12, 1958

IN THE PRIVY COUNCIL No. 2 of 1958

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

52108

B E T W E E N

PERCY SIMONS trading as Acme Credit Services ... ... (Plaintiff) Appellant

- and -

ANTHONY EUGENE MIDDLETON GALE ... ... (Defendant) Respondent

C A S E FOR THE APPELLANT

Record

10 1. This is an Appeal brought pursuant to the provisions of the Order in Council dated 2nd April 1909 and by virtue of final leave to appeal granted by the Supreme Court of New South Wales on the 20th December 1957 from a final judgment of the Supreme Court of New South Wales constituted by the Honourable Mr.Justice Walsh given on 12th November 1957 whereby it was directed that judgment be entered for the Defendant in an action in which the present Appellant was the Plaintiff and the present Respondent was the

pp. 34-35

pp. 13-27

p.27, ll.28-33
p.31, ll. 1-27

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Defendant.

p.2, ll.23-27 2. The Appellant claimed the amount of £A29,000 being the full and fixed amount under two policies of insurance in respect of a vessel named "Cap Tarifa" and interest on such sum at the rate of eight pounds per centum per annum from 16th April 1956.

Appendix Exs."A" & "B"

p.4, ll. 1-7 3. The issue for determination on this Appeal is whether the Respondent established that the Appellant had failed to fulfil a warranty contained in each of the two policies.

Exs. "A" & "B" 4. The policies, each dated 25th April 1956, were for respective amounts of £A22,000 and £A7,000 and were respectively subscribed by Underwriting Members of Lloyds and Members of the Institute of London Underwriters. They had been arranged for the Appellant by his brokers, Edward Lumley & Sons (N.S.W.) Pty. Ltd. who had, in turn, negotiated them through one of Lloyds Brokers in London. One of the policies was subscribed by, inter alios, the Respondent Anthony Eugene Middleton Gale, to the extent of his proportion, and who was named by the respective Underwriters as the person to be sued upon the policies.

Ex.1. p.40 l.35
p.41, l.7.

Appendix Ex. "B"

p.3, ll.17-26 Appendix Exs."A" & "B" 5. The policies each provided (inter alia) as follows :-

" 'CAP TARIFA'

"To pay Total Loss of £29,000 in the event of the "vessel not completing loading within 90 days from "time of sailing from Noumea from any cause

"whatsoever.

"No Free of Capture and Seizure

"Warranted animals available for loading.

"Warranted all arrangements for conversion made "at inception of this Insurance".

6. In December 1955, the "Cap Tarifa" was lying in Noumea and required the fitting of cattle stalls to enable the loading and carriage of cattle from Townsville in the State of Queensland to Manilla Phillipine Islands. — Ex. "1" p.39, ll.18-32 p.41, ll.26-31 Ex. "I.R." p.71, ll.10-19 pp. 72-73

7. Each policy named "Acme Credit Services" as the insured. — Exs. "A" & "B"

8. By his pleadings, the Respondent admitted:

(i) That the risk underwritten was that the vessel "Cap Tarifa" should load cattle at Townsville in the State of Queensland within 90 days of having sailed from Noumea. — p.1, ll.28-32 p.3, ll.31-33

(ii) That the said vessel sailed from Noumea on 10th January 1956 but the adventure was abandoned at Brisbane in the State of Queensland.. — p.2, ll.15-17 p.4, ll.10-11 p.3, ll.36-38

(iii) That the vessel did not proceed to Townsville — pp. 1-3

(iv) That there was a total loss of £A29,000 — pp. 2-3 p.15.

(v) That animals were available for loading — p.2. p.4

9. The Respondent put in issue the Appellant's title to the policies and also raised a defence that the use of the firm name "Acme Credit Services" had been abandoned at the date of the issue of the Writ. — p.4, ll.12-16 p.4, ll.17-21

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p.4, ll.1-7

10. As a defence to the action, the Respondent claimed that, in breach of an express warranty contained in each policy, the Appellant had not made all arrangements for conversion of the vessel "Cap Tarifa" at inception of the insurance.

pp. 6-12

p.13, ll. 8-9
p.31, ll.12-13

11. The action was tried as a Commercial Cause by Walsh J. without a jury by consent of both parties on the 8th, 9th and 10th days of October 1957.

p.7, ll.38-40

p.8, ll.1-29

12. At the hearing, the Appellant tendered the two policies of insurance and a Certificate of Registration under the Business Names Act, 1934 (New South Wales) produced by the Registrar-General for New South Wales. The Certificate of Registration certified that Percy Simons was registered as the sole proprietor of a finance business carried on since 1st September 1952 under the name of "Acme Credit Services".

Ex."C", p.38

p.8, l.30

The Appellant then closed his case.

13. The Business Names Act 1934 (New South Wales) provides (so far as is presently relevant) as follows:

" P A R T II

"REGISTRATION OF FIRMS, INDIVIDUALS OR CORPORATIONS "CARRYING ON BUSINESS UNDER BUSINESS NAMES.

" 4. Subject to the provisions of this Part -

" (b) every individual having a place of business in New South Wales and carrying on business under a business name which does not consist of his surname (together with his Christian name or names or the

" initials thereof) without any addition;

"shall, unless the firm-name of such firm,individual "or corporation was registered under the Registration "of Firms Act, 1902, and no entry of abandonment of "the use of such firm-name had, before the "commencement of this Act, been made by the "Registrar-General, be registered in the manner "directed by this Part:

x x x x

" 16. (1) The Registrar-General shall keep a "register and index of the business names of all "firms, individuals, and corporations registered "under this Act, and of all statements furnished "in reference thereto.

" (2) On receiving any statement furnished "pursuant to section six of this Act the Registrar- "General shall cause the business name of the firm, "individual, or corporation on whose behalf the "statement was furnished to be entered in the "register; and upon such entry being made the firm, "individual, or corporation shall be deemed to be "registered.

x x x x

" 17. (3) The register referred to in section "sixteen or a certificate of registration, or a "copy of or extract from any statement furnished in "pursuance of this Act or filed in pursuance of any "corresponding previous enactment purporting to be "signed and certified by the Registrar-General, "shall in all courts, and before all persons having "authority to hear, receive and examine evidence, "be admitted as prima facie evidence of the matter "contained therein and of the fact and date of "registration as shown thereon.

" A certificate purporting to be signed by the "Registrar-General, that a firm, individual, or "corporation was not, on any date or during any "period, registered under the business name "specified in the certificate, shall likewise be "admitted as prima facie evidence, according to its "tenor, that the firm, individual, or corporation "was not so registered."

14. The Respondent tendered: p.11, l.24; p.11A

(a) A Certificate dated 13th December 1955 and Appendix Ex. "4"

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evidently given to the Appellant on 14th December 1955 by his brokers stating in substance that they had "Insured with Underwriters at Lloyds London and/or Companies on account of Acme Credit Services" the risk as above described with warranties as expressed in the said Certificate. This Certificate was admitted in evidence over the

p.11A. 11.1-3 Appellant's objection.

Ex. "1" pp. 39-75 (b) Certain letters written on behalf of the Appellant and containing statements as to the making of arrangements for conversion of the vessel

Ex. "3" pp. 77-89
Ex. "1.H." pp. 56-57
Ex. "1.I" pp.57-58
Ex. "1.J" p.58, 11.14-33 (c) A number of documents in the form of copies of statutory declarations which the Appellant had handed to the Respondent in support of his claim. These declarations set out in circumstantial detail the steps taken by the Appellant in connexion with the arrangements to convert the vessel on its arrival in Brisbane en route to Townsville

Ex. "5" p.90, 11.1-27 (d) A notice dated 13th June 1956 given by the Appellant to the Registrar-General for New South Wales of his abandonment as from that date of the use of the firm name "Acme Credit Services".

p.12, 11.28-32 15. No other evidence was admitted either in the Respondent's case or in the reply of the Appellant.

pp. 13-27 16. On 12th November 1957, Walsh J. delivered a

p.27, 11.31-33 reserved judgment, in which he found a verdict for the Respondent and directed that judgment be entered

in accordance with that verdict.

17. In the course of his judgment, His Honour first referred to a question debated before him as to whether the Respondent by his pleadings had merely put in issue the Appellant's title to the policies or had put in issue the Appellant's insurable interest in their subject matter. Without deciding the precise ambit of this aspect of the defence His Honour held that in any case the Respondent failed, His Honour deciding that the Appellant had had title to the policies and also an insurable interest in their subject matter.

p.14, l.10; p.16, l.36

p.14, ll.28-32

18. Having called attention to the terms of the policies, His Honour stated the remaining questions in the case as follows :-

p.16, l.42; p.17, l.11.

(1) What is the true construction of the Warranty and in particular to what date or point of time do the words "at inception of this insurance" refer;

p.17, ll.12-27

(2) Does the onus of proof lie upon the Plaintiff or the Defendant in relation to the question whether the warranty was fulfilled or broken;

(3) Upon the evidence does the Plaintiff's action fail upon the ground that the warranty was broken

19. In connection with the first of these questions, His Honour decided that in construing the policies to ascertain the meaning of the expression "at inception of this insurance" and in giving effect to them he was

p.17, l.29; p.20, l.20

p.18, ll.39-44

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"entitled to take into account the fact that a certificate had been issued to the Plaintiff and the date of its issue, in deciding what was meant by the language used in the policies". Having taken these

p.17, l.29; p.18, l.2 elements into account the learned Judge rejected the Appellant's contention that the expression "at inception of this insurance" contained in the instant policies was a reference to the time of the commencement of the risk, namely, the date or point of time of the

p.20, ll.9-15 sailing of the vessel from Noumea, and held that it was a reference to the date of the issue of the Certificate to the Appellant by his brokers. 10

p.18, l.3; p.20, l.10 In the course of his discussion of this matter, His Honour observed - as the fact is - that the

p.18, ll.3-7 policies are not in terms connected with the certificate beyond the appearance on each of a certain

p.18, ll.21-28 notation and that it may be true, as the Appellant submitted, that there was no evidence as to when the various Underwriters bound themselves in respect of the insurance, and that in that sense the date when the contract of insurance became effective was not 20

p.19, l.15; p.20, l.10 established. His Honour also adverted to the difference in punctuation and layout between the warranties set out in the certificate and those set out in the policies but concluded that they bore the same meaning

p.19, ll.41-46 in each. He held that the words "at inception of this insurance" were attached only to the warranty as to the

conversion of the vessel.

The learned Judge's ultimate conclusion on the first point is expressed as follows :- p.20, ll.8-20

> "In my opinion what the plaintiff warranted was "that all arrangements for conversion had been made "at the time when the certificate was issued. I "think it is arguable that the reference was to an "earlier time, namely the time when application "for the insurance was first made. This would "be on or about 7th December. However, having "regard to the views I have formed upon other "questions yet to be discussed it makes no practical "difference whether the critical date is the 7th or "14th of December; and it is sufficient for me to "hold that the policy required that at the latest "the arrangements should have been made by 14th "December"

- that being the date His Honour took as the date of the issue of the certificate to the Appellant by his brokers. p.17, ll.29-34

20. In connection with the second question above-mentioned, His Honour held - as the Appellant respectfully submits, rightly in accordance with principle and authority - that the onus of establishing breach of the warranty as to the conversion of the vessel lay on the Respondent. p.20, l.21; p.24; l.8

21. For the purpose of determining the third question, the following facts were either directly established or inferred by His Honour by or from the documents tendered by the Respondent: p.24, l. 9 p.27, l.27 p.24, l.22; p.24, l.29.

(i) That on 14th December 1955, Brown and Broad Ltd. of Brisbane (hereinafter called the "Shipyard") who claimed to "do the fitting of nearly all p.41, ll.20-25 pp. 56-58 p.78, ll.37-39

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p.80, ll.1-3
p.86, ll.1-25

"ships in the Port of Brisbane" and were experienced in the fitting of vessels for the carriage of cattle were asked by telephone on behalf of the Appellant if they would undertake to fit the "Cap Tarifa" which was "due to arrive in Brisbane approximately the first week in January" 1956 and which could spend up to five weeks in the Brisbane River. The shipyard having consulted its bookings, said that it would fit the ship if it arrived about that time. To a request for a quotation the shipyard answered that they did not give firm quotations because of the unknown quantity of materials, wages, etc.

Ex. "3A" pp. 78-79
Ex. "3B" pp.79-80
Ex. "3L" p.89, ll.1-31

Ex."3D", p.82
Ex."3B", p.80

(ii) That on the 21st December 1955, when the shipyard was again telephoned on behalf of the Appellant "to recheck that everything is arranged for Brown and Broad to fit the ship", the shipyard said that the "Cap Tarifa" had been "booked" "for about the first week in January to fit it to carry cattle". To a further request by the Appellant for a firm quotation for the work, the shipyard indicated that it was unlikely that they would depart from their "usual custom of charging at cost plus 10% but that if they had some details of the ship the

p.82, ll.12-14
p.80, ll.20-23

p.82, ll.15-17

p.80, ll.23-24

p.82, ll.18-25
p.80, ll.25-30
Ex. "3L", p.89

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foreman would be consulted to see if a firm figure could be given.

(iii) That payment of the cost of converting the vessel as well as the cost of other matters ancillary to the venture had been arranged to be made by the New Zealand Loan and Mercantile Agency Company Limited, through whom the cattle were to be available at Townsville.

Ex."1" p.46, ll.33-36
Ex. "1.P" pp.67-68
Ex. "1.R." p.73, ll.15-22
Ex. "1.I" p.58, ll.7-10
Ex. "1.Q" p.70, ll.26-32

(iv) Some details of the vessel were supplied to the shipyard but on 23rd December 1955 the shipyard indicated through their foreman that they would not depart from their usual custom and would "charge the work at cost plus 10%". In this course the Appellant acquiesced.

Ex. "1.I" p.57, l.35 p.58, l.6
Ex. "3.F" p.84, ll.3-16
Ex. "3.G" p.84, l.28; p.85, l.27
Ex. "3.I" p.86, ll.27-44

(v) That the shipyard claimed that the arrangements to convert the vessel were definite and that the shipyard acted upon them when the vessel did arrive in the Brisbane River.

Ex. "3.J" p.86, ll.1-47
Ex. "3.G" p.85. ll.9-22
Ex. "3.K" p.88, ll.1-50
Ex. "3.L" p.89, ll.1-31

(vi) That the venture was abandoned for a cause unconnected with the conversion of the vessel or with the arrangements or alleged lack of arrangements to convert it for carrying cattle.

Ex. "1" p.41, l.33; p.44, l.25

(vii) That there was nothing in the evidence to suggest that according to the practice or usage of the Port of Brisbane or its shipyards relating to arrangements for conversion of vessels at

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Brisbane for the carriage of cattle was other than that the vessel should be "booked", as aforesaid, with a shipyard for that purpose.

p.20, ll.8-20 22. His Honour, having determined that in construing the policies the words "at inception of this insurance" related to the point of time when the certificate was issued, held that the necessary arrangements for the conversion of the vessel had not been made on the 14th December 1955. Consequently

p.27, ll.28-29 he held that the Respondent had established the defence that there was a breach of warranty. His judgment on this point concluded :-

p.26, l.30; p.27, l.27.

"The conclusion to which this evidence brings me "is that what took place on 14th December was no "more than exploratory of an arrangement later "intended to be made for the carrying out of the "work. I think it is clear that, at that time, "neither party became contractually bound to "proceed with the transactions. It has been sub-"mitted that the warranty does not require that "there should have been a binding contract for the "doing of the work. Even if this be so, in my "opinion the warranty as to the 'making of all "arrangements' for conversion required something "more definite and precise than the tentative under-"taking given by Brown and Broad Limited on 14th "December. That company had no prior knowledge "of the vessel, not having fitted her before, and "had no plan and no information at all as to the "work to be done. It seems to me that, quite apart "from any contractual obligation, it could not truly "be said, on 14th December, that Brown and Broad "Limited had put itself under any firm engagement, "binding upon it as a matter of business honesty "and fair dealing. Whether it would turn out to be "so bound remained to be seen, and was dependent "upon a number of factors not yet explored or not "yet agreed upon by both sides. These included the "plaintiff's willingness to submit to the company's "policy as to quotations, and the details as to the

"magnitude and nature of the task to be performed.

" I have sought to consider the relevant evidence "from the point of view from which I was urged, on "behalf of the Plaintiff, to approach it. This was "to take it as a whole, and to view it at its high- "est in favour of the plaintiff. I have not over- "looked that in subsequent declarations, officers of "Brown and Broad Limited have asserted that there "was a definite arrangement. But as to this, two "things may be said. The first is that the letters "and conversations must be examined by me to "ascertain whether they support such an assertion; "and I cannot accept it merely because it is made. "The second is that, as Mr.Shand argued, at least "some parts of the declarations suggest that the "definite arrangement came into being on 23rd "December, at a conversation which took place on "that date and therefore, tend to negative the "proposition that a definite arrangement was made "on 14th December".

23. The Common Law Procedure Act 1899-1957 (New South Wales) provides (inter alia) as follows :-

" 140. Upon all debts or sums certain recovered "in any action, the jury on the trial of any issue "or assessment of any damages may, if they think "fit, allow interest to the creditor at a rate not "exceeding eight per centum or (in respect of any "bill of exchange or promissory note) at a rate "not exceeding twelve per centum per annum -

"(a) from the time when such debt or sum was " payable (if payable by virtue of some written " instrument, and at a date or time certain);

x x x x

" 141. The jury on any trial or assessment of "damages may, if they think fit, give damages in "the nature of interest -

.....

"(b) over and above the money recoverable in " actions on policies of insurance, made after " the twenty-eighth day of September, in the " year One thousand eight hundred and forty-one " being the date of the passing of the Act fifth " Victoria number nine"

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24. The Usury, Bills of Lading, and Written Memoranda Act, 1902, (New South Wales) provides (inter alia) as follows :-

"4. In all cases where interest for the loan of money or upon any other contract may be recovered in any action or suit, the amount so recovered shall not, where the rate of interest has not been previously agreed upon by the parties, exceed eight per centum per annum"

p.13, ll.8-9
p.31, ll.12-13

25. The action was tried as a Commercial Cause by the Judge, without a jury by consent of both parties. Thus Section 3 of the Supreme Court Procedure Act 1900 (New South Wales) was applicable. That Section provides as follows :-

" 3. (1) In any action by consent of both "parties the whole or any one or more of the issues "of fact in question may be tried, or the amount of "any damages or compensation may be assessed by a "judge without a jury"

" (2) Notwithstanding such consent a judge "may at any time order that all or any of the issues "of fact in an action be tried with a jury if it "appears to him to be expedient."

26. The Appellant respectfully submits :

Appendix Ex. "4"

(i) That the certificate issued to the Appellant by his brokers was not admissible for the

p.18, ll.39-44

purpose for which it was tendered, namely, to determine the meaning or effect of the expression "at inception of this insurance" in the policies of insurance with which it was neither incorporated not contractually connected.

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(ii) That His Honour was in error in utilising the fact and particularly the date of issue of the said certificate when construing the policies. In this connexion it may be conceded, as His Honour says, that, even in the absence of any evidence as to the date when a contract of insurance was made, "the obligation can only have been accepted as being one defined and delimited by some terms then known to the Underwriters or to somebody whom they authorised to accept the obligation on their behalf". But it does not follow as His Honour reasoned "If it is asked where are such terms to be found, the answer must surely be that they are to be found in the certificate issued by Lumley", and in any case it does not follow that the date of the issue of the certificate is the date when a binding contract of insurance was made, the certificate itself not binding the Underwriters.

p.18, l.4; p.19, l.8

p.18, ll.21-28

p.18, ll.29-33

p.18, ll.33-35

(iii) That the Appellant's broker had no authority to bind the Underwriters and from the text of the cables endorsed on the certificate it is fairly apparent that he made out his certificate before his London correspondent had in fact placed the full amount of the cover with Underwriters. Further, there was no evidence that the precise terms, but particularly the date of issue of the

Appendix Ex. "4" Ex. "1.A" pp.47-50

certificate, were at any relevant time communicated to or known by the Underwriters.

(iv) That, in the absence of evidence as to the date of the making by the Underwriters of a contract to insure, there was no date to which the reference in the policies "at inception of this insurance" could refer other than the date of the inception of the risk thereby undertaken Further, the nature of the warranty, bearing in mind the circumstances of a shipfitting or repairing trade makes it unlikely that the expression would refer to a date which bore no connexion whatever, temporal or otherwise, to the risk. Nothing in the arrangements called for the vessel to leave Noumea at or within any particular time. The only time element was that of 90 days from its time of sailing from Noumea whenever that might chance to be. The Appellant further submits that it is incorrect to conclude that the Underwriters joining the Syndicate at various times intended by the terms of the policies to refer to the date of the issue of a certificate, whose terms did not bind them and of which they are not shown to be aware and for which the policies do not call or provide.

27. The Appellant in any case respectfully submits

that, upon the material before him, it was not open to His Honour to conclude, or in the alternative that His Honour ought not to have concluded, that - as at 14th December 1955 - all arrangements within the meaning of the warranty had not been made for conversion of the vessel. The Appellant submits that the evidence showed that the shipyard had "booked" the vessel for the first week in January, the time of its expected arrival in the Brisbane River, and had undertaken to do all the necessary work. The Appellant submits that, for the purposes in hand, neither the fact that the shipyard were unaware of the precise extent, as distinct from the nature of, the work to be done. or the fact that no fixed price for the work had been agreed prevents the booking of the vessel being an arrangement within the meaning of the policy. The Appellant submits that this is particularly so in the absence of evidence as to the usage of the particular port and the presence of the statement by the shipyard that the arrangement was definite.

28. The Appellant respectfully submits that the Respondent failed to establish the defence that the Appellant had not made all arrangements for conversion of the vessel at inception of the insurance. p.4, ll.1-7

29. The Appellant respectfully submits that his Appeal ought to be allowed because the decision of

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Mr.Justice Walsh is wrong and that a verdict should be entered for the Appellant for the sum of £A29,000 and that there be awarded to the Appellant damages in the nature of interest at the rate of Eight pounds per centum per annum from 16th April 1956 and that it be directed that judgment should be entered accordingly for the following among other

R E A S O N S

(1) BECAUSE the learned trial Judge was in error in holding that the policies must be construed with relation to the terms of the certificate of insurance dated 13th December 1955 and the date of its issue

(2) BECAUSE the learned trial Judge was in error in holding that the words "at inception of this Insurance" which appear in the policies relate to the date of issue of the said certificate.

(3) BECAUSE the learned trial Judge should have rejected the tender of the said certificate

(4) BECAUSE the learned trial Judge, having admitted the said certificate in evidence, was in error in rejecting the tender of the certificate of insurance dated 29th December 1955.

p.12, ll.29-31
Appendix
M.F.I. "1"

(5) BECAUSE the learned trial Judge should have held that the words "at inception of this Insurance" in the instant policies relate to the commencement of the risk which was the point of time at which

the vessel "Cap Tarifa" sailed from Noumea.

(6) BECAUSE the learned trial Judge was in error in holding that the Respondent established the defence that the Appellant had not made all arrangements for conversion of the vessel "Cap Tarifa" at inception of the insurance.

(7) BECAUSE the learned trial Judge should have held that the Appellant had made all arrangements for conversion of the vessel "Cap Tarifa" at inception of the insurance.

(8) BECAUSE the learned trial Judge was in error in finding a verdict for the Respondent.

(9) BECAUSE the learned trial Judge should have found a verdict for the Appellant for the full amount claimed and awarded to the Appellant damages in the nature of interest at the rate of eight pounds per centum per annum from 16th April 1956.

G.E. BARWICK

M.R. HARDWICK.

No. 2 of 1958

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N

PERCY SIMONS trading as ACME CREDIT SERVICES ... (Plaintiff) Appellan

- and -

ANTHONY EUGENE MIDDLETON GALE ... (Defendant) Responde

C A S E FOR THE APPELLANT

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