arrangement amounts to a variation of the terms of the original contract and not to a mere alteration in manner of performance.

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APPEAL from the Supreme Court of Victoria.

Eric Granville Murray Phillips entered into an agreement in writing, dated 25th October 1938, with Ellinson Brothers Pty. Ltd., for his employment as its manager from 1st July 1938 till 30th June 1940. The agreement provided, by clause 5, that Phillips should devote at least 160 hours to the business in every period of four weeks; by clause 4, that his remuneration as manager should be a share of the net profits arising from the company's business earned in each of the years during the period from 1st July 1938 to 30th June 1940, which share should be calculated as follows:—In each year he should receive ten per cent of the net profits of the company up to £8,000, and also thirty-three and one-third per cent of any net profits between £8,000 and £15,000, and also forty-five per cent of any net profits over £15,000; and, by clause 9, that if he should without reasonable excuse fail to obey or observe the instructions and orders of the directors or should be unable through illness to perform his duties for a period of four consecutive weeks at any one time or if he for any other reason should not perform his duties, then the company might by notice in writing forthwith determine his employment, but in any such case or in case of his death he or his personal representatives should be entitled to a proportionate part of the share of profits to which he would otherwise have been entitled for the financial year in which his employment was so determined, or if he so died (as the case might be) for and in respect of the period up to the determination of his employment or death.

Phillips sued the company in the Supreme Court of Victoria to recover the liquidated amount of £2,666 13s. 4d. By pars. 2 and 3 of his statement of claim the plaintiff alleged that he was employed by the defendant as its manager under an agreement in writing dated 25th October 1938 from 1st July 1938 to 30th June 1940 at a remuneration equal to ten per cent of the net profits of the defendant on the first £8,000, thirty-three and one-third per cent from £8,000 to £15,000, and forty-five per cent on any amount exceeding £15,000, and claimed as his share of the net profits for the year ending 30th June 1940 the sum of £2,666 13s. 4d. for his salary for services as manager thereunder. Alternatively (par. 4) the plaintiff claimed from the defendant £2,666 13s. 4d. for work and labour done for the defendant at its request, the particulars given being: "Services as manager from 1st July 1939 to 30th June 1940."

The defendant pleaded that by the agreement it was a condition precedent to any liability on the part of the defendant to pay to the plaintiff a share of its net profits of any year, that the plaintiff should devote at least 160 hours in every period of four weeks

during the said year to the management of the defendant's business and that this condition was not performed, in that the plaintiff did not devote any of his time between 15th October 1939 and 30th June 1940 to the management of the defendant's business. Alternatively, the defendant pleaded that on or about 15th October 1939 the plaintiff refused to perform any of his duties under the agreement and repudiated the agreement and the defendant accepted the said repudiation and was thereby discharged from any obligation to pay to the plaintiff the amount claimed or any amount as his share of the profits of the defendant for the year ending 30th June 1940.

In reply to this plea the plaintiff alleged that "about January 1940 the managing director of the defendant company (who had been abroad during the greater part of the year 1939) was taking an active part in the management of the business. Moreover the nature of the business had changed considerably from what it had been when the agreement sued upon was made. Under these circumstances the managing director instructed the plaintiff not to devote in future more than fifteen hours a week in carrying out his duties as manager of the defendant company. Relying thereon the plaintiff from that time devoted fifteen hours a week in carrying out his duties and so continued during the remainder of the term and the defendant company accepted the benefit of his services without objection, and the defendant therefore is estopped from alleging that the failure by plaintiff to devote more than fifteen hours a week in carrying out his duty was a breach of the condition mentioned in the defence."

The action was tried before *Martin* J. and a jury of six men.

The plaintiff gave evidence in which he stated that he had worked for the company according to the terms of the agreement up till January 1940. The defendant made a loss for the year ending 30th June 1939, so that the plaintiff received no remuneration for that year. The plaintiff deposed that on the return of the managing director from England, he repeatedly asked him for something for the year's work he had done, or for a salary of eleven pounds per week or for some concession in the matter of hours. He said that all requests were refused until January 1940, when the managing director agreed to reduce the time to fifteen hours per week for the unexpired period of the contract, and that he gave this amount of time to the business until 30th June 1940.

The case for the defendant was that up to 15th October 1939 the plaintiff fulfilled his part of the agreement, but thereafter he absented

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himself and did not attend to the work of managing the company on any proper construction of the contract.

Counsel for both parties agreed that if Phillips was successful in his action the amount of his remuneration for the whole period should be £2,966 13s. 4d.

*Martin* J., in summing up to the jury stated, *inter alia* :—" The two positions set up by the parties are shortly these : The plaintiff says ' I did fulfil the letter of the contract right up to January 1940, then you made a concession that I should work fewer hours, I accepted that position, and thereafter, I worked those hours.' The case for the defendant is that ' from October 1939, you walked off the job and did nothing under that contract at all.' . . . But there may be another position which arises from these positions, although neither side has put such a position ; it may be that you will not accept the evidence of either side absolutely, and you may possibly come to the position that the plaintiff, whilst not abandoning the contract did not perform it, and that both parties thereafter, without words being spoken, regarded the contract as at an end, impliedly agreed that this contract should be rescinded. If you do come to such a conclusion, then the plaintiff would be entitled to a *pro-rata* share of the profits for that year."

The judge then asked six specific questions of the jury as follows : —1. Did the plaintiff act as manager from 15th October 1939 of the defendant for 160 hours monthly up to January 1940 ? 2. Did the managing director of the defendant tell the plaintiff in that month that thereafter he need only attend at its premises for fifteen hours weekly ? 3. Did the plaintiff thereafter act as manager of the defendant for fifteen hours weekly until 30th June 1940 ? 4. (*a*) Did the plaintiff after 15th October 1939 absent himself from the company's premises, except for attendances connected with his cost accounting work, without obtaining permission so to do ? (*b*) If so, when did this begin ? 5. (*a*) Did the plaintiff and the defendant impliedly agree that this contract was to be determined ? (*b*) If so, when did this happen ? 6. To what sum (if any) is the plaintiff entitled ?

Counsel for the company requested and was granted leave by the judge to move if the jury made a finding under question 5 which resulted in the plaintiff obtaining a verdict for any portion of the amount claimed, that no judgment should be entered in accordance with that verdict, because it was not pleaded and there was no evidence to support it.

The jury, without answering the specific questions asked, returned a general verdict for the plaintiff for £865. Both parties moved for

judgment, and, after argument, judgment was entered for the defendant with costs. The formal judgment stated that judgment was given for the defendant pursuant to the leave reserved to the defendant to move for judgment notwithstanding the jury's verdict.

Phillips appealed to the High Court.

The relevant rules of the Supreme Court are set out in the judgments hereunder.

*Dean*, for the appellant. There was no leave reserved to the defendant to move for judgment if the jury found for the plaintiff. The only leave reserved was confined to the jury's answer to question 5. The jury did not answer this question, but gave a general verdict. It is not permissible to analyse the verdict. If the verdict is wrong, then the defendant's proper procedure is to apply to the Full Court of the Supreme Court of Victoria for a new trial.

[McTIERNAN J. referred to *Edmond Weil Incorporated* v. *Russell* (1).]

In that case there was a special verdict.

[RICH A.C.J. referred to *Fieman* v. *Balas* (2).]

Order XXXVI., rule 32, of the *Rules of the Supreme Court* 1938 (Vict.) is all that is left of the old rule, Order XXXVI., rule 39. It merely enables the presiding judge to give effect to powers already conferred upon him. Order LVIII. governs the procedure for new trials. The judge has no power to set aside the jury's verdict; the only course open to him was to enter judgment (*Driver* v. *The War Service Homes Commissioner* [*No.* 1] (3) ). There were two courses open:—(*a*) to request the judge to direct a verdict for the defendant as the plaintiff had made out no case to go to the jury; (*b*) after the general verdict to apply to the Full Court for a new trial. The judge can direct a verdict for the defendant only if there is no evidence of the cause of action. If there is any dispute on the question of fact, the judge cannot take the case from the jury. Although the amount was not the full amount awarded, the judge had no option but to accept the jury's verdict. The proper course was to enter judgment in accordance with the verdict and leave the parties to apply to the Full Court. It was not a case in which he could set aside the verdict; the leave reserved did not extend to that eventuality. If it becomes necessary to examine the propriety of the verdict, there are two grounds upon which it could be supported:—(*a*) The jury was entitled to take the view that the plaintiff did perform the contract substantially and give him a portion of the

(1) (1936) 56 C.L.R. 34.
(2) (1930) 47 C.L.R. 107.
(3) (1924) V.L.R. 515, at pp. 530, 533.

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moneys due (*H. Dakin & Co. Ltd.* v. *Lee* (1) ). The principle has been applied in service contracts (*Sagar* v. *H. Ridehalgh & Son Ltd.* (2) ). (*b*) The plaintiff is entitled to a *pro-rata* payment under clause 9 of the contract.

*Coppel*, for the respondent. The contract is one of employment for two years. The sole remuneration is that to be ascertained at the expiration of the period. Service was a condition precedent to payment. In the statement of claim the plaintiff sued for salary. Before recovering this sum, he must show that he performed the conditions precedent to payment (*Cutter* v. *Powell* (3) ). The sum awarded shows that the jury took the view that the work ended on 15th October 1939. The amount was necessarily arrived at in that way. The judge could infer that the jury found that the plaintiff ceased work on 15th October, and consequently was in breach ; it was then a question of law for the judge to decide whether the breach went to the root of the contract (*George D. Emery Company* v. *Wells* (4) ; *Poussard* v. *Spiers* (5) ). The sole question on this appeal is whether it was open to the judge to infer that is what happened in this case. There is no need to move the Full Court of the Supreme Court for a new trial (Order XL., rules 3-5). *Martin* J. drew an inference not inconsistent with the jury's verdict.

[WILLIAMS J. referred to *Shears* v. *Mendeloff* (6).]

Judgment has been entered in English trials in similar circumstances (*Skeate* v. *Slaters Ltd.* (7) ; *Goodman* v. *Pocock* (8) ).

*Dean*, in reply. If the defendant is successful on this appeal, it necessarily excludes the plaintiff's claim, a right which the defendant did not possess before the jury's verdict given in the plaintiff's favour. The verdict does not show that the plaintiff's pleaded case has been rejected. In *Skeate* v. *Slaters Ltd.* (9) *Buckley* L.J. meant that if in a trial before a jury there was no evidence to go to the jury, even after verdict the judge could enter judgment for defendant. *Phillimore* L.J. pointed out that it was the duty of the judge to enter judgment in accordance with the verdict (10).

*Cur. adv. vult.*

(1) (1916) 1 K.B. 566.
(2) (1931) 1 Ch. 310, at p. 323.
(3) (1795) 6 T.R. 320 [101 E.R. 573].
(4) (1906) A.C. 515, at p. 524.
(5) (1876) 1 Q.B.D. 410, at p. 413.
(6) (1914) 30 T.L.R. 342.
(7) (1914) 2 K.B. 429.
(8) (1850) 15 Q.B. 576 [117 E.R. 577].
(9) (1914) 2 K.B., at p. 438.
(10) (1914) 2 K.B., at p. 444.

The following written judgments were delivered :—

RICH J. This appeal raises an important question as to the power of a judge of the Supreme Court of Victoria to enter judgment for a defendant when a jury has found a verdict in favour of the plaintiff.

Upon the hearing of this case before *Martin* J. the jury returned a verdict in favour of the plaintiff, but the learned judge, notwithstanding this verdict, gave judgment for the defendant. The plaintiff in this appeal challenges his right to do so.

The trial was not without misadventure. Counsel for the defendant, when the jury had retired, obtained leave from the judge, in the event of the jury finding in favour of the plaintiff upon a specific question left to them, to move that no judgment should be entered in accordance with that " verdict " (finding), and it appears that the formal judgment of the court is in error when it recites that the defendant moved the court pursuant to leave reserved for judgment on behalf of the defendant, notwithstanding the verdict of the jury. A perusal of the transcript reveals that the only leave reserved to the defendant was that in respect of the event already referred to, viz., the answer of the jury in favour of the plaintiff to one of a number of questions drawn up and left to the jury by the learned judge. The jury, instead of answering any of the questions submitted to them, returned, as they were entitled to do, a general verdict in favour of the plaintiff, but, notwithstanding this verdict, the learned judge entered judgment for the defendant, apparently upon the ground that it was not open to the jury to return the verdict which they in fact found in favour of the plaintiff. The question now to be determined is whether the learned judge was justified in law in adopting that course.

I assume for the time being that the learned judge was right in saying that it was not upon the evidence open to the jury to return their verdict in favour of the plaintiff. It may be stated generally, though the statement requires qualification, that it is the function of the jury to decide issues of fact: See *Driver* v. *War Service Homes Commissioner* (1). Lord *Blackburn* in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (2) said : " It was laid down in *Ryder* v. *Wombwell* (3) that ' there is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies ; if there is not, the judge ought

(1) (1924) V.L.R., at p. 533.
(2) (1878) 3 App. Cas. 1155, at pp. 1208, 1209.
(3) (1868) L.R. 4 Ex. 32.

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to withdraw the question from the jury, and direct a nonsuit, if the onus is on the plaintiff; or direct a verdict for the plaintiff if the onus is on the defendant.' "

Owing to changes made by the judicature rules in England and the State of Victoria there is now no such thing as a judgment of nonsuit, and the proper course appears to be that taken at the trial in the case of *Fox* v. *Star Newspaper Company*, which is reported on appeal to the House of Lords in the Law Reports (1). At the trial *Russell* L.C.J. refused to direct a nonsuit, and ruled that there must be a verdict for the defendant, and the jury found accordingly. The House of Lords ruled that the course pursued by the Lord Chief Justice was right. And see *Rees* v. *Duncan* (2), overruled on another point (*Bowes* v. *Chaleyer* (3)). While there is a power given to the court, both in England and in the State of Victoria, to control, the court is not at liberty to supersede, the functions of the jury, and exercise the function of affirmatively finding the facts (*Mechanical and General Inventions Co. and Lehwess* v. *Austin and the Austin Motor Co.* (4)). Unless the control of the court over the jury is regulated in accordance with the law and confined within the proper limits, trial by jury would have no meaning. According to the practice of the courts of common law, trials at nisi prius were, in substance, inquiries as to facts, and no judgment could be entered except by the court in banc, the judges of which exercised the right of granting in their discretion a new trial, if there appeared to have been any miscarriage on the trial (*Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (5), per Lord *Blackburn*). The record with the jury's finding came before the court in banc, and if the unsuccessful party took no further proceedings the court gave judgment for the party who had obtained the jury's verdict. An unsuccessful party had the right to challenge the judgment against him, and one method of doing so was by an application for a new trial—a practice which came into existence in the seventeenth century. Applications could be made for a new trial on the following, among other grounds: that the jury's verdict was perverse or against the weight of evidence; and in the case of a plaintiff's application there might have been added, in appropriate circumstances, an application to set aside a nonsuit. If a plaintiff were successful on an application for a new trial or to set aside a nonsuit, the court ordered a new trial. The courts at Westminster, however, could not direct a verdict to be entered unless leave had

(1) (1900) A.C. 19.
(2) (1900) 25 V.L.R. 520.
(3) (1923) 32 C.L.R. 159.
(4) (1935) A.C. 346, at p. 379.
(5) (1878) 3 App. Cas., at p. 1205.

been reserved at the trial, and the consent of the parties to this course was implied upon the reservation of this leave (*Davies* v. *Felix* (1) ). In *Dewar* v. *Purday* (2) *Patteson* J. said : " When leave is reserved, by consent of parties, to move to enter a nonsuit, it is on the understanding that the cause will go on and the plaintiff obtain a verdict." The usages and practices of the common law should still be observed unless they have been destroyed or modified by the judicature system and its rules.

Since the coming into operation of the judicature system in England and the State of Victoria the verdict of a jury may be set aside by an appellate court and under certain conditions disregarded by the trial judge. An application can be made to the Court of Appeal in England and to the Full Court in the State of Victoria for a new trial. In the State of Victoria the judge at the trial has not the power to direct a new trial (*Driver* v. *War Service Homes Commissioner* [*No.* 1] (3) ). As a matter of historical interest it may be noted that until 1890 this power was exercised in England by a Divisional Court, and since then by the Court of Appeal : See 53 & 54 Vict. c. 44. Sec. 34 of the *Supreme Court Act* 1928 of the State of Victoria empowers the Full Court to hear motions for new trials. The procedure relating to new trials is regulated by Order LVIII. of the *Rules of the Supreme Court*, and rule 1 thereof specifically refers to applications to set aside verdicts. It appears now to be established that an appellate court is not bound to order a new trial, but may give the appropriate judgment, notwithstanding the jury's verdict : See *Baird* v. *Magripilis* (4), per *Starke* J. I think also that under the system created by the judicature Acts and rules it is a well-established practice that a jury's verdict may be disregarded by agreement, whereby leave is reserved to the unsuccessful party to move for judgment notwithstanding the jury's verdict. Such a reservation was " always in the nature of a convention between the judge, the jury and the counsel " (*Hollins* v. *Fowler* (5) ; *Slade* v. *Victorian Railways Commissioners* (6) ). " Leave reserved " has also been defined as meaning a compact between the parties that the case should go on (*Hudson* v. *Victorian Railways Commissioner* (7) ). The *Rules of the Supreme Court* do not, in my opinion, permit a judge at the trial to disregard a jury's finding except there is such a convention or compact : See also the remarks of *Isaacs* J. in *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (8). A

(1) (1878) 4 Ex. D. 32, at p. 35.
(2) (1835) 3 A. & E. 166, at p. 170 [111 E.R. 376, at p. 378].
(3) (1924) V.L.R. 515.
(4) (1925) 37 C.L.R. 321, at p. 334.
(5) (1875) L.R. 7 H.L. 757, at pp. 772, 773.
(6) (1889) 15 V.L.R. 190, at p. 194.
(7) (1900) 26 V.L.R. 269, at p. 274.
(8) (1924) 35 C.L.R. 14, at p. 31.

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great difference exists between a finding by the judge and a finding by the jury. "Where the jury find the facts, the court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury" (*Jones* v. *Hough* (1), per *Bramwell* L.J.) and a party who has insisted upon his right to a trial by jury, has that right of which he cannot be deprived by the court (*Jones* v. *Hough* (2), per *Collins* L.J.). The only rule of the *Rules of the Supreme Court* which appears to be relevant is rule 32 of Order XXXVI., which provides that a judge shall at or after trial give judgment for any party; or leave any party to move for judgment. If this rule could be construed as giving power to a judge to give any judgment he thought proper without regard to the jury's verdict the right of a party to have issues of fact tried by a jury would be valueless. A judge could then say: "I disagree with the jury's conclusion on the facts", and substitute his own view of the facts for that of the jury. It is well-settled law that where there is evidence to support a verdict this verdict cannot be disregarded even if the trial judge were strongly against the conclusion at which the jury arrived. Rule 32 is a procedural rule and, in my opinion, does not authorize a judge to substitute his own conclusions on the facts for those of a jury and give judgment accordingly. One of the objects of this rule was to obviate the necessity of moving for judgment. A trial judge cannot ignore the verdict of the jury unless there has been a reservation of leave whereby the unsuccessful party can move for judgment, notwithstanding the jury's verdict. A somewhat similar rule was discussed by counsel in *Perkins* v. *Dangerfield* (3), and in this case the court apparently considered that the trial judge had no power to disregard the finding of the jury. As pointed out in *Musgrove* v. *McDonald* (4): "According to the practice of courts of common law . . . the only way of taking exception to a verdict of a jury was by application for a new trial, and that a party who did not adopt that method was not in a position to dispute the facts as found by the jury." Similarly, in my opinion, a party against whom the jury has given a verdict cannot upon the trial dispute that verdict unless leave has been reserved enabling him to move for judgment despite the jury's verdict. The power of a judge at nisi prius is well defined by *FitzGibbon* J. in *Power* v. *Dublin United Tramways Co.* (5), where he says:—"A judge sitting alone at nisi prius has no jurisdiction to set aside or disregard a finding of a jury, and he cannot direct a jury to find a verdict

(1) (1879) 5 Ex. D. 115, at p. 122.
(2) (1879) 5 Ex. D., at p. 125.
(3) (1879) 51 L.T. 535.
(4) (1905) 3 C.L.R. 132, at p. 149.
(5) (1926) I.R. 302, at p. 323.

contrary to the answers given by them; *Perkins* v. *Dangerfield* (1) . . . If a judge decides in a doubtful case to leave questions to the jury, in order that the expense of a new trial may be avoided in the event of his decision being set aside by a higher court, he is, I think, bound to accept the findings at which the jury arrive; and I do not think that the dicta in *Skeate* v. *Slaters Ltd.* (2) are in accordance with the law or the practice in this country so far as the duty or powers of a judge at nisi prius are concerned."

This statement appropriately defines, I think, the position of a trial judge of the Supreme Court of Victoria in jury actions, and unless leave has been reserved to the unsuccessful party he must apply to the Full Court of the Supreme Court. It is not unimportant to emphasize that in a jury trial at common law the jury's verdict is the basis of the judgment, and consequently where there is no evidence to support a verdict for the plaintiff or where the evidence is all one way the judge should so direct the jury: "If a question is put which is irrelevant or as to which the evidence is all one way" (the judge) "would be bound to direct the jury that the evidence was all one way" (*Gibbs Bright & Co.* v. *Rowan* (3)). In *Rocke* v. *McKerrow* (4), Lord *Esher* M.R. said:—"Supposing the judge at the trial to be of opinion that he ought to direct a verdict for the defendant on the ground that there is no evidence to support the plaintiff's case, and he so directs the jury, and his direction is questioned, then that is only ground for a new trial." *Brett* J. in *Ex parte Morgan*; *In re Simpson* (5) said:—"If there is no evidence the judge is bound to direct the jury, as a matter of law, to find in a particular way, and the jury is bound to obey . . . In a court of law, where there was no evidence, and yet the judge left the question to the jury, and they found as if there were evidence, there was a double miscarriage. The judge in such case was guilty of misdirection, an error in law; the jury, of an error in fact. Yet the only remedy was a new trial. The reason was that the judgment of a court of law must be founded on a verdict"—See also *Bradbury* v. *N.Z. Loan & Mercantile Agency Co. Ltd.* (6).

In my opinion it is the duty of counsel for a defendant, who contends that there is no evidence to support a verdict for the plaintiff, to request the judge to direct the jury to find a verdict in favour of the defendant, and if he refuses so to direct the jury it is then incumbent on counsel if he desires to contend that he is entitled to judgment to obtain a reservation of leave which will entitle him to

(1) (1879) 51 L.T. 535.
(2) (1914) 2 K.B. 429.
(3) (1887) 13 V.L.R. 621, at p. 634.
(4) (1890) 24 Q.B.D. 463, at p. 464.
(5) (1876) 2 Ch. D. 72, at p. 98.
(6) (1926) 27 S.R. (N.S.W.) 15; 44 W.N. 4.

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move for judgment, if the verdict of the jury is in favour of the plaintiff, and if this is not done judgment must be entered in accordance with the verdict, in which case the defendant's only remedy is a motion for a new trial. In the present case it is clear that no leave was reserved to the defendant to move for judgment in the event of the jury finding a general verdict for the plaintiff; in fact it is clear that any leave reserved to the defendant was restricted and conditional upon a finding in answer to a particular question. Accordingly the learned judge, in my opinion, had no authority in law to disregard that verdict, but was bound to enter judgment in accordance therewith. If the defendant had grounds for an attack upon the verdict of the jury, he should have applied to the Full Court for a new trial.

It is said that instances can be found where a single judge sitting with a jury has set aside or disregarded the verdict or findings returned or made by a jury and entered judgment on his own view of the case. Probably if the circumstances were known it would be found that by the express or tacit consent of the parties the judge either had undertaken the duty properly belonging to the Court of Appeal of examining the validity of the findings of the jury or had adjourned an application that the jury should be directed to find in favour of one of the parties. If this be not the explanation then I am compelled to quote the words of Lord *Selborne* L.C. in another connection in *Cooper* v. *Cooper* (1):—"But, when examined, these cases are found to present a remarkable example of the extraordinary manner in which the use of precedents has, sometimes, caused the courts of this country, first to slide into manifest error, and afterwards to follow that error under the notion that they are bound to do so."

In my opinion the appeal should be allowed and the judgment below set aside.

STARKE J. This action was tried in the Supreme Court of Victoria with a jury, who found a verdict for the plaintiff—the appellant here—for the sum of £865, but the trial judge, notwithstanding that verdict, directed that judgment be entered for the defendant—the respondent here. The *Rules of the Supreme Court* warrant this direction on the part of the trial judge if the evidence made no case fit to be submitted to the jury: See Order XXXVI., rule 32; Order XL., rule 5; *Skeate* v. *Slaters Ltd.* (2).

An appeal has been brought direct to this court from the judgment so entered, and for an order that judgment be entered for the appellant in accordance with the verdict, or a new trial had.

(1) (1873) 8 Ch. App. 813, at p. 825. (2) (1914) 2 K.B. 429.

The appellant alleged in his statement of claim that he was employed by the defendant as its manager under an agreement in writing dated 25th October 1938 for two years at a remuneration equal to ten per cent of the net profits of the respondent on the first £8,000, thirty-three and one-third per cent from £8,000 to £15,000, and forty-five per cent on any amounts exceeding £15,000, and claimed as his share of the profits for the year ending 30th June 1940 the sum of £2,666 in round figures for services as manager thereof. Alternatively, the appellant added a common count for work and labour done for the respondent at its request. By its defence, the respondent admitted the agreement and pleaded a term of the agreement that the appellant should devote at least one hundred and sixty hours in every period of four weeks during the said year to the management of the respondent's business, and that the appellant did not perform this term of the agreement. In reply to this plea, the appellant alleged that about January 1940 he was instructed by the managing director of the respondent not to devote in future more than fifteen hours a week in carrying out his duties as manager of the respondent company and that, relying thereon, the appellant devoted fifteen hours a week in carrying out his duties, and so continued during the remainder of the term, and the respondent accepted the benefit of his services without objection and was estopped from alleging that failure by the appellant to devote more than fifteen hours a week in carrying out his duty was a breach of the term of the agreement mentioned. This plea does not allege a variation of the agreement. It is a plea, as I understand it, of dispensation or variation of performance of the agreement requested by the respondent and accepted by the appellant (*Ogle* v. *Earl Vane* (1); *Besseler Waechter Glover & Co.* v. *South Derwent Coal Co.* (2)).

According to the evidence given by the appellant, the managing director of the respondent suggested that he might allow the appellant to work only twenty hours a week instead of forty hours, as provided for in the agreement. The appellant suggested that twenty hours would probably not meet the case, in view of the fact that he had drawn so little from the business, whereupon the managing director suggested fifteen hours per week, which the appellant accepted, and said: "Thank you." But this is not a mere alteration of the mode or manner of performing the agreement, the obligation of the contract still continuing, but a variation of the term of the agreement by the substitution of a new term which was not pleaded by the appellant. It is a principle of English law that parties having contracted to do an entire work for a specific sum can recover nothing

(1) (1868) L.R. 3 Q.B. 272. (2) (1938) 1 K.B. 408.

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unless the work be done or it can be shown that it was the other party's fault that the work was incomplete or that there is something to justify the conclusion that the parties have entered into a fresh contract (*Cutter* v. *Powell* (1) ; *Appleby* v. *Myers* (2) ; *Forman & Co. Proprietary Ltd.* v. *The Ship* " *Liddesdale* " (3) ). If the contract be indivisible and not severable, then nothing can be recovered under the contract unless it be completed according to its terms or a new contract is made or is to be implied from the acts of the parties, giving rise to new rights (*The Madras* (4) ). The contract in the present case was one of this character. The obligation to pay remuneration based on profits was dependent upon the performance of the services stipulated in the agreement, namely, that the defendant should devote at least 160 hours in every four weeks during the year to the management of the respondent's business. The promises of the parties were mutual and concurrent. The plaintiff admittedly did not perform this contract according to its terms, and accordingly can recover nothing upon it. Upon the argument in this court, he relied upon a variation of its terms, that is, a reduction of the number of hours' service to fifteen per week or sixty hours in every four weeks. But this is a variation of the agreement or a new contract which was not pleaded, and was in any case without consideration to support it, which is necessary in English law—See *Anson* on *Contracts*, 17th ed. (1929), p. 330— and was not in writing as required by the provisions of the *Statute of Frauds*. Accordingly, the plaintiff could not recover upon any variation of the agreement as upon a new contract.

But it was said that the appellant might sue on a *quantum meruit* under the common count, if the evidence warranted the conclusion that the contract had been determined, or that the parties had treated the contract as at an end or rescinded. The trial judge put this view to the jury, but ultimately on the motion for judgment he apparently held that there was no evidence fit to be submitted to the jury of any determination or rescission of the contract. It is not necessary to examine the evidence in detail, but no such case was made in the pleadings or at the trial, and there is in fact no evidence whatever of any determination or rescission of the contract (*Morris* v. *Barron & Co.* (5) ).

Again, the trial judge put what he called a third position to the jury :—" The third position " is " that the plaintiff " (appellant) " continued to give substantial performance under this contract

(1) (1795) 2 Smith's Leading Cases, 12th ed. (1915), p. 1.
(2) (1867) L.R. 2 C.P. 651, at p. 661.
(3) (1900) A.C. 190, at p. 202.
(4) (1898) P. 90, at p. 94.
(5) (1918) A.C. 1.

and even if his performance is a very bad one and he was useless to them as manager, if he continued to do substantial work under that contract, then he would be entitled to his full share of profit; the mere fact that he was a bad manager and of little use to them would not take away from him the right to his share of the profits." Later he said :—" If there was neither abandoning nor any implied rescission of the contract, then you are asked : Did he substantially perform the contract—that is, do substantially his 160 hours a month up to January and thereafter substantially his fifteen hours a week ? Of course, if he did occasionally some little thing such as the signing of the tender . . . that of course would not be substantial performance. It is a question of whether he substantially performed the contract. If he did substantially perform—no matter if he did it badly, or whether he was manager in nothing but name—if he was willing to perform and did his best to perform, he would be entitled to his full share under the agreement." I do not understand this direction. No doubt there are cases in the books in which defective work has been done under a special contract or goods supplied under such a contract but not in conformity therewith and a deduction allowed from wages or from price because the defendant accepted and retained the benefit of that which was actually done or supplied (*Farnsworth* v. *Garrard* (1); *Read* v. *Rann* (2); *Sagar* v. *H. Ridehalgh & Son Ltd.* (3); *H. Dakin & Co. Ltd.* v. *Lee* (4) ). The obligation to pay for the work done, goods supplied, or services rendered arises from the defendant having taken the benefit of the work done, goods supplied, or services rendered (*Sumpter* v. *Hedges* (5); *Cutter* v. *Powell* (6) ). So also it has been held that a person who rendered services under an agreement which was in fact void was entitled to recover for the services rendered upon the basis of a *quantum meruit* (*Craven-Ellis* v. *Canons Ltd.* (7) ). And the *Statute of Frauds*, it seems, is no answer to such an action (*Scott* v. *Pattison* (8); *Horton* v. *Jones* (9) ). Again, there are cases in which it has been held that slight or trivial omissions in the completion of a contract did not prevent the enforcement of the contract (*Lowther* v. *Heaver* (10); *Wilkinson* v. *Clements* (11); *Hudson* on *Building Contracts*, 5th ed. (1926), pp. 204, 205).

(1) (1807) 1 Camp. 38 [170 E.R. 867].
(2) (1830) 10 B. & C. 438 [109 E.R. 513].
(3) (1931) 1 Ch. 310.
(4) (1916) 1 K.B. 566.
(5) (1898) 1 Q.B. 673.
(6) (1795) 2 Smith's Leading Cases, 12th ed. (1915), pp. 25 et seq.
(7) (1936) 2 K.B. 403.
(8) (1923) 2 K.B. 723.
(9) (1934) 34 S.R. (N.S.W.) 359, at p. 367.
(10) (1889) 41 Ch. D. 248.
(11) (1872) 8 Ch. App. 96, at p. 106.

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But it is clear upon the general principle already mentioned that a party cannot sue upon the common counts if work be done or goods supplied under a special contract remaining unperformed on his part if the obligations of the contract be entire, indivisible, and not severable (*Cutter* v. *Powell* (1)). A new contract cannot in such circumstances be inferred as a fact or implied as a matter of law. In the present case, the agreement of October 1938 was entire, indivisible, and not severable in its obligations. The old agreement was not discharged or affected by the variation relied upon. It did not constitute an agreement on the part of the parties to abandon or rescind the old agreement upon the consideration of their mutual promises to abandon their rights under the contract. Nor did it constitute a fresh contract substituting a new term in the old agreement giving rise to new rights, for no consideration whatever appears for giving up rights under the old agreement. So we come back to the position that the appellant did not complete according to its terms a contract entire, indivisible, and not severable.

Consequently, in my opinion, the appellant made no case to go to the jury, and the trial judge was right in entering a judgment for the respondent for the reasons I have given, though they are not, I think, the same as those of the learned judge.

Finally I must refer to the verdict of the jury. It was a general verdict for £865. It was argued that the verdict must have been based upon the instruction of the trial judge that if the appellant did not abandon the contract and did not walk off the job, but the parties agreed that the contract was ended, then the appellant would be entitled to a *pro-rata* share of the profits up to the time the parties came to such agreement. The verdict may have been reached on that basis, but I agree that the instruction was wrong and that there is no evidence whatever to support the instruction or a verdict based upon it. It is, however, possible that the jury may have acted on some other view, and it seems to me unwise and contrary to the practice for the court to confine a general verdict to any particular issue in the case. A general verdict would no doubt be set aside if founded upon several counts or causes, one of which was bad or unsupported by the evidence. The whole verdict would be thus infected. But the remedy would be a motion for a new trial to the Supreme Court, and not a limitation of the verdict by construction to some count or cause of action upon which it could be maintained. The result of such a construction in this case would suggest that no verdict was found upon the issues pleaded and that they ought still to be tried. *Preston* v.

(1) (1795) 2 Smith's Leading Cases, 12th ed. (1915), pp. 9 et seq.

*Peeke* (1) cannot be pushed too far; it deals with the quantification of damages and should be compared with *Duke of Buccleuch* v. *Metropolitan Board of Works* (2); *O'Rourke* v. *Commissioner for Railways* (3); and *O'Connell's Case* (4).

However, for the reasons given, the trial judge was right, in my opinion, in directing a judgment for the respondent, and this appeal should be dismissed.

McTIERNAN J. The plaintiff sued the defendant for remuneration for work done as its manager from 1st July 1939 to 30th June 1940. The plaintiff sued on a special count on the contract, which was under seal, whereby he was engaged as manager, and alternatively on an indebitatus count for work and labour done in that capacity at the defendant's request. The contract provided that the plaintiff's remuneration was to be equal to a stipulated share of the net profits earned by the defendant in each year of the engagement, the terminal date of each year being 30th June. The term of the engagement began on 1st July 1938 and was to continue for two years unless the defendant determined it by notice in writing, and in that case the plaintiff was to receive a share of the profits proportionate to the period served. It was a condition of the contract that the plaintiff would give at least one hundred and sixty hours in every four weeks to his duties as manager throughout the term of the engagement. The statement of defence sets up that the plaintiff's right to any remuneration was contingent on the performance of this condition during the year, but that he did not carry on as manager at all after 15th October 1939; and, alternatively, that the plaintiff renounced the contract on that date and the defendant accepted the renunciation, with the result that the defendant's obligation under the contract was discharged. By his reply the plaintiff said that he fulfilled the contract according to its terms until January 1940, when the defendant excused him from working in excess of fifteen hours in each week, and that thereafter he worked for fifteen hours in each week until the end of the year, and that the defendant was estopped from relying on the condition requiring him to work at least one hundred and sixty hours in every four weeks. The action was tried by *Martin* J. with a jury in the Supreme Court of Victoria. The issues referred to the jury were not confined to those raised by the pleadings. The issues which the jury tried are substantially contained in the following passage

(1) (1858) 27 L.J. Q.B. 424.
(2) (1872) L.R. 5 H.L. 418, at p. 462.
(3) (1890) 15 App. Cas. 371, at p. 377.
(4) (1844) 5 State Trials (N.S.) 1; 11 Cl. & F. 155, at p. 412 [8 E.R. 1061, at p. 1158].

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from his Honour's summing up :—" The two positions set up by the parties are shortly these. Plaintiff says : ' I did fulfil the letter of the contract right up to January 1940, then you made a concession that I should work fewer hours. I accepted that position and thereafter I worked those hours.' The case for the defendant is that ' from October 1940 you ' (the plaintiff) ' walked off the job and did nothing under the contract at all ' . . . But there may be another position which arises from these positions, although neither side has put such a position. It may be you will not accept the evidence of either side absolutely, and you may possibly come to the position that the plaintiff, whilst not abandoning his contract, did not perform it, and that both parties thereafter, without words being spoken, regarded the contract as at an end, impliedly agreed that this contract should be rescinded. If you do come to such a conclusion then the plaintiff would be entitled to a *pro-rata* share of the profits for the year." The evidence that the plaintiff worked according to the letter of the contract until 15th October 1939 was not denied, and it was agreed that the profits earned in the year ending 30th June 1940 were £14,500. At the conclusion of the summing up the learned trial judge invited the jury to answer a number of questions. The fifth question was: " Did the plaintiff and the defendant impliedly agree that the contract was to be determined ? If so when did this happen ? " It appears from the transcript that the defendant's counsel made this application to the learned judge : " I ask your Honour to reserve me leave to move if the jury make a finding under question 5, which results in the plaintiff obtaining a verdict of any portion of the amount claimed—leave to reserve to apply to your Honour that no judgment should be entered in accordance with that verdict because it is not pleaded and there is no evidence to support it." His Honour acceded to the application in these terms : " Very well."

No objection was taken that there was no evidence proper to be left to the jury upon which they could find that the plaintiff fulfilled the contract until January and that then he was excused from working in excess of fifteen hours in each week and that he did work for that time until 30th June 1940. And no point was taken that the jury could not find a verdict for the plaintiff on that evidence notwithstanding that the contract was under seal and the condition regarding the time to be served was varied by parol. There was evidence on which the jury could properly find all these issues in the plaintiff's favour, and upon that evidence they could find a verdict for the plaintiff (*Hughes* v. *Metropolitan Railway Co.* (1) ).

(1) (1877) 2 App. Cas. 439, at p. 448.

The jury made no special finding. They exercised their right to find a general verdict (*Mayor and Burgesses of Devizes* v. *Clark* (1) ). The verdict was for the plaintiff. The jury assessed the damages on the verdict at £865.

The *Rules of the Supreme Court* provide that the judgment of the court shall be obtained on motion for judgment (Order XL., rule 1). A motion for judgment was made on behalf of each party, and the learned trial judge gave judgment for the defendant. In giving judgment, his Honour said : —" The jury ignored the questions, as they were entitled to do, and brought in a general verdict for the amount stated. On that of course counsel for the plaintiff moves for judgment and the defendant in pursuance of a right reserved also moved for judgment. The sum awarded by the jury shows that it regarded the plaintiff's employment to have come to an end on or about 15th October 1939." The sum of £865 at which the jury assessed the damages on the verdict is in fact equal to seven twenty-fourths of the profits earned during the year, and could be appropriate to the period from 1st July 1939 to 15th October 1939. It was not within the province of the judge to set aside the jury's verdict, and he did not purport to do so.

The power to set aside a verdict or finding of a jury is reserved exclusively to the Full Court, which also has the power on appeal to order a new trial (Order LVIII.). It would not be possible to reconcile trial by jury with the trial judge having power to enter a judgment inconsistent with the jury's verdict if he should think it erroneous. If the trial judge had that power, it would not be necessary to appeal to the Full Court to set aside the verdict. In the present case the judgment inconsistent with the verdict was not entered pursuant to any power which the learned judge claimed he could exercise independently of consent (*Edmond Weil Incorporated* v. *Russell* (2) ). But it is plain that the power which he exercised exceeded the only consent which it can be assumed he had to enter judgment inconsistent with the verdict. The consent did not extend to his reserving power to enter judgment inconsistent with a general verdict. Where the jury gives a general verdict, the facts which are ascertained by the jury do not appear on the record (*Tidd, Practice of King's Bench and Common Pleas*, 7th ed. (1821), vol. 2, p. 892). It is otherwise if the jury find a special verdict. They find a general verdict by ascertaining the facts and applying the law as the judge declares it, to the facts. A general verdict is compounded of fact and law. " A general verdict is so called because the whole matter is thereby found

(1) (1835) 3 A. & E. 506 [111 E.R. 506]. (2) (1936) 56 C.L.R., at p. 46.

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generally" (*Bacon's Abridgement*, 7th ed. (1832), vol. VIII., p. 98). "A general verdict is a finding by the jury in the terms of the issue or issues referred to them" (*Tidd, Practice of King's Bench and Common Pleas*, 7th ed. (1821), vol. 2, p. 896; *Cutts* v. *Buckley* (1)). His Honour, however, inferred from the amount at which the damages were assessed, that it was an ascertained fact that the plaintiff did not carry on as manager after 15th October 1939. The judgment which he gave was that which his Honour considered to be applicable to that fact. His view was that there was no evidence upon which the jury could properly find that the parties mutually agreed to the rescission of the contract upon the terms that the plaintiff should receive payment for the time served since 1st July 1939. The validity of his Honour's judgment depends upon the question whether it was right to say that it was an ascertained fact that the plaintiff did not carry on as manager after 15th October 1939. The jury, as has been observed, declined to find that fact specially. The fact does not appear on the record upon which the learned judge gave judgment. The fact could not be supplied under Order XL., rule 5. The judge did not do so. He did not infer the fact from the evidence. If he had done so, he would have usurped the province of the jury, to whom all the issues in the case were referred. What his Honour did was to interpret the verdict and the damages as a special finding of fact. But it is difficult to see how an interpretation can be right which replaces a verdict for the plaintiff by a judgment for the defendant. As the damages were assessed on a general verdict, they cannot be ascribed to one issue rather than another. If they are ascribed to the issue raised by the written pleadings, they are less than what could have been awarded. If they are to be ascribed to the other issue, the assessment would fall with the verdict if there is no evidence to sustain it. The trial judge cannot surmise upon what issue the jury assessed the damages. It is just as likely that the jury arrived at a compromise on the issue raised by the written pleadings as that they found for the plaintiff on the other issue. If there was not sufficient evidence to support a verdict upon both issues, that may be a reason for setting aside the verdict and ordering a new trial. The judgment which the law required to be given on the record was a judgment in accordance with the verdict which the jury found and the amount of damages which they assessed on the verdict.

A number of cases, of which *Skeate* v. *Slaters Ltd.* (2) is typical, were cited where the trial judge entered judgment which was not in accordance with a verdict, and those cases are relied upon as

(1) (1933) 49 C.L.R. 189.

(2) (1914) 2 K.B. 429.

affording authority for what the trial judge did in the present case. But in those cases it was not necessary for the court to supply by deduction any fact upon which to base the judgment which was given. The evidence by itself was held to be so deficient that the jury could not reasonably find for the plaintiff. Besides, in the present case there is evidence on which the jury could reasonably find one of the issues, that raised by the written pleadings, in the plaintiff's favour. *Skeate* v. *Slaters Ltd.* (1) is not consistent with the principle applied in *Perkins* v. *Dangerfield* (2). The dicta in the case are also the subject of adverse comment in *McDonnell & East Ltd.* v. *McGregor* (3).

In my opinion judgment ought to have been entered for the plaintiff for £865. The judgment for the defendant should be set aside and judgment entered for the plaintiff for that sum with costs: See *R.* v. *Snow* (4).

In my opinion the appeal should be allowed with costs.

WILLIAMS J. The appellant as plaintiff sued the respondent company as defendant in the Supreme Court of Victoria in an action tried before a judge and jury to recover the liquidated amount of £2,666 13s. 4d. By his statement of claim the plaintiff alleged (par. 2) that he was employed by the defendant as its manager under an agreement in writing dated 25th October 1938, from 1st July 1938 to 30th June 1940, at a remuneration equal to ten per cent of the net profits of the defendant on the first eight thousand pounds and thirty-three and one-third per cent from eight thousand to fifteen thousand, and forty-five per cent upon any amount exceeding fifteen thousand; and claimed the above sum as his share of the net profits for the year ending 30th June 1940 for his salary for services as manager. Alternatively, he claimed this sum for work and labour done for the defendant at its request, the particulars given being "services as manager from 1st July 1939 to 30th June 1940." The defendant pleaded that by the agreement it was a condition precedent to any liability on its part to pay to the plaintiff a share of its net profits of any year that the plaintiff should devote at least 160 hours in every period of four weeks during the year to the management of the defendant's business and that this condition was not performed in that the plaintiff did not devote any of his time between 15th October 1939 and 30th June 1940 to this purpose. The defendant pleaded alternatively that on or about 15th October 1939 the plaintiff refused to perform any of

(1) (1914) 2 K.B. 429.
(2) (1879) 51 L.T. 535.
(3) (1936) 56 C.L.R. 50, at p. 56.
(4) (1915) 20 C.L.R. 315, at p. 322.

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his duties under the agreement and repudiated the same and the defendant accepted the repudiation and was thereby discharged from any obligation to pay to the plaintiff the amount claimed or any amount as his share of the profits of the defendant for the year ending 30th June 1940. By his reply (par. 2) the plaintiff alleged that "in or about January 1940 the managing director of the defendant (who had been abroad during the greater part of the year 1939) was taking an active part in the management of the business. Moreover, the nature of the business had changed considerably from what it had been when the agreement sued upon was made. Under these circumstances the managing director instructed the plaintiff not to devote in future more than fifteen hours a week in carrying out his duties as manager. Relying thereon the plaintiff from that time devoted fifteen hours a week in carrying out his duties and so continued during the remainder of the term and the defendant accepted the benefit of his services without objection." At the hearing the following words were added to this paragraph: "and therefore was estopped from alleging that the failure by the plaintiff to devote more than fifteen hours a week in carrying out his duty was a breach of the condition mentioned in the defence."

It appears from the evidence that the agreement sued upon was a deed dated 25th October 1938 whereby the plaintiff agreed to act as manager of the defendant for two years from 1st July 1938 until 30th June 1940, his remuneration in respect of each year to be the share of the net profits of that year referred to in the statement of claim. By clause 3 the plaintiff agreed to devote at least 160 hours to the business in every period of four weeks between the hours of 8 a.m. and 7 p.m. on Mondays, Tuesdays, Wednesdays, Thursdays and Fridays and between the hours of 8 a.m. and 1 p.m. on Saturdays. Clause 9 provided that if the manager should without reasonable cause fail to obey or observe the instructions and orders of the directors or should he be unable through illness to perform his duties for a period of four consecutive weeks at any one time or if he for any other reason should not perform his duties, then the defendant might by notice in writing forthwith determine the employment of the manager, but in any such case or in case of the death of the manager he or his personal representative should be entitled to a proportionate part of the share of profits to which he would otherwise have been entitled for the financial year in which his employment was determined or if he so died (as the case might be) for and in respect to the period up to the determination of his employment or death.

Admittedly the plaintiff performed the agreement for the year ending 30th June 1939, but the defendant made a loss in that year, so that he received no remuneration. He said that he first asked the defendant for £1,000, or, alternatively, to continue a salary of £11 per week which he was receiving while the managing director was abroad as a solatium, but both requests were refused; that he then proposed that the necessity for his devoting 160 hours every four weeks to the business should be reviewed, so that he would have more time to practise his profession of a consulting cost accountant; that after many refusals the managing director in January 1940 eventually agreed to reduce the time to fifteen hours per week for the unexpired period of the contract; and that he then gave this amount of time to the business until 30th June. Counsel for the defendant objected to the evidence of this oral agreement if it was evidence of a variation of the deed, and the reply was then amended by the addition of the words already mentioned.

At the hearing both counsel agreed that if the plaintiff was entitled to succeed on either of the counts in the statement of claim his share would be £2,966 13s. 4d. The plaintiff did not make any claim under clause 9 of the agreement, and there was no evidence of any rescission under this clause.

Admittedly the plaintiff did not perform the agreement for the last six months according to its tenor, but he claimed that after January there had been a mere voluntary forbearance on the part of the defendant to insist upon the performance of the condition as to hours according to its strict terms, leaving the original contract unaffected, so that the defendant could at any time have insisted upon the plaintiff in the future devoting the full 160 hours to the business. It is clear law that a contract required to be in writing by the Statute of Frauds cannot be varied orally (*Morris* v. *Baron & Co.* (1); *British and Beningtons Ltd.* v. *N.W. Cachar Tea Co.* (2); *Dowling* v. *Rae* (3); and, as to deeds, *Berry* v. *Berry* (4)), but "a distinction has been pointed out and recognized between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the court cannot give effect, in favour of either, to such attempt; if the parties make an arrangement as to the second, though such arrangement be only made by words it can be enforced" (*Plevins* v. *Downing* (5)). And, as *Goddard* J. (as he then was) pointed out in *Besseler Waechter Glover & Co.* v. *South Derwent*

(1) (1918) A.C. 1.
(2) (1923) A.C. 48.
(3) (1927) 39 C.L.R. 363, at pp. 370, 371.
(4) (1929) 2 K.B. 316.
(5) (1876) 1 C.P.D. 220, at p. 225.

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*Coal Co.* (1): "It does not appear to me to matter whether the request comes from one side or the other, or whether it is a matter which is convenient to one party or to both. What is of importance is whether it is a mere forbearance or a matter of contract." If an arrangement amounts to a parol variation of the original contract it is ineffective either to enable the contract to be enforced as so varied or to prevent the original contract being enforced in its unaltered form. And, even if the original contract as varied is subsequently wholly performed by the plaintiff there does not appear to be any reason why the defendant, by the application of some doctrine of waiver or estoppel, should be prevented from relying on the statute, when he could do so where the plaintiff has wholly performed an original contract required to be in writing by the statute (*Cocking* v. *Ward* (2)). In *Morrell* v. *Studd and Millington* (3), *Astbury* J., and in *Hartley* v. *Hymans* (4), *McCardie* J., expressed the view, with which I agree, that when a contract falling within the statute is once made, no conduct or verbal waiver can be relied upon to substitute a different term from one appearing in the contract itself: See also *Harvey* v. *Grabham* (5); *Levey & Co.* v. *Goldberg* (6).

The only case therefore in which a subsequent parol arrangement can be effective is where it relates to the mode and manner of the performance of an existing obligation and is not intended to substitute one agreement for another (*Hickman* v. *Haynes* (7)).

In the present case the plaintiff's evidence shows that it was the intention of the parties to vary his obligations under the deed, and not merely to alter the mode and manner of their performance. For the original contract under which he was bound to devote 160 hours every four weeks to the business during its term in order to share in the profits, there was to be substituted a contract by which he became entitled to a full share of the profits in the second year if he worked the 160 hours for the first 18 months and thereafter gave 15 hours a week to the business. The defendant was to lose the entire benefit of the plaintiff's services for the balance of the time between 15 hours per week and 160 hours in every four weeks, but he was to receive the same lump sum without giving any substituted performance for this loss of time. The purpose of the concession was to reduce the amount of service required to qualify him for his share of profits at the end of the second year. It diminished

(1) (1938) 1 K.B., at p. 417.
(2) (1845) 1 C.B. 858 [135 E.R. 781].
(3) (1913) 2 Ch. 648, at p. 659.
(4) (1920) 3 K.B. 475, at p. 491.
(5) (1836) 5 A. & E. 61 [111 E.R. 1089].
(6) (1922) 1 K.B. 688, at p. 690.
(7) (1875) L.R. 10 C.P. 598, at pp. 604, 605.

the consideration moving from the plaintiff to the defendant, and involved a definite change in the contractual relations of the parties. The plaintiff did not aver or prove that he was ready and willing to perform the original condition during the final six months. It is clear that he required the remitted time to devote to his own practice, and that he was incapable of performing it as he could not be in two places at once. It was never intended after January that the defendant should retain the right to change its mind and demand that the plaintiff should again give his full services for the balance of the term. To explain his failure to work the full time for the last six months he was driven to rely on the assent of the defendant to allow him to vary the terms of the original contract. If the contract had been for the sale of a definite quantity of goods over the value of ten pounds for a lump sum, to be delivered by instalments within a certain period, an arrangement altering the dates and amounts of deliveries would only have related to the mode of performing the existing obligation, so long as the seller still remained liable to deliver the total quantity, but if the new arrangement was that a smaller quantity should be delivered for the same lump sum this would be a variation substituting a new contract for the original contract, and I can see no distinction in principle between such a variation and the one here in question. It was in fact an agreement for a variation of the original contract similar to those in question in *Harvey* v. *Grabham* (1); *Goss* v. *Lord Nugent* (2); *Stead* v. *Dawber* (3); *Marshall* v. *Lynn* (4); *Giraud* v. *Richmond* (5); *Sanderson* v. *Graves* (6); and *Cutts* v. *Taltal Railway Co. Ltd.* (7). In all these cases the plaintiff sought unsuccessfully to prove a subsequent arrangement, which the court considered to be a parol variation of his original obligation as distinct from a mere substituted mode of performing it. Here the plaintiff sought to enforce the original contract, but his own evidence showed he had not performed it, but had performed a new and unenforceable agreement consisting of the original contract as varied by a subsequent agreement in January. He did not sue on the original deed as so varied. If he had done so the defendant could have pleaded want of writing, and absence of authority in the managing director to agree to such a variation. Express authority would have to be proved, because no such authority could be implied, since it would not be within his ordinary powers to promise the plaintiff such an indulgence (*British Thomson-Houston*

(1) (1836) 5 A. & E. 61 [111 E.R. 1089].
(2) (1833) 5 B. & Ad. 58 [110 E.R. 713].
(3) (1839) 10 A. & E. 57 [113 E.R. 22].
(4) (1840) 6 M. & W. 109 [151 E.R. 342].
(5) (1846) 2 C.B. 835 [135 E.R. 1172].
(6) (1875) L.R. 10 Ex. 234.
(7) (1918) 62 S.J. 423.

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*Co. Ltd.* v. *Federated European Bank Ltd.* (1) ). If he had been able to overcome the absence of authority and to establish an oral contract, he might have been able to sue upon a *quantum meruit* relying on the authorities quoted by *Jordan* C.J. in *Horton* v. *Jones* (2): "If . . . a person does acts for the benefit of another in the performance of a contract which is unenforceable by reason of the fourth section of the Statute of Frauds, and the other so accepts the benefit of those acts, or otherwise behaves in relation to them, that in the absence of the unenforceable contract, the former could maintain an action of debt upon the common money counts, he may sue in indebitatus to obtain reasonable remuneration for the executed consideration (*Gray* v. *Hill* (3); *Mavor* v. *Pyne* (4); *Savage* v. *Canning* (5); *Knowlman* v. *Bluett* (6); *Merrell* v. *Loft* (7); *Scott* v. *Pattison* (8); *Law Quarterly Review*, vol. 41, p. 79). In such a case the action is in indebitatus only. The existence of the unenforceable contract prevents a new contract, in respect of which special assumpsit could be maintained, from being implied from the acts performed (*Britain* v. *Rossiter* (9) ) and the unenforceable contract may be referred to as evidence, but as evidence only, on the question of amount (*Scarisbrick* v. *Parkinson* (10); *Ward* v. *Griffiths Bros. Ltd.* (11) )". To the above cases can be added the subsequent decision of the Court of Appeal in *Craven-Ellis* v. *Canons Ltd.* (12).

In my opinion, therefore, the cause of action alleged in par. 2 of the statement of claim failed in law on the plaintiff's own evidence.

He also sued for the same sum for work and labour done for the defendant at its request. This was also a claim in respect of services rendered in accordance with the deed. The plaintiff might have performed the oral agreement substantially, but have done some part of his work insufficiently or badly and have yet recovered to the extent to which the defendant had benefited from his services (*H. Dakin & Co. Ltd.* v. *Lee* (13) ). But after January the plaintiff failed to perform a substantial part of the agreement, and he could not be said to have fulfilled, even insufficiently, the condition of giving 160 hours every four weeks to the defendant's service which he had to perform to become entitled to the amount sued for (*Cutter* v. *Powell* (14); *Sumpter* v. *Hedges* (15); *Small & Sons Ltd.* v.

(1) (1932) 2 K.B. 176, at p. 184.
(2) (1934) 34 S.R. (N.S.W.) 359, at p. 367.
(3) (1826) Ry. & M. 420 [171 E.R. 1070].
(4) (1825) 2 C. & P. 91 [172 E.R. 41].
(5) (1867) 16 W.R. 133.
(6) (1874) L.R. 9 Ex. 307.
(7) (1895) 13 N.Z.L.R. 739.
(8) (1923) 2 K.B. 723.
(9) (1879) 11 Q.B.D. 123.
(10) (1869) 20 L.T. 175.
(11) (1928) 28 S.R. (N.S.W.) 425; 45 W.N. 130.
(12) (1936) 2 K.B. 403.
(13) (1916) 1 K.B. 566.
(14) (1795) 6 T.R. 320 [101 E.R. 573].
(15) (1898) 1 Q.B. 673.

*Middlesex Real Estates Ltd.* (1) ). The claim in respect of work and labour done also failed on the plaintiff's own evidence.

His Honour should therefore have ruled in law that there was no case to go to the jury under either of the counts in the statement of claim. But he told the jury that if they were satisfied the plaintiff performed his duties for the full time as manager until January, and the managing director of the defendant then excused him from further performance provided he devoted fifteen hours per week to the business, and he thereafter gave this amount of time to the business, he was entitled to recover the £2,966 13s. 4d. He left it to the jury to determine whether, as the defendant alleged, the plaintiff had refused to work as manager at all after 15th October 1939, and had thereby repudiated the deed. This second issue only became material if the first issue was properly before them.

The learned judge also left to the jury a third issue, not raised by the pleadings, by telling them they need not adopt in its entirety the story told by either side, but to quote his own words :—" There may be another position which arises from these positions, although neither side has put such a position ; it may be that you will not accept the evidence of either side absolutely, and you may possibly come to the position that the plaintiff, whilst not abandoning his contract, did not perform it ; and that both parties thereafter, without words being spoken, regarded the contract as at an end, impliedly agreed that this contract should be rescinded. If you do come to such a conclusion, then the plaintiff would be entitled to a *pro-rata* share of the profits of that year." He asked the jury the following questions :—1. Did the plaintiff act as manager from 15th October 1939 of the defendant for 160 hours monthly up to January 1940 ? 2. Did the managing director of the defendant tell the plaintiff in that month that thereafter he need only attend at its premises for fifteen hours weekly ? 3. Did the plaintiff thereafter act as manager of the defendant for fifteen hours weekly until 30th June 1940 ? 4. (*a*) Did the plaintiff after 15th October 1939 absent himself from the company's premises, except for attendances connected with his costs accounting work, without obtaining permission so to do ? (*b*) If so, when did this begin ? 5. (*a*) Did the plaintiff and the defendant impliedly agree that this contract was to be determined ? (*b*) If so, when did this happen ? 6. To what sum (if any) is the plaintiff entitled ? The jury refused to answer any of the questions and brought in a general verdict for the plaintiff for £865. This amount represented a proportionate share of the sum of £2,966 13s. 4d. for the period ending on 15th October, and there

(1) (1921) W.N. 245.

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can be no doubt the verdict was attributable to this third issue. Moreover, the evidence was so overwhelming that the plaintiff did not work at the defendant's premises as its general manager after October that a verdict for the plaintiff on the issues contained in the pleadings would probably have been perverse.

Before verdict counsel for the defendant had taken the objection that there was no evidence to support an affirmative answer to question 5. The following appears in the transcript: "Dr. *Coppel*" (defendants' counsel): "As to question 5, there is no evidence in the plaintiff's case anywhere to support it. His Honour: I think that may be so, but juries are very much at large, they may possibly interpret that conversation on Cup Day as an implied rescission—'I am not going to come any more,' and, 'We do not want you to come any more.' I told the jury that no-one put that case. Dr. *Coppel*: I ask your Honour to reserve me leave to move, if the jury make a finding under question 5, *which results in the plaintiff obtaining a verdict for any portion of the amount claimed*—leave to reserve to apply to your Honour that no judgment should be entered in accordance with that verdict, because it is not pleaded and there is no evidence to support it. His Honour: Very well." No objection was taken by the appellant's counsel to the making of this reservation.

When the jury had been discharged both parties moved for judgment. After argument the learned judge ordered judgment to be entered for the defendant, as recited in the order, "pursuant to leave reserved for the defendant notwithstanding the verdict of the jury," on the ground that, having regard to the pleadings and the evidence, it was not open to the jury to return this verdict.

On this appeal the main contention of the appellant has been that his Honour was bound to enter judgment under Orders XXXVI., rule 32, and XL., rule 5, of the *Rules of the Supreme Court of Victoria* 1938 for the plaintiff for £865 in accordance with the verdict. The jury did not make any special findings. They brought in a general verdict, but, having regard to the summing up, it is plain enough they must have considered questions 1 and 3 should be answered in the negative and 4 and 5 in the affirmative, the date referred to in question 4 (*b*) and 5 (*b*) being 15th October (*Bradbury* v. *N.Z. Loan and Mercantile Agency Co. Ltd.* (1)).

The *Rules of the Supreme Court* 1883 (England) contain the following three rules:—Order XXXVI., rule 39: "The judge shall, at or after trial, direct judgment to be entered as he shall think right, and no motion for judgment shall be necessary in order to obtain

(1) (1926) 27 S.R. (N.S.W.) 15, at p. 21.

such judgment. Any appeal from any judgment so directed shall be to the Court of Appeal"; Order XL., rule 10: "Upon a motion for judgment, or upon an application for a new trial, the court may draw all inferences of fact, not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit"; Order LVIII., rule 4 (so far as material): "The Court of Appeal shall have power to draw inferences of fact and to give any judgment and to make any order which ought to have been made, and to make such further or other order as the case may require."

In Victoria, Order XXXVI., rule 32, which reads: "The judge shall at or after trial give judgment for any party or adjourn the case for further consideration or leave any party to move for judgment," corresponds to Order XXXVI., rule 39 (England). Order XL., rule 5 (Vict.), by virtue of which the learned judge entered judgment in the present case, corresponds to Order XL., rule 10 (England), except that in the Victorian rule the words "or upon an application for a new trial," are omitted. Order LVIII., rule 4 (Vict.), which concerns the powers of the Full Court on appeal, is identical with Order LVIII., rule 4 (England). It has been pointed out that Order LVIII., rule 4, is wider than Order XL., rule 10, because, under the former rule, the Court of Appeal is not limited to drawing inferences of fact not inconsistent with the jury's verdict (*Millar* v. *Toulmin* (1); *Allcock* v. *Hall* (2)). But it has been held under Order LVIII., rule 4, and under Order XL., rule 10, before it contained the words "not inconsistent with the findings of the jury", that the court can set aside a judgment founded on the verdict of a jury in favour of the party on whom the onus lies and enter it for the unsuccessful party at the trial, if it is satisfied that the finding of the jury and the judgment entered pursuant thereto cannot stand because the evidence so preponderates in the latter's favour that any jury acting properly could only reasonably come to the one conclusion, and the court has all the materials before it for finally determining the matter in dispute because all the material evidence has been given at the trial, and there is no chance of a new

(1) (1886) 17 Q.B.D. 603; (1887) 12 App. Cas. 746.
(2) (1891) 1 Q.B. 444.

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trial bringing to light other material facts which might alter the result—See under Order XL., rule 10: *Bryant* v. *North Metropolitan Tramways Co.* (1); *Hamilton* v. *Johnson* (2); *Chapleo* v. *Brunswick Building Society* (3); *Bobbett* v. *South Eastern Railway Co.* (4); *Everett* v. *Griffiths* (5); under Order LVIII., rule 4: *Millar* v. *Toulmin* (6); *Allcock* v. *Hall* (7); *Paquin Ltd.* v. *Beauclerk* (8); *Winterbotham Gurney & Co.* v. *Sibthorp & Cox* (9); *Banbury* v. *Bank of Montreal* (10); *Calmenson* v. *Merchants' Warehousing Co. Ltd.* (11); *Croker* v. *Croker* (12); *Mechanical & General Inventions Co. and Lehwess* v. *Austin and the Austin Motor Co.* (13); *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Co.* (14).

Since a single judge in Victoria cannot order a new trial, and the judgment must not be inconsistent with the findings of the jury, it would seem that he cannot give judgment for the defendant, where the jury have found for a plaintiff who has to discharge the onus, on the ground that the verdict is against the weight of evidence where there is some evidence on which they could reasonably find for the plaintiff (*Banbury* v. *Bank of Montreal* (15); *Winnipeg Electric Co.* v. *Geel* (16); *Driver* v. *War Service Homes Commissioner* [*No.* 1] (17)). But the powers conferred upon the court by Orders XXXVI., rule 32, and XL., rule 5, appear to me to be ample to enable him to do so, where he is satisfied on reconsideration there is no such evidence. There cannot be any distinction in principle between the case where there is an issue of fact which the trial judge leaves to the jury because he considers at the time there is some evidence upon which they could reasonably find for the plaintiff and they disagree, and that where they find for the plaintiff. In *Bobbett's Case* (18) *Denman* J. left to the jury the question whether the plaintiff had since 1864 had possession of the premises to the exclusion of the defendant. The jury were unable to agree, and were discharged; but, both parties claiming the judgment, he reserved the case for further consideration, and having heard it argued gave judgment on the several points discussed. The following passages appear in the report:—"This brings me to the question whether upon the undisputed facts proved at the trial and set forth above, I ought to

(1) (1890) 6 T.L.R. 396.
(2) (1879) 5 Q.B.D. 263.
(3) (1881) 6 Q.B.D. 696, at p. 714.
(4) (1882) 9 Q.B.D. 424; (1882) W.N. 92.
(5) (1921) 1 A.C. 631, at p. 657.
(6) (1886) 17 Q.B.D. 603; (1887) 12 App. Cas. 746.
(7) (1891) 1 Q.B. 444.
(8) (1906) A.C. 148, at p. 161.
(9) (1918) 1 K.B. 625.
(10) (1918) A.C. 626, at p. 706.
(11) (1921) 125 L.T. 129.
(12) (1932) P. 173.
(13) (1935) A.C. 346.
(14) (1941) A.C. 55, at p. 65.
(15) (1918) A.C., at p. 705.
(16) (1932) A.C. 690, at pp. 696, 697.
(17) (1924) V.L.R. 515.
(18) (1882) 9 Q.B.D., at p. 426.

give judgment for either party under Order XL., rule 10. When that question arises I understand the proper test to apply is to consider whether there is evidence such as if left to the jury would warrant them in finding a verdict for the plaintiff, which the court would not be clearly bound to set aside as wholly unreasonable. If there be such evidence there ought to be a new trial; if not, in the absence of any ground for thinking that further light could be thrown upon the matter by a new trial, judgment ought to be entered for the defendant. Applying this test to the present case, I am of opinion that I ought to enter judgment for the defendants . . . On the whole I am of opinion that there was no reasonable evidence upon which a jury could have found that the defendants had been out of possession since 1863 or 1864, by reason of any exclusive possession or tenancy of the plaintiff . . . For these reasons I am of opinion that if the jury had found a verdict for the plaintiff, on the question I left to them, or if it had been left to them to say whether the plaintiff occupied in 1864 or since as tenant or as mere licensee, and they had answered that he occupied as tenant, such verdict could not have been allowed to stand as being wholly unreasonable and unsupported by the evidence; and therefore that there ought to be judgment for the defendant under Order XL., rule 10. I give judgment for the defendants accordingly with costs" (1). His decision on the question of evidence was affirmed by the Court of Appeal (2). *Peters* v. *Perry & Co.* (3), *Everett* v. *Griffiths* (4) and *Paquin Ltd.* v. *Beauclerk* (5) are similar cases. In *Milissich* v. *Lloyds* (6) the Court of Appeal pointed out that under Order XL., rule 10, it had power to order judgment to be entered in the same way as the judge at the trial *as a matter of law* should have directed it to be entered, but the court had no power to withdraw questions of fact from the jury which were properly for their consideration.

The functions of the judge and jury under the *Judicature Rules* were succinctly stated by *Mellish* L.J.:—"The question before us is an important one, as to the power of the court to enter judgment under the *Judicature Acts*. Now, although the *Judicature Acts* do undoubtedly give very general powers to the court as to entering judgment, it is clearly not intended by the legislature that the court should take advantage of that general rule to take away questions from the consideration of the jury, *which are questions of fact properly for their consideration*" (7). *Brett* J.A. said:—"It is a recognized

(1) (1882) 9 Q.B.D., at pp. 430, 431.
(2) (1882) W.N. 92.
(3) (1894) 10 T.L.R. 366.
(4) (1921) 1 A.C. 631.
(5) (1906) A.C. 148.
(6) (1877) 36 L.T. 423.
(7) (1877) 36 L.T., at p. 425.

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rule that where there is some evidence, judges will not interfere with the verdict, but when there is no evidence they will. If the matter is so conclusive that no reasonable man could find otherwise than in one way, then the court, as a matter of law, should direct the jury to find that way; but the moment a reasonable man might say that what was omitted might have an effect in favour of the plaintiff, then the question is for the jury" (1).

In *Skeate* v. *Slaters Ltd.* (2) all three members of the Court of Appeal expressed the view that "a judge who at the conclusion of the plaintiff's case has ruled that there is some evidence for the jury is entitled at the conclusion of the whole case to reconsider his ruling and to enter judgment for the defendant if he is then of opinion that the plaintiff's evidence fails to disclose any cause of action against the defendant." *Phillimore* L.J. said:—"A judge to whom application is made to enter judgment for the defendant on the ground that the plaintiff has made out no case may, notwithstanding that he refuses to stop the case, and allows it to go to the jury, upon reconsideration, hold that there is no case, even after the verdict of the jury. Sometimes he prefers to take a verdict, so that, in case his view of the law be wrong, the facts may be decided once for all without the expense of a second trial. This may result in a jury giving a verdict for the plaintiff and the judge then giving a judgment for the defendant, and it is not without objection as it leads to misconception. But it may be done, and has been done in reported cases" (3). See also *Halliwell* v. *Venables* (4) where *Scrutton* L.J. said:—"There has been too much lately of this trying to run cases on no evidence to go to the jury. It is very much better for the parties in the matter of expense that the verdict of the jury should be taken in such a case coupled with the submission that there is no evidence to go to the jury, because then you save expense to the parties of a second trial."

In *Shears* v. *Mendeloff* (5) *Avory* J., after the jury had brought in their verdict for the plaintiff, having on further consideration come to the conclusion he ought not to have left the case to them, entered judgment for the defendant. The learned trial judges did the same thing in *Roche* v. *McKerrow* (6); *Thompson* v. *L.M. & S. Railway Co.* (7); and *Fender* v. *St. John-Mildmay* (8)—See also *Jane* v. *Stanford* (9); *Hendle* v. *Qualtrough* (10); *Gibbs Bright &*

(1) (1877) 36 L.T., at p. 426.
(2) (1914) 2 K.B. 429.
(3) (1914) 2 K.B., at p. 444.
(4) (1930) 143 L.T. 215, at p. 216.
(5) (1914) 30 T.L.R. 342
(6) (1890) 24 Q.B.D. 463.
(7) (1930) 1 K.B. 41.
(8) (1938) A.C. 1.
(9) (1935) N.Z.L.R. 891.
(10) (1899) 9 Q.L.J. 218.

*Co.* v. *Rowan* (1); *Ward* v. *Griffiths Bros. Ltd.* (2); and *Deeble* v. *Nott* (3).

It is the duty of this court on appeal to give the same judgment as his Honour should have given (*Judiciary Act* 1903-1940, sec. 37). It must leave the jury supreme within its province, but it can determine the question of law whether there is any evidence to support either of the counts in the declaration, and, in order to dispose of the appeal completely, imagine that a count has been added to cover the third issue left to the jury. It can consider whether this imaginary count would be bad in law. In my opinion an agreement that the plaintiff need not continue to act as manager after 15th October would not be sufficient in itself to enable him to sue on a *quantum meruit*. It is totally different from the cases referred to in *Smith's Leading Cases*, 13th ed. (1929), vol. 2, p. 10, and *Segur* v. *Franklin* (4), where the defendant had prevented the plaintiff from fulfilling his part of the bargain. It would simply be an oral rescission releasing both parties from any further rights and obligations under the agreement. The plaintiff therefore would not have been entitled to any damages on the third issue even if there had been any evidence to establish a mutual rescission.

The conclusion is that, as the plaintiff failed to establish any cause of action, there never was any case in law to go to the jury. His Honour was therefore authorized by the law governing the procedure of the Supreme Court to disregard the jury's verdict and was right in entering judgment for the defendant. *McDonnell & East Ltd.* v. *McGregor* (5) is distinguishable, because there the jury had returned a verdict open to them on the evidence and so within their province, and the trial judge could only give judgment in accordance with the verdict.

The same result can be reached in another way. The three issues already mentioned were left to the jury. They returned a general verdict for £865, but they must be deemed to have applied their minds to the facts in the light of the summing up. They could only have awarded this sum on the third issue, because his Honour had told them quite explicitly that if they found for the plaintiff on either of the counts in the statement of claim they must bring in a verdict for £2,966 13s. 4d. It was open to his Honour even at common law to interpret the verdict as a finding in favour of the plaintiff on the third issue only (*Preston* v. *Peeke* (6)) and he could do so *a fortiori* under Order XL., rule 5, as part of the material

(1) (1887) 13 V.L.R. 621, at p. 634.
(2) (1928) 28 S.R. (N.S.W.) 425; 45 W.N. 130.
(3) *Ante*, p. 104.
(4) (1934) 34 S.R. (N.S.W.) 67, at p. 72.
(5) (1936) 56 C.L.R. 50.
(6) (1858) 27 L.J.Q.B. 424.

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necessary for finally determining the matters in dispute. If there had been evidence to support the finding, his proper course, having regard to the view he took of the law, would have been to order the statement of claim to be amended by adding the necessary third count and enter a verdict and judgment for the plaintiff on this count (*Cossey* v. *Diggons* (1); *Iles* v. *Turner* (2); *Burrell* v. *Evans* (3)). But on a fair reading of the application by the defendant's counsel after the jury had retired, it is plain to my mind that he submitted that there was no evidence to support this issue and that his Honour, without objection from the appellant's counsel, gave him leave to move for judgment if the jury found in the plaintiff's favour upon it. This reservation therefore, can be deemed to have been made with the implied consent of the parties, so that his Honour would have been entitled at common law to reconsider the evidence and, if he thought there was no case to go to the jury, supersede the verdict (*Davies* v. *Felix* (4); *Edmond Weil Incorporated* v. *Russell* (5)).

The appeal should be dismissed.

*As the court is evenly divided the appeal will be dismissed with costs.*

Solicitor for the appellant, *Paul C. Nunan.*
Solicitor for the respondent, *D. S. Abraham.*

O. J. G.

(1) (1819) 2 B. & Ald. 546 [106 E.R. 465].
(2) (1834) 3 Dowl. 211.
(3) (1930) 46 T.L.R. 578.
(4) (1878) 4 Ex. D., at p. 35.
(5) (1936) 56 C.L.R., at pp. 46, 47.