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Hawkins & Fletcher

Judge (Isaac)

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High Court of Just.
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Chk 1 to 5

HAWKINS V FLETCHER.

JUDGMENT.

...

MR JUSTICE ISAACS.

Judgment.

...

Isaacs J.

Notwithstanding the very full and earnest presentation by Mr Macrossan of the case for this appeal, I am unable to entertain any doubt that it should be dismissed.

The late and lamented Chief Justice McCawley examined the facts with extreme thoroughness, and after giving weight to every possible consideration, arrived at ~~the~~ the conclusion that the defendant, the present appellant, was liable in damages for breach of his agreement. The damages were awarded on the basis that several hundred cows, the subject of the contract, were in calf at the date of delivery. That being the basis, it becomes unnecessary to consider whether reliance can be placed upon the oral warranty, which formed an alternative ground of complaint in this case. The oral warranty may be disregar^ded, because the interpretation placed by McCawley C.J., upon the words "dry cows" in the written contract of 13 September 1923, was that that expression meant "cows not in calf", and that interpretation, in the circumstances of this case cannot be shaken. -----

There were several objections taken to the judgment under appeal, and these may be dealt with in ^{logical} order. -----

~~This is a very~~

~~which is necessary~~

First it was said that the words in the contract "as inspected
"by Mr W. Walters" negatived the idea of any warranty, and in-
-dicated that Walters, the respondent's agent, bought on his
own judgment after inspection. But the words as to inspection
in their collocation merely identify the bulk inspected, out
of which the lesser number purchased are to come, and as to
these, the words of the contract form the terms of purchase.
One of those terms is that about 700 are sold as "dry cows".
Then it was said, that to reach an interpretation, not being
the ordinary and natural meaning of the words under construc-
-tion, it was necessary-----

to find a trade usage, and trade usage, it was urged, had not been pleaded. That objection fails because its fundamental assumption is absent. The expression "dry cows" has no primary natural meaning that could have any sensible application to the contract. There can be no doubt as to the primary meaning of the word "cow"; but the word ~~dry~~ "dry" has an extremely varied signification, dependent largely on the substantive to which it is attached. Linked to such words as sheep, garment, nurse, light, sermon, weather, wine, humour, and a host of other words, the attributes it indicates or suggests are different sometimes in nature -as physical or intellectual- and sometimes in degree.

To paraphrase the expression "dry cows" would be impossible unless one had or assumed the surrounding circumstances.-----

The question here is simply what is the meaning of the phrase or term in this contract, made in the proved circumstances. Briefly those circumstances are that the cows were bought for the purpose known to both parties, not of keeping them for dairying, but of travelling them a considerable distance along a somewhat difficult road and fattening them for sale.

What is the meaning of "dry cows" when used in that connection?

There being no fixed natural meaning, which would be intelligible, what is to be done in order to ascertain the intention of the parties?

You can always give parol evidence to identify the subject-matter of the contract. The law as to that I have very recently -----

stated, and made somewhat detailed reference to the most authoritative cases in Cameron v Slutzkin (32 C.L.R. at pp. 90 to 93). Beyond that reference, I shall do not more as to this point than requote one passage from the judgment of Viscount Haldane L.C., in Charrington v Wooder (1914 A.C. p. 71 at p. 77):- "If the language of a written contract has a definite and unambiguous meaning, parol evidence is not admissible to shew that the parties meant something different from what they have said. But if the description of the subject-matter is susceptible of more than one interpretation evidence is admissible to show what were the facts to which the contract relates". The learned Lord adds:- "If there are circumstances which the parties must ~~have~~ be taken to have had in view when entering into the ~~contract~~ contract, it is necessary that the Court which construes the contract should have these circumstances before it".

Now, here there is, as I have said, no definite and unambiguous meaning attachable to the words: they have no sensible meaning at all apart from the circumstances of their use; and, consequently, it is necessary for a Court of construction to familiarise itself with the surroundings of the occasion, such as the vocabulary of persons engaged constantly or usually in the occupations involved when dealing for the purposes of such a transaction. The meaning so ascertained is not a secondary meaning, it is the natural and indeed the only sensible meaning in connection with the event. ~~There is no other meaning to be ascertained.~~

~~There is no other meaning to be ascertained.~~

If however the evidence be regarded as admissible, there is another objection urged, namely, that the evidence is not sufficiently precise, consistent and general, to enable a Court to reach the conclusion referred to. -----

It must be at once observed that no attempt was made -if we except a very late and faint attempt - by way of dernier ressort - to maintain there was no contract because of an unenforceable indefiniteness of subject-matter. Treating that suggestion with seriousness, it is sufficient to say it is not tenable.

The task of ~~finding~~ finding the proper interpretation of the phrase "dry cows" was difficult, but not insuperable. The late^y learned Chief Justice carefully found his way through the differently phrased testimony of the experts. Having heard the witnesses, and appraised their respective values, he came, in substance, to the conclusion, that the cattle industry, like most other modern industries, has a somewhat varied terminology in keeping with its variations of purpose.

"Dry cow" when applied to a cow, regarded as a milking proposition, is not of precisely the same meaning as when applied to a cow looked at as a fattening proposition. In the latter case, the evidence accepted by the Chief Justice, as the most reliable convinced him that "dry cow" conveyed the sense of the cow not being in calf. It is impossible to displace that conclusion without displacing the testimony of the witnesses relied on; and that is so dependent on the personal

characteristics of the witnesses and their manner of testifying

that it is hopeless to ask the Appellate Court to discard their evidence.

The result is that the Appeal fails, and should be dismissed with Costs.

Judgment.Higgins J.

The evidence of witnesses as to the meaning of the words "dry cows", as used in the beef cattle industry, was, in my opinion, properly admitted by the late Chief Justice; and his conclusion depends so much on the relative weight to be attached to the different experts (so-called) that it ought not, under the circumstances, to be disturbed by a Court of Appeal which has not seen or heard the witnesses.

The conclusion of the learned Judge was that the expression "dry cows" in Exhibit 1 does not mean, or include, cows in calf. Many of the cows delivered by the defendant (appellant) were in calf, and therefore died or were injured in travelling; and the defendant is liable in damages.

According to Parke B., advising the House of Lords in *Shaw v. Wilson* (9 Cl. & Fin. 355, 555), not only is it competent to receive evidence of the meaning of a foreign language, "but it is also competent [to receive evidence of meaning] where technical terms or peculiar terms, or indeed any expressions are used which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage or amongst particular classes". According to the same Judge, when speaking as a member of the House no parol evidence can be admitted to detract add to or detract from the description in the deed, or to alter it in any respect; but parol evidence is always admissible to show all "circumstances necessary to place before the Court when it construes an instrument in the position of the parties to it, so as to enable ^[the Court] it to judge of the meaning of the instrument" (*Baird v. Fortune & Macq*, H.L. 149). According to Stephen on Evidence (7th Edn 102) - "In order to ascertain the meaning of the signs and words made (sic) upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical local and provincial expressions, of abbreviations, and of common words which from the context appear to have been used in a peculiar sense; but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used".

The word "dry" is a common word; the word "cows" is a common word; but the expression "dry cows" cannot be called common as used outside the

dairy industry. Does it mean dry of rain, or dry of milk? The expression is used here by two men contracting in the beef cattle industry; and the dry cows are sold with spoiled cows. Even assuming that we cannot find a necessary intention that the cows were to travel along a long rough and difficult road, and that we must find in the context of the document itself that the expression is used in a peculiar sense, there^{is} enough in the context to show that the expression was so used.