[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;
DEFENDANT,

AND

McKEOUGH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1953.

BRISBANE, *July* 30, 31.

Williams A.C.J., Webb, Kitto and Taylor JJ.

Practice—Trial of action by jury—All issues raised on pleadings not put to jury—Substantive issues—Conduct of case—Inferences of fact not inconsistent with findings of jury—Power of appellate tribunal—The Judicature Acts 1876 *to* 1921 (*Q.*) (40 *Vict. No.* 6—12 *Geo. V. No.* 15), *s.* 8—*The Rules of the Supreme Court* 1900 *to* 1951 (*Q.*), *O. LXX*, *rr.* 11, 26.

In an action for breach of promise of marriage the plaintiff pleaded the defendant's promise to marry her, the promise by her to marry the defendant and her readiness and willingness to marry the defendant. By his defence the defendant denied these allegations and put them in issue. At the trial no evidence was given by the defendant, and cross-examination of the plaintiff was directed to showing that the plaintiff was urging the defendant to marry her. During the trial counsel for the defendant stated that he was not conceding anything and was insisting on the plaintiff proving her cause of action. On the evidence and conduct of the case the real contest between the parties was the issue whether the plaintiff promised to marry the defendant. Counsel for the defendant took no part in framing the questions for the jury. Apart from damages, the only issue put to the jury was whether the defendant promised to marry the plaintiff. On the jury answering the questions in the plaintiff's favour the trial judge entered judgment for the plaintiff. On appeal, the Full Court of the Supreme Court of Queensland drew inferences of fact as to the essential ingredients of the cause of action, namely the two issues not put to the jury that the plaintiff promised to marry the defendant and that she was at all material times ready and willing to marry the defendant.

Held, that the Full Court was entitled to make the findings as inferences of fact not inconsistent with the findings of the jury, since the issues not put to the jury were not regarded at the trial as real or substantive issues.

Per curiam: It is only in rare instances and with considerable caution that this power should be exercised by a court of appeal.

Baird v. *Magripilis* (1925) 37 C.L.R. 321, followed and applied.

Royal Mail Steam Packet Co. v. *George & Branday* (1900) A.C. 480, distinguished and explained.

Decision of the Supreme Court of Queensland (Full Court): *Smith* v. *McKeough* (1954) Q.S.R. 17, affirmed.

APPEAL from the Supreme Court of Queensland.

In an action commenced in the Supreme Court, Mary Kathleen McKeough sued Howard Ney Smith for damages for breach of promise. By her statement of claim the plaintiff alleged, *inter alia*, that the plaintiff and defendant promised to marry each other, that she was always ready and willing to marry the defendant and that he refused to marry her. The defendant by his defence denied these allegations and put them in issue.

The trial was held at the Circuit Court, Maryborough, before *Sheehy* J. and a jury. During the trial counsel for the defendant stated that he was not conceding anything on behalf of his client and was insisting that the plaintiff prove her cause of action. No evidence was called in defence. In cross-examination of the plaintiff, counsel asked the following questions to which the plaintiff replied as set forth :—

"Q. You all along obviously hoped to marry Smith? A. I not only hoped to marry Mr. Smith, but Mr. Smith had asked me to marry him".

"Q. What I put to you was that all along you hoped to marry Smith—not whether Smith had promised to marry you. You in fact hoped to marry Smith? A. Yes".

"Q. You wanted to marry him? A. Yes".

"Q. In November 1950 you were threatening to take the baby and clear off to New South Wales . . . Tell us why? A. When I wrote that letter I was upset because I had not had news of her or anything like that".

"Q. I am not suggesting that you did not genuinely want to marry him. I am suggesting that you were trying to get him into the frame of mind that he wanted to marry you and you were seeking to do it in that way? A. You are saying all the time that every time I wrote a letter there was a threat behind it to take the baby".

"Q. You wanted to marry Mr. Smith because you believed rightly or wrongly that Mr. Smith was a wealthy man? A. That is not the reason".

"Q. . . . the position was that you hoped he would marry you and you hoped you would be able to talk him into marrying you? A. He told me he would marry me".

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Counsel for the defendant took no part in framing the questions for the jury which were:—(1) Did the defendant . . . promise to marry the plaintiff? (2) (Not material). (3) If answer to question (1) is yes, what damages? . . .

The jury answered the questions as follows: (1) Yes. (3) £4,000.

Counsel for the defendant moved for judgment on the ground that there were no findings of fact on the issues whether the plaintiff promised to marry the defendant and whether at all material times she was ready and willing to marry him.

The trial judge (*Sheehy* J.) entered judgment for the plaintiff for £4,000 with costs.

The defendant appealed to the Full Court (*Mansfield* S.P.J., *Philp* and *Stanley* JJ.) which under O. LXX, rr. 11, 26 of *The Rules of the Supreme Court* of 1900 *to* 1951 (Q.) drew these inferences of fact in favour of the plaintiff and dismissed the appeal: *Smith* v. *McKeough* (1).

From this decision the defendant appealed to the High Court, on the ground that the Full Court was wrong in law by reason of the fact that the respondent upon the trial of the action having failed by her own default to obtain from the jury findings of fact which she should have obtained as to certain matters necessary ingredients of her cause of action and upon which her right to recover any damages depended, that is to say, the allegations contained in the statement of claim that the respondent promised to marry the appellant and that the respondent was always ready and willing to marry the appellant, the Full Court had no power in law to find the said facts in favour of the respondent or to pronounce and was not justified, on the evidence and was wrong in pronouncing any judgment in favour of the respondent.

R. King (with him *A. S. Given*), for the appellant, referred to *Psaltis* v. *Schultz* (2); *Rickards* v. *Lothian* (3); *Royal Mail Steam Packet Co. Ltd.* v. *George* (4); *Milissich* v. *Lloyds* (5); *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (6), per *Isaacs* A.C.J. (7); *Jenyns* v. *Public Curator of Queensland* (8); and distinguished *Baird* v. *Magripilis* (9).

P. D. Connolly, for the respondent, was not called upon to argue.

(1) (1954) Q.S.R. 17.
(2) (1948) 76 C.L.R. 547.
(3) (1913) A.C. 263, at p. 274.
(4) (1900) A.C. 480, at pp. 493, 494.
(5) (1877) 36 L.T. 423.
(6) (1924) 35 C.L.R. 14.
(7) (1924) 35 C.L.R., at p. 31.
(8) (1953) Q.S.R. 225.
(9) (1925) 37 C.L.R. 321.

The following judgments were delivered :—

WILLIAMS A.C.J. This is an appeal by the defendant from an order of the Full Supreme Court of Queensland made on 9th June 1953, dismissing his appeal from a judgment entered by the learned trial judge in favour of the plaintiff. The judgment was given in an action in which the plaintiff sued the defendant for breach of promise of marriage. The defendant seduced the plaintiff whilst he was still a married man, but on 30th May 1951 a decree nisi was made for dissolution of his marriage and that decree nisi was made absolute on 20th November 1951. After the decree nisi had been made for dissolution of marriage, the defendant could promise to marry the plaintiff and the promise would be valid, although it did not contain a condition that the marriage was not to take place until the decree nisi had been made absolute : *Psaltis* v. *Schultz* (1).

The action was tried before *Sheehy* J. and a jury. The defendant did not go into evidence. The plaintiff gave evidence and was cross-examined at length by counsel for the defendant, a great deal of the cross-examination being directed to show that the plaintiff was throughout urging and, indeed, if I might adopt the phrase of *Taylor* J., " pestering " the defendant to marry her. After February 1949 sexual intercourse took place between them from time to time and one child was born of this intercourse and she became pregnant with another child about the time that the defendant married another woman on 1st April 1952. She was still pregnant when the case came on for trial in October 1952.

In order to succeed in the action it was necessary for the plaintiff to prove not only that the defendant promised to marry her but also that she promised to marry him and that she continued to be ready and willing to do so at all material times. On more than one occasion during the hearing Mr. *King* said that he was not conceding anything on behalf of his client, and he can claim that, so far as his statements to the court were concerned, he was insisting upon the plaintiff proving all three ingredients in her cause of action. But the actual conduct of the case was such that, as I understand the evidence (apart from another issue raised by way of defence which is immaterial on this appeal, that is the issue of the chastity of the plaintiff) the real contest between the parties and the only substantial issue in the action was whether the defendant had promised to marry the plaintiff.

The learned judge was certainly under that impression when he summed up to the jury and at the conclusion thereof left four questions to the jury. They were as follows : (1) Did the defendant

(1) (1948) 76 C.L.R. 547.

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after the date of the decree nisi on 30th May 1951 promise to marry the plaintiff? To that question the jury answered: "Yes". (2) Is the defendant the father of the child of which the plaintiff is now pregnant? The answer to that question was also "Yes", but we can leave that question and answer out of consideration for it relates to the defence of want of chastity to which I have referred. (3) If answer to question (1) is yes, what damages? The answer to that question was £4,000.

The jury did not bring in any general verdict in the action.

Upon these answers the plaintiff and defendant applied to his Honour to direct judgment to be entered for them respectively. These applications were made, as I understand the case, under the first limb of r. 37 of O. XXXIX of *The Rules of the Supreme Court* 1900 *to* 1951 (Q.). This rule provides: The judge may, at or after a trial, direct that judgment be entered for any or either party, or may adjourn the case for further consideration, or may leave any party to move for judgment.

The rest of the rule is immaterial.

There is also r. 6 of O. XLII which provides: "Upon a motion for judgment, the Court may draw any inference of fact not inconsistent with the findings of the jury, if any, and may, 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 not so satisfied, direct the motion to stand over for further consideration, and may direct such questions or issues of fact to be tried or determined, and such accounts and inquiries to be taken and made, as may be just". It does not appear to have been as yet authoritatively decided whether this rule and the wide powers which it gives is applicable where a motion for judgment is made to the trial judge under O. XXXIX, r. 37. It is not necessary for us to express any opinion upon this point in the present case because no attempt was made by the plaintiff to ask the learned trial judge to make findings of fact under r. 6. Apart from findings by his Honour under r. 6 of O. XLII that the plaintiff promised to marry the defendant and was ready and willing to do so at all material times (assuming that rule does apply to a motion for judgment before a single judge), I would think, as the Full Court thought on appeal, that the plaintiff had not proved the two ingredients in her cause of action which were not submitted to the jury, and his Honour should have entered judgment for the defendant.

But the case was taken on appeal to the Full Supreme Court and that court has wide powers under O. LXX of which the material rules for present purposes are rr. 11 and 26. Rule 11 provides:

The court, upon the hearing of an appeal, shall have power to draw inferences of fact, not inconsistent with the findings of the jury, if any, and to give any judgment and make any order which ought to have been given or made in the first instance, and to make such further or other order as the case may require. The rest of the rule is immaterial.

Rule 26 provides: Upon the hearing of an application for a new trial or to set aside the verdict or finding of a jury, the court may, 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, and may for that purpose draw any inference of fact not inconsistent with the findings of the jury, if any. I need not read the rest of the rule. It will be seen that these rules like r. 6 of O. XLII confine the power of the court to draw inferences of fact which are not inconsistent with the findings of the jury. But it is quite clear that the inferences of fact which the Full Court was asked to draw, and which it did draw on the appeal, that the plaintiff agreed to marry the defendant and was always ready and willing to marry him at all material times, were inferences of fact which were not in any way inconsistent with the findings of the jury. On the contrary, having regard to the plaintiff's evidence, no other findings were reasonably open on those two ingredients in her cause of action which would not have been inconsistent with the answer of the jury to question (1). They were completely consistent with this answer and completely in line with the opinion which the jury must necessarily have formed of the credibility of the plaintiff when they accepted her evidence that the defendant had promised to marry her and answered the first question in her favour. They could not have accepted her evidence on this ingredient without also accepting her evidence that she was throughout urging the defendant to marry her. It seems to me, as the members of the court have pointed out on more than one occasion during the argument, that these two ingredients were never in any real or substantial sense live issues at the trial. No doubt Mr. *King* asserted at times that he was keeping them alive, but they were not really alive on the evidence. At the time of his summing up, his Honour was entitled to think they were not live issues and no doubt that was why he submitted only the first question to the jury.

The final inquiry therefore is whether, in such circumstances, having regard to the wide powers conferred on the Full Court by the rules to which I have referred, it was not open to the Full Court to make affirmative findings in favour of the plaintiff on those issues.

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Apart from authority, I would have no doubt that in such circumstances the rule is wide enough to authorize such findings. There are statements in some of the cases which appear to hold that on the true construction of these rules the court has no such power, but all these statements must be read in the light of the facts with which they are dealing. When they are properly understood they are no more than statements relating to the manner in which the discretion of the court should be exercised in such circumstances. It is clear, of course, that, where there is a jury, the jury is the tribunal of fact, so that it is only in rare instances that the court will draw inferences of fact and the discretion to do so under the rules must be exercised with extreme caution and only in plain cases. As I have said, I consider that this case is one of those cases. In any event I agree with the Full Supreme Court that the matter is decisively determined so far as the construction of rr. 11 and 26 is concerned by the decision of this Court in *Baird* v. *Magripilis* (1). There the court went further than it was necessary for the Full Court to go in the present case, because it not only set aside the answer of the jury to the first question but proceeded to answer that question and also the second question in favour of the plaintiff. The relevant principles are, I think, stated in plain terms by *Starke* J. in that case (2). He said : " Under the Judicature Rules, an appellate Court, where all the facts are before it, and it is satisfied that the evidence is such that only one possible verdict could reasonably be given, is not bound to order a new trial, but has jurisdiction to give any judgment and make any order which ought to have been made, notwithstanding the verdict of a jury (*Millar* v. *Toulmin* (3) ; *Allcock* v. *Hall* (4) ; *Skeate* v. *Slaters Ltd.* (5) ; *Winterbotham Gurney & Co.* v. *Sibthorp and Cox* (6) ; *Clouston & Co.* v. *Corry* (7) ; *Paquin Ltd.* v. *Beauclerk* (8) ; *Everett* v. *Griffiths* (9) ; and cf. *Toulmin* v. *Millar* (10)). The *Rules of the Supreme Court* of Queensland are not precisely the same as the Judicature Rules (cf. Order LXX., rr. 11 and 26). They allow ' any inferences of fact not inconsistent with the findings of the jury, if any '. It is not disputed that the Supreme Court has always exerted the same power under its Rules as the Court of Appeal has exerted under the *Judicature Act*. And I think this practice can be supported as a matter of law. The court clearly has jurisdiction to set aside the verdict of a jury which is unreasonable or

(1) (1925) 37 C.L.R. 321.
(2) (1925) 37 C.L.R., at pp. 334, 338.
(3) (1886) 17 Q.B.D. 603.
(4) (1891) 1 Q.B. 444.
(5) (1914) 2 K.B. 429, at p. 441.
(6) (1918) 1 K.B. 625.
(7) (1906) A.C. 122.
(8) (1906) A.C. 148.
(9) (1921) 1 A.C. 631.
(10) (1887) 12 A.C. 746.

perverse, and if a finding is set aside and no longer exists, then it seems to me that the authority to draw inferences of fact under the Rules may be exercised (cf. *United States* v. *Motor Trucks Ltd.* (1)). But that authority will only be exerted where the evidence is such that only one possible verdict could reasonably be given upon the evidence : it is a strong power and must be exercised with considerable caution " (2).

Mr. *King* relied strongly on the statement in the judgment of *Isaacs* J., as he then was, in *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (3). This passage was cited in the recent case of *Jenyns* v. *Public Curator of Queensland* (4). After referring to O. XLII, r. 6, of the *Rules of the Supreme Court* (Q.) his Honour said : " But that, as stated, does not, in my opinion, permit the Court to disregard an actual finding unless, perhaps, a direction was asked for and the application postponed ; nor does it enable the Court to substitute itself for the jury on a substantive issue which should have been submitted to them " (5).

It is the second limb of that passage which is relevant here and the important words are " on a substantive issue which should have been submitted to them ", that is, the jury. As I have already said, having regard to the evidence, it could not be said that the question whether the plaintiff was willing to marry the defendant and continued ready and willing to do so was in any real sense a substantive issue, so that his Honour's remarks do not apply to the present case. The case of *Royal Mail Steam Packet Co.* v. *George* (6) is, I think, capable of a similar explanation. It appears from the report of that case that there are in the Jamaica Code of Civil Procedure, s. 438, similar provisions to those which appear in r. 6 of O. XLII and the two rules contained in O. LXX. Mr. *King* laid stress on the passages, where their Lordships said : " The findings of the court in this case are not inconsistent with any of the findings of the jury. The question remains whether the Code enables the court to decide questions of fact never submitted to the jury at all " (7) and where, after discussing the judgment of *Mellish* L.J. in *Milissich* v. *Lloyds* (8), their Lordships said : " However that may be, the defendants say they are entitled to have the opinion of a jury upon their liability. Their Lordships hold them to be so entitled, and for that purpose a new trial is necessary " (9).

(1) (1924) A.C. 196.
(2) (1925) 37 C.L.R., at p. 334.
(3) (1924) 35 C.L.R. 14, at p. 31.
(4) (1953) Q.S.R. 225.
(5) (1924) 35 C.L.R., at p. 31.
(6) (1900) A.C. 480.
(7) (1900) A.C., at p. 493.
(8) (1877) 36 L.T. 423.
(9) (1900) A.C., at p. 495.

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But these remarks relate to an earlier statement, where their Lordships said : " With regard to the point on which they (that is the Full Court of Jamaica) rest their judgment—namely, the incidence of coal dust on the new works of the plaintiffs—Mr. Pollock drew attention to several passages in the evidence with the view of shewing that such new incidence was substantial and injurious. Whether the evidence does or does not lead to the inference that a substantial new wrong has been caused by the plaintiffs is a point which ought to have been brought before the jury and decided at the trial ; and as it was not so, the question is reduced to this, whether the court is justified in deciding it upon appeal " (1).

This passage appears to me to show that in the subsequent passages their Lordships were dealing with the question whether in the exercise of its discretion the court on appeal would be justified in making the necessary finding. The question with respect to which the court was asked to make the finding was the live and active question whether a substantial new wrong had been caused by the plaintiffs, and that was a question which their Lordships thought should be submitted to the jury and not the kind of question which the court on appeal in the proper exercise of its discretion would answer for itself. But, as I have said, the two ingredients which were not submitted to the jury in the present case were of an entirely different nature and were such that the Full Supreme Court in the exercise of its discretion was fully entitled to draw the necessary inferences of fact and make the affirmative findings which it did in favour of the plaintiff.

For these reasons the appeal should be dismissed with costs.

WEBB J. I agree.

KITTO J. I agree.

TAYLOR J. I agree.

Appeal dismissed with costs.

Solicitors for the appellant, *Corser Sheldon & Gordon*, Maryborough, by *G. A. L. Uhl & Sheldon.*

Solicitors for the respondent, *George McGhie,* Maryborough, by *C. R. Ellison.*

B. J. J.

(1) (1900) A.C. at p. 493.