SPENCER . . . . . APPELLANT
PLAINTIFF,

AND

THE COMMONWEALTH OF AUSTRALIA RESPONDENT.
DEFENDANT,

ON APPEAL FROM A JUDGE EXERCISING THE ORIGINAL JURISDICTION OF THE HIGH COURT.

H. C. OF A. 1906.

PERTH, *Nov.* 13, 14, 15, 16, 22.

Higgins J.

1907.

PERTH, *Oct.* 23, 24, 25, 29.

Griffith C.J., Barton and Isaacs JJ.

Resumption of land—Valuation—Weight of evidence—Procedure—Pleading—Plea of Payment into Court—Admission of value pro tanto—Costs—Property for Public Purposes Acquisition Act 1901, (*No.* 13 *of* 1901), *secs.* 14, 15, 16, 17—*Rules of High Court, Order XVII., r.* 3; *Order XVIII., r.* 5.

Where, in an action for compensation under the *Property for Public Purposes Acquisition Act* 1901, issue has been joined upon a plea of payment into Court without denial of liability, the only issue is whether the amount paid in is sufficient, and the plaintiff is entitled to that sum in any event.

In assessing the value of land resumed under the Act, the basis of valuation should be the price that a willing purchaser would at the date in question have had to pay to a vendor not unwilling, but not anxious, to sell.

APPEAL from the judgment of *Higgins* J. exercising the original jurisdiction of the High Court.

The Commonwealth in 1905 resumed the plaintiff's land by proclamation under the *Property for Public Purposes Acquisition Act* 1901, secs. 6, 7, for the purpose of erecting a fort for the defence of Fremantle harbour, and offered £2,641 in compensation, with a formal notice of valuation under the Act. The plaintiff brought an action in the High Court under sec. 15 of the Act claiming £10,000 as compensation. The Common-

wealth paid into Court without denial of liability £3,000 with interest, and issue was joined whether that sum was enough to satisfy the plaintiff's claim. At the trial the only contest was as to the true value of the land, and it was not suggested by the plaintiff that he was entitled to receive at the least the amount paid into Court. Counsel for the plaintiff admitted that the Court had power to order the payment out of Court to the defendant of any excess over the amount which might be awarded.

The action was heard before *Higgins* J.

Pilkington K.C. and *Stawell*, for the plaintiff.

Keenan A.G., and *Northmore*, for the defendant.

HIGGINS J. read the following judgment. This is a claim for £10,000 compensation for land taken by the Commonwealth for defence purposes on the 22nd July 1905, under the *Property for Public Purposes Acquisition Act* 1901. The land is situated at North Fremantle, about 10 miles from Perth, and contains 6 acres 1 rood and 2 perches. There are no improvements, except a picket fence on the boundary, and a rude building to which no one attaches any money value. The plaintiff is entitled to receive an amount equivalent to the value of the premises as on 1st January 1905. The land consists of sand-hummocks overlooking the Indian Ocean. It has no grass; and it is useless in its present condition for any purpose of production. The owner is entitled to the benefit of any value attributable to the view and to the breezes of the ocean; and he is entitled also to any value which has been added to the site by the growth of population, by the erection of buildings in the neighbourhood, and by the enterprise of the Government and of the municipality. Roads have been made around the land; there are railway lines and conveniences within a short distance; and the harbour has been made and deepened, and wharves constructed. Under sec. 19 of the Act it is my duty not to have regard to any alteration in value "arising from the proposal to carry out the public purpose for which the land is taken;" but I agree with Mr. *Pilkington* that I should take into account all the prospects and potenti- Nov. 22, 1906.

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alities of the land as on 1st January 1905, including the fact that, by reason of the position of the land, the Defence Department might possibly become a competitor for it, and thus increase its value in competition (*Browne and Allan on Compensation*, 2nd ed., p. 718; *Ripley* v. *Great Northern Railway Co.* (1); *In re Gough and Aspatria, Silloth and District Joint Water Board* (2)).

Now, I have heard the evidence and the arguments; and, with the assistance of counsel for the plaintiff and for the defendant, I have inspected the land. As a result, I entertain a very strong view that the claim for compensation is most excessive. Even the valuations made by the defendant's valuers are liberal. The truth is that, in such cases as this generally, no land agent or valuer has any tangible interest in straining the value unduly downwards, whereas most have a tangible interest in the opposite direction. I do not at all imply, however, that the gentlemen who have given evidence have not given their opinion honestly, on *data* which they frankly state. Yet in this case I am face to face with valuations varying so widely as £8,400 and £2,066. The plaintiff's witnesses assume that the Clifton Street frontage is required for factory or storage purposes, and that the Railway Commissioner will be able and willing to run a siding across Clifton Street into the buildings. As one of the witnesses said to me, his valuation of this frontage—£5,296 or £8 per foot—is the price which a manufacturer would give if *he needed this part of the land*; and another admitted that there is no advantage in having the railway so near unless one can get the private siding. While desiring to give ample weight to the possibilities of this land, I refuse to treat these contingencies as if they were certainties. I believe the evidence of the defendant's witnesses that there is not, and was not on 1st January 1905, any demand for land for factory or storage purposes, and that, if such a demand should arise, there is other land available. I accept the evidence also of those who state that the land is not suitable for villa residences, but only for workingmen's dwellings. I do not think anything is to be gained by an exhaustive statement of the evidence submitted, or of the relative qualifications of the experts. Some of the transactions deposed to with regard to lands in the

(1) L.R. 10 Ch., 435.

(2) (1903) 1 K.B., 574.

vicinity I cannot regard as being of much use in enabling me to ascertain the fair value of this land. Indeed, there are so many factors which may operate as an inducement to any particular dealing in land, that it is unsafe for the Court, which cannot have full knowledge of all the circumstances, to rest its decision on any one transaction. Some of the land in John Street opposite this land was sold with difficulty at various times, chiefly from 1896 to 1902, when land values were higher than on 1st January 1905, at prices averaging about £45 per lot, and on terms, without interest. Some of the lots have not yet been sold, and are for sale at the best terms obtainable. Each lot has 33 feet frontage with a right of way at the rear. This would mean about £1 6s. 8d. per foot frontage. These frontages are admitted by the plaintiff's witnesses to be of the same value as the plaintiff's land facing John Street, except that the plaintiff's frontages would have greater depth; and yet the plaintiff's witnesses claim £3 per foot for the plaintiff's frontages to John Street. There are other standards of comparison of more or less weight. In 1904 the half interest of the late Mr. George Leake in similar land, of nearly the same area (over 6 acres), but not quite so near the wharves, was sold to the owner of the other half interest for £937 10s. This would mean about £1,875 for over six acres, even if we assume that the owner of the other half interest would not be willing to give more than an ordinary purchaser. Moreover, in December 1901, before the great fall in values in Fremantle, the Shell Oil Company bought three sections (about 5 acres) at the rate of £480 per acre, and these sections Mr. Learmonth regards as being very much more valuable than the plaintiff's land. Personally I should have felt much doubt, if I were to rely on my own judgment, as to the possibility of getting even the prices which the defendant's witnesses mention. But I have to remember that the land available for sites in and around Perth and Fremantle is all, or nearly all, of a sandy character, and I am not justified in refusing to give credence to expert witnesses who say that they could find purchasers as stated. If it is not invidious to make a selection among competent and honourable witnesses, I should prefer to rely on the opinion of Mr. Learmonth, and he is the witness who fixes the value at the lowest—£2,066 or £330 per acre.

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There is no claim made by the plaintiff for damage under secs. 13, 14, 19 in addition to the value of the land taken. But the plaintiff's counsel urge that it is incumbent on the Court to allow 10 per cent. more than the true value in consideration of the land being compulsorily taken; and I have been referred to certain Victorian cases: *Leslie* v. *Board of Land and Works* (1); and *In re Wildman*; *Ex parte Lilydale and Warburton Railway Construction Trust* (2) in support of this contention. I am unable to see how a consideration of this kind enters into the question of value, at all events, in the case of land held merely as a speculation, land which the owner does not want for its own sake, land as to which he is not an additional competitor; and it is only on the question of value, not of damage, that the point is pressed. Besides, even if it is a grievance to suffer compulsion, it must be remembered that the owner is saved the expense of surveying and levelling, and preparing the land for sale, of advertising, of agent's commission, &c. I do not quite appreciate some of the expressions used by the learned Judges in the cases cited. But, without taking it upon me either to condemn or to endorse these expressions, it is enough for me to say that there is phraseology used in the Victorian Acts referred to in *Leslie's Case* (1) which are not found in the Federal Act, and that the Federal Act seems to be sufficiently clear and definite as to my present duty. Having regard to all the potentialities of the site, and to all the other circumstances, I think that I am giving to the plaintiff all that he can justly claim if I determine the amount of compensation at £2,250. This amount is less than that offered to him—£2,640 19s. 10d. on 18th December, 1905; and it is still less than the amount paid into Court (including interest) £3,086 1s. 2d. I determine the amount of compensation at £2,250 and direct judgment to be entered accordingly. I order that the money in Court be paid out to the defendant after the payment to the plaintiff of the £2,250 with interest thereon as prescribed by sec. 20. No costs. I have had great doubt whether I should not make the plaintiff pay all the costs; but, inasmuch as the plaintiff was probably misled by the amount of possible purchase

(1) 2 V.L.R. (L.), 21.

(2) 27 V.L.R., 43; 22 A.L.T., 199.

money, £6,400, which appeared provisionally in the papers presented to Parliament by the Federal Treasurer, I think it a fair thing, on the whole, to let each party abide his own costs. Liberty to apply.

This order, in so far as it involves the repayment to the defendant of the difference between the amount awarded and the amount paid into Court, seems to be justified on the authority of *Gray* v. *Bartholomew* (1), and Mr. *Pilkington*, on behalf of the plaintiff, has intimated that he does not dispute my power to order the repayment.

Oct. 23, 1907.

The plaintiff moved the High Court for a new trial on the ground that the finding as to value was against evidence and the weight of evidence.

Pilkington K.C. and *Stawell*, for the appellant. Upon the evidence that was given the value assessed was too small. *Higgins* J. considered all the witnesses fair and honest and equally credible; yet out of the ten expert witnesses, five on each side, who testified as to the value, he chose the evidence of the lowest valuator on the Commonwealth side, contrary to the opinion of nine others equally competent and credible. Also the Public Works Department of Western Australia had made an independent valuation, which the Commonwealth used in its Estimates in 1904, assessing this land at £6,400.

It is admitted that, by sec. 16, the Judge is not to be bound in any way by the amount of the valuation notified to the claimant, which was £2,641; and, by sec. 19, the land cannot gain any value arising from the proposal to carry out the public purposes for which the land was taken. But the Act does not refer in any way to payment of money into Court, which was an admission of liability to the extent of the money paid in: *Hennell* v. *Davies* (2); *Berdan* v. *Greenwood* (3); *Dunn* v. *Devon and Exeter Constitutional Newspaper Co.* (4); *Langridge* v. *Campbell* (5); *Dumbleton* v. *Williams, Torrey & Field Ltd.* (6); *Hobson* v.

(1) (1895) 1 Q.B., 209.
(2) (1893) 1 Q.B., 367.
(3) 3 Ex. D., 251.
(4) (1895) 1 Q.B., 211*n*.
(5) 2 Ex. D., 281.
(6) 76 L.T., 81.

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Stoneham (1); *Chitty's Archbold*, 12th ed., p. 1366; *Elliott* v. *Callow* (2). The plaintiff is not to blame for not taking that money out of Court, because, under Order XVIII., r. 5, it must be taken in satisfaction of the whole claim. If there was jurisdiction to award plaintiff a less amount than was paid into Court, the balance could be paid out to defendant: *Gray* v. *Bartholomew* (3); but there was not such jurisdiction.

The assessment of the value was arrived at on a false basis. It was treated as though at the time of the resumption the land must necessarily be realized as if at a forced sale, and in the shape of a subdivision into small workingmen's allotments. The weight of the evidence was that the most advantageous sale would be as a factory site; the Judge was not entitled to follow his own opinion: *London General Omnibus Co.* v. *Lavell* (4). The awarded value being against the evidence, it is open to the Court to fix the value. The proper basis for a valuation is, what would a willing purchaser be reasonably expected to have to pay to an owner willing, but not anxious, to sell; the plaintiff is not bound to produce immediately a willing purchaser; he is entitled to wait a reasonable time for a purchaser for that purpose for which the land can reasonably be expected to have most value: *In re Ossalinsky (Countess) and Mayor &c. of Manchester* (5); *In re Gough and Aspatria, Silloth and District Water Board* (6); *Leslie* v. *Board of Land and Works* (7); *In re Wildman*; *Ex parte Lilydale and Warburton Railway Construction Trust* (8); *Russell* v. *Minister of Lands* (9); *Housing of Working Classes Act* 1890 (Eng.), (53 & 54 Vict. c. 70), sec. 21.

Keenan A.G. and *Northmore*, for the respondent. There was power to award less than the amount paid in. This being a resumption case, there could not be any denial of liability in the plea, unless the Commonwealth had desired to deny the plaintiff's title to the land. The money paid in was therefore not an admission of liability to that extent, but a deposit of so much to

(1) 13 V.L.R., 738.
(2) 2 Salk., 597.
(3) (1895) 1 Q.B., 209.
(4) (1901) 1 Ch., 135.
(5) Browne and Allan on Compensation, 2nd ed., App. p. 659, at p. 622.
(6) (1903) 1 K.B., 574.
(7) 2 V.L.R. (L.), 21.
(8) 27 V.L.R., 43; 22 A.L.T., 199.
(9) 17 N.Z.L.R., 241, 780.

be available against whatever the Court might award; the balance to be refunded, on the authority of *Gray* v. *Bartholomew* (1). The High Court Rule, Order XVIII., r. 1, materially differs from English Rule, Order XXII., r. 1, in containing the additional words "unless otherwise stated." The question for the Judge was not the bare issue whether the money paid into Court was enough; sec. 16 of the Act requires him to find what damage the plaintiff has suffered. Once the plaintiff has declined to take out the money paid into Court, but on the contrary has pleaded an issue which goes to trial, he has no indefeasible title to the money. Payment into Court is only in continuation of the notification of valuation to the plaintiff: secs. 13, 15; and under sec. 17 the Judge is empowered to award less than that amount. The pleadings cannot affect the procedure prescribed by the Act, which affords the sole remedy between the parties; and sec. 16 binds the Judge to ignore any admissions as to value made in the pleadings and to assess the true value.

With regard to finding the value of the land, the Court is bound to consider only reasonably immediate probabilities and potentialities, legitimate expectations, not barely possible contingencies. There was no evidence that there was any reasonable prospect of the land being required for factory and storage sites; the only positive evidence given was the other way, that the land was saleable only as workingmen's lots; a buyer would considerably abate his offer if buying to realize on less proximate probabilities of demand for other special purposes. Defendant's witnesses valued the land properly, at the price that ordinary prudent buyers would give, not on the basis of a forced sale, but in an open bargain with a prudent seller. The fact that the land was specially adapted for a fort might introduce the Commonwealth Government as an additional competitor, but not at fancy prices. The discretion of the Judge in these resumption cases, as in the analogous awards in salvage cases, should not be disturbed: *The "Alice"* (2). The pleadings did not raise the issue whether the money paid in was enough to satisfy the plaintiff's claim, but really whether it was not more than enough, *i.e.*, whether

(1) (1895) 1 Q.B., 209.

(2) 5 Moo. P.C.C. N.S., 300, at p. 303.

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plaintiff's claim was excessive : *Hennell* v. *Davies* (1) ; *Dumbleton* v. *Williams, Torrey & Field Ltd.* (2). In *Gray* v. *Bartholomew* (3) the order was made in that way because, under Order XXII., r. 5, the plaintiff was entitled to the whole money paid in, "unless the Court otherwise orders," which words are not in the High Court Rules ; that judgment did not decide the effect of a plea of payment in on the rights of a plaintiff.

[ISAACS J.—*Langridge* v. *Campbell* (4) is very plain that payment in irrevocably admits that so much is due, and leaves only one issue to decide, whether a greater, not a less, amount is owing.]

The whole case was conducted upon a different understanding, and defendant should therefore have leave to amend in order to raise the true issue requisite under the Act.

[GRIFFITH C.J.—Apparently no direct rule for payment out was put in the High Court Rules because of the old rule at law that money once paid in was thenceforward the plaintiff's property. It would prejudice the plaintiff, after conducting his case on that basis, to allow such an amendment.]

If the plaintiff is declared entitled to the amount paid in, and no more, the defendant is entitled to costs since the date of payment in.

Pilkington in reply. There is no doubt that plaintiff's land was "fit" for industrial purposes ; the only element of futurity in its value was the finding of an actual purchaser ; and plaintiff was not bound to produce him. The special "adaptability" spoken of in *In re Ossalinsky (Countess) and Mayor of Manchester* (5), referred to peculiar purposes such as quarry and reservoir sites, not to ordinary purposes such as industrial sites. The plaintiff is entitled to have the Judge's misdirection of himself corrected, so that the land may be valued at its present value having regard to the reasonable probabilities of sale at the most advantageous price : *Montgomerie* v *Wallace-James* (6).

The plaintiff should get all the costs if he gets the full amount

(1) (1893) 1 Q.B., 267.
(2) 76 L.T., 81.
(3) (1895) 1 Q.B., 209.
(4) 2 Ex. D., 281.
(5) Browne and Allan on Compensation, 2nd ed., App., p. 659.
(6) (1904) A.C., 73.

paid into Court: sec. 17 of the Act; or, at any rate, should not have to pay costs.

Cur. adv. vult.

The following judgments were read :—

Oct. 29, 1907.

GRIFFITH C.J. This is an action brought under the provisions of the *Property for Public Purposes Acquisition Act* 1901 (No. 13 of 1901) to recover compensation for land taken by the defendant for public purposes. The land was in fact taken as a site for a fort. By sec. 6 of that Act land might be acquired by the publication of a notice in the *Gazette*. Persons claiming compensation in respect of any land so acquired were within a prescribed time to serve a notice on the Minister of the Department concerned and the Attorney-General (sec. 13). If a *primâ facie* case for compensation was disclosed, the Minister was required to cause a valuation to be made of the land, and to inform the claimant of the amount of the valuation (sec. 14 (2)). If the claimant and the Minister did not agree as to the amount, the claimant might institute proceedings in the High Court in the form of an action for compensation against the Commonwealth (sec. 15), which was to be tried by a single Justice without a jury (sec. 16). In determining the amount of compensation the Justice was not to be bound by the amount of the valuation notified to the claimant (*Ib.*). If judgment were given for a sum equal to or less than the amount of the valuation notified to the claimant, he was to pay the costs of the action unless the Justice otherwise ordered, but, if the judgment were for a sum one third less than that amount, the claimant was to pay the costs in any event (sec. 17). Either party might move for a new trial or to set aside the finding in accordance with the practice of the High Court (*Ib.*). The Act did not contain any other special provisions as to procedure. In my opinion the direction that the proceedings were to be by action incorporated the general practice of the Court relating to actions, so far as no other practice is substituted.

The plaintiff by his statement of claim, after setting out the necessary facts showing his title to sue, claimed £10,000. The defendants' defence was in the following words :—" The defend-

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ants bring into Court the sum of £3,086 1s. 2d. and say that it is enough to satisfy the plaintiff's claim." Accompanying particulars showed that that sum was made up of £3,000 for the value of the land and £86 1s. 2d. for interest at 3% from the date of acquisition to the date of payment, which was the rate prescribed by sec. 20 of the Act. The plaintiff simply joined issue.

Upon these pleadings the action was set down for trial before *Higgins* J., who, after hearing much conflicting evidence, found that the value of the land at the relevant date (1st January 1905) was £2,250 only. He thereupon ordered that that sum with interest at the rate prescribed by the Statute should be paid out to the plaintiff, and that the residue should be paid to the defendant, and directed that judgment should be entered without costs. From this judgment the plaintiff appeals.

Two distinct questions are raised upon the appeal: (1) whether the plaintiff is entitled in any event to the whole of the money paid into Court, and (2) whether the learned Judge was wrong in assessing the value of the land at a sum not exceeding £3,000. The first question depends upon the effect of the Rules of Court; the second depends partly upon the principles to be applied in estimating the value of the land, and partly upon the evidence in the case.

I have already pointed out that the ordinary practice of the Court is applicable to the action. By Order XVIII., Rule 1, a defendant in an action to recover a debt or damages may before or at the time of delivering his defence (or later by leave of the Court or a Justice) pay into Court a sum of money by way of satisfaction, "which shall, unless otherwise stated, be taken to admit the cause of action in respect of which the payment is made." Or he may pay money into Court with respect to any cause of action with a defence denying liability, in which case the money is subject to the specific provisions contained in Rule 6, one of which is that, if the plaintiff does not accept it in satisfaction, it remains in Court until the determination of the action, and is subject to the orders of the Court. If the defendant succeeds in the action the whole amount is to be repaid to him, and if the plaintiff recovers less than the amount paid in the balance is to be repaid to the defendant.

Rule 5 provides that when money is paid into Court the plaintiff may before joining issue accept it in satisfaction, in which case he may tax his costs up to that date, and if they are not paid within four days may sign judgment for them. The Rules do not contain any express direction as to the payment out to the plaintiff of money paid into Court either with or without denial of liability, but under Order XVII., Rule 3, which provides that when admissions of fact are made on the pleadings any party may at any stage of the cause apply to the Court or a Justice for such judgment or order as upon the admissions he is entitled to, it is clear that the plaintiff is entitled to ask for payment out to him at any time. If a formal order is necessary it is little more than formal, although, no doubt, the Court or a Justice might allow a defendant in a proper case to amend his defence or withdraw his notice of payment, but in the absence of such amendment I think that the plaintiff's right to the money paid into Court without denial of the cause of action is absolute, whatever may be the result of the action. This is in accordance with the view that was always accepted as to the effect of payment into Court before the statutory provisions of the Common Law Procedure Acts (see *Archbold's Practice*, ed. 1866, vol. 2, p. 1366).

In the present case the defence contained nothing to limit the effect of the payment into Court. It follows that the plaintiff's cause of action in respect of which the payment was made was admitted. No case was cited to us in which it has been expressly decided that the admission involved in a plea of payment into Court is an admission of liability to the full amount paid in, but in all the cases cited this seems to have been taken for granted. In any view the plaintiff became entitled to receive the money as soon as it was paid in, and nothing has since occurred to disentitle him to it, unless the finding of the learned Judge has that effect. The only issue for trial raised by the joinder of issue was whether the sum paid into Court was or was not enough to satisfy the plaintiff's claim. It was, therefore, not material to consider whether it was more than enough. If it was not enough, the plaintiff would be entitled to damages *ultra*, if it was, he was entitled to no more than he already had. It was suggested that the direction that the Justice should not be bound by the

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valuation notified to the claimant implies that he should not be bound by an admission on the record, but I am unable to accept this suggestion. I am, therefore, of opinion that the plaintiff is entitled to recover at least the amount paid into Court. In an ordinary case, if a plaintiff does not recover more than the sum paid into Court, judgment is given for the defendant, but the Statute appears to contemplate that there must be a formal judgment for the plaintiff in every case. I think, therefore, that the plaintiff is entitled to judgment for the sum paid into Court in any event.

I proceed to consider whether he is entitled to anything more. The evidence, as I have said, was conflicting, but the divergence was not so much with regard to facts as with regard to the point of view from which the question of value was regarded.

The land is situated at North Fremantle, within 100 yards of the ocean, and at a very short distance from the harbour. The area is more than six acres, and there is a railway line separated from it only by a road. Fremantle is the principal port of the State of Western Australia, and some persons naturally entertain a high opinion of its future prospects. The plaintiff's witnesses thought that the land in question, by reason of its situation, its height, and its exceptionally large area amongst a number of small subdivisions, had a prospective value as a site for a factory or some other enterprise requiring a considerable space. It was also one of a very small number of suitable sites for a fort. The defendants' witnesses on the other hand thought that the land was not fit for anything except subdivision into small allotments for workmen's dwellings, of which there were several in the immediate neighbourhood, and they estimated the value on the basis of the sum which they thought could have been realized for it in January 1905, if so subdivided. The learned Justice, in effect, accepted the view of the defendants' witnesses, or rather of those of them who put the lowest valuation on the land, and, if I rightly understand his judgment, applied his mind to the question of what the plaintiff could have realized by a sale of the land in January 1905, if he had then sold it.

It has often been pointed out that, when a cause has been heard by a Judge on oral evidence, a Court of Appeal is very

reluctant to differ from him on a question of fact, especially when there is a conflict of evidence. And the same considerations apply whether the conflict is as to the actual facts, or as to a matter of opinion as to which it is material to weigh the relative values of the opinions of different witnesses. So far, therefore, as *Higgins* J. founded his judgment on the weight to be given to the opinion of the different witnesses as to relevant facts, I am not prepared to differ from him. I therefore accept the conclusion (though I doubt whether I should have arrived at it myself) that, if the land had been cut up and sold in small allotments in January 1905, it would not have realized more than £2,250. I will assume also that he thought that at that date it would have realized more if sold in that mode than in any other. But I do not think that these facts conclude the question of value, although they are very relevant to the question.

In the case of chattels it is often, though not always, easy to ascertain the value. In order that any article may have an exchange value, there must be presupposed a person willing to give the article in exchange for money and another willing to give money in exchange for the article. When there is a large or considerable number of articles of the same kind which are the subject of daily or frequent sale and purchase, the value of the articles is taken to be their current price. Thus, in the *Sale of Goods Act*, the measure of damages for wrongful refusal to deliver goods is to be ascertained with reference to "the market or current price of the goods." The foundation of this doctrine is that a man desiring to sell such articles can readily find a purchaser at a price which is fairly certain, and conversely that a man desiring to buy can find a seller at about the same price. But these considerations are not necessarily equally applicable to land. There is, no doubt, much land in many places the value of which per acre is as definitely fixed as the price of wheat or sugar. But in the case of a new port, in a new State, where the area of land is limited, and each piece differs in many of its characteristics from the rest, it is impossible to apply any such rule. Bearing in mind that value implies the existence of a willing buyer as well as of a willing seller, some modification of the rule must be made in order to make it applicable to the case

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of a piece of land which has any unique value. It may be that the land is fit for many purposes, and will in all probability be soon required for some of them, but there may be no one actually willing at the moment to buy it at any price. Still it does not follow that the land has no value. In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, *i.e.*, whether there was in fact on that day a willing buyer, but by inquiring "What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?" It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together. This is not, as I understand the evidence and the decision of the learned Justice, the test which was applied by him or by the witnesses upon whose testimony he relied. On this ground I think that his assessment of the value is open to be reviewed.

But, applying what I conceive to be the true test, I am unable to come to the conclusion upon the whole evidence that the plaintiff has satisfied the onus, which is upon him, of showing that such an owner would not in January 1905 have accepted an offer of £3,000 cash, although I am not prepared to say that he would have accepted a smaller sum. In coming to this conclusion I have given much weight to the opinion of the learned Justice, as I understand it, as to the value of the testimony of the respective witnesses so far as regards their accuracy and the soundness of the basis of their opinion. I am, therefore, of opinion that on this ground, as well as on that already dealt with, the plaintiff was entitled to recover £3,000. But the result, so far as regards the issue for trial, is the same, namely, that the sum paid into Court was enough to satisfy the plaintiff's claim.

If the action had been triable, and tried, with a jury, the result would have been that the plaintiff would have had to pay the costs of the issue on which he failed. And I do not see any sufficient reason for departing from this rule in the present case. *Higgins* J., in the exercise of his discretion under sec. 17 of the Act, relieved the plaintiff from payment of costs although he recovered less than the amount of the valuation, and the Court could not review that exercise of discretion if it applied to the case as now determined. But I do not think that he applied his mind at all to the question of costs on the basis that the plaintiff was entitled to the £3,000 paid into Court. We must, therefore, exercise our own discretion, which I think will be best done by following the ordinary rule.

Counsel for the defendant asked for leave to amend the defence by stating that the liability for the full sum paid in was not admitted. Assuming that such an amendment could be made, it would, in the view which I take of the facts, be prejudicial and not beneficial to the defendant, for it would entail payment by it of the costs of the action. But, even if I took a different view of the facts, I do not think that any sufficient ground was shown for allowing so unusual an amendment.

The judgment appealed from should therefore be varied by directing judgment for plaintiff for £3,081 1s. 2d., with costs up to the time of payment into Court. The plaintiff must pay the defendant's costs of action after payment. The respondent should pay the costs of this appeal.

BARTON J. The amount of the valuation being £2,640 19s. 10d., and the defendant having paid £3,000 into Court without any denial of liability, the first question is whether the plaintiff is not entitled to have at least the whole £3,000, and I think he is. Sec. 17 of the *Property for Public Purposes Acquisition Act* 1901 provides that in determining the amount of compensation the Justice who tries the case shall not be bound by the amount of the valuation notified to the claimant. But I do not see how the defendant can have the benefit of that section after paying into Court, irrespectively of the valuation, a sum exceeding it in

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amount and tendering issue on the bare averment that the sum so paid in was enough. The plaintiff was entitled to join issue on the plea as filed, and to prove, if he could, that £3,000 was not enough, and thus the contest invoked by the defendant was solely on the sufficiency of that sum. The plea deliberately abandoned the valuation as the subject of contest, and by offering £3,000 without denying liability, disabled the defendant, in my opinion, from contending that a less sum should be assessed as compensation. Any contention that a less sum was enough became irrelevant to the issue raised by the defendant, by whose own pleading the sole question was, £3,000, or how much more? It is true that the Statute does not expressly authorize the plea of payment into Court, but it does not exclude it even by implication (although in some circumstances it may be rather an imprudent plea to an action under the Statute). The authority given to the claimant by sec. 15 to proceed for compensation refers only to an action, and if an action is brought, it is reasonable to conclude that the practice and procedure in ordinary actions are to be applied as far as may be. Now as to their application. In the first place, keeping in mind that the payment into Court was unaccompanied with any denial of liability, it must be taken to admit the plantiff's cause of action to the extent of £3,000, and the interest, £86 1s. 2d., follows as of course under sec. 20 of the Act: *Hennell* v. *Davies* (1). The Chief Justice has made a close analysis of the Rules under Order XVIII. which are relevant to this case, and I cannot add to that; further, I think it impossible to resist the construction of Order XXVII., Rule 3, which lays it open to a plaintiff to treat such an admission of fact as this plea as the foundation for an application, at any stage of the cause, to the Court or a Justice, for the payment out to him of the amends tendered with the plea. From that construction it follows, not only that the refusal of such an order is scarcely to be thought of, but also that the right to it is not dependent on the result of the action. The comprehensive Rule in question, so construed by its framers, is probably the reason why it has not been thought necessary to provide specially for payment out of Court, as in England is done by Order XXII., r. 5. I am, there-

(1) (1893) 1 Q.B., 367.

fore, of opinion that the plaintiff was and is entitled to the whole of the money paid into Court.

The remaining question is whether the plaintiff has shown a right to compensation exceeding the sum paid in. For it is on him to show it, and he undertook to do so. As in most cases of the kind, the witnesses, called as experts in land values, presented a view for each side difficult to reconcile with that for the other. The differences were upon a matter in which the worth of opinion, and not the degree of truthfulness, was in question. Still, the matter was one of credibility in that sense, and the conflict was strong. In such a case a Judge who sees and hears the witnesses has a distinct advantage over others who are asked to review his decision. Therefore I am very loath to attempt such a process in this case, and can only do so on the ground of necessity. But, after giving my best attention to the judgment of *Higgins* J., I am unable to find that he has applied certain principles which, as it appears to me, should be applied to a question of this kind. I am unable to say that the bare market value of the land for workingmen's residences on a particular day would be a value constituting a real compensation for this taking. The Court must take into consideration all the circumstances, and, to quote the admirable judgment of the Supreme Court of New Zealand in *Russell* v. *The Minister of Lands* (1), must "see what sum of money will place the dispossessed man in a position as nearly similar as possible to that he was in before." His loss is to be tested by the value of the thing to him: *Stebbing* v. *Metropolitan Board of Works* (2), and the loss he has sustained is not necessarily to be gauged by what the land would realize if peremptorily brought into the market on a day named. True, it is "value" which is to be assessed, but the value to the loser of land compulsorily taken is not necessarily the mere saleable value. See *Russell* v. *The Minister of Lands* (No. 2), (3). I make these observations without losing sight of the fact that, in arriving at the market or saleable value of £2,250 for workingmen's cottage sites, which is the only value that I think he found, *Higgins* J. was perfectly entitled to follow, as he did, that one of

(1) 17 N.Z.L.R., 241, at p. 253.
(2) 40 L.J.Q.B., 1, at p. 5, *per Cockburn* C.J.
(3) 17 N.Z.L.R., 780.

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the defendants' witnesses who gave the lowest estimate of market value, and I should not be at all disposed to disturb his conclusion on that element of the case, as an element.

The plaintiff's witnesses attributed considerable value to this land, or a great part of it, as a site for a factory—one of them said a freezing-house. One cannot shut one's eyes to the fact of the importance of Fremantle as a port, or refuse to see that Australian ports generally are growing in trade and consequence. It may be that commerce and manufactures will for years be concentrated on the part of the port south of the river, but probably that will in a reasonable time cease to be the case with this the chief port of this State. A man is perfectly entitled, so long as he escapes government resumptions, to hold his land, in view of such progress as he sees going on, in the hope and belief that it will realize its best return to him before many years as a site for some manufacture or the like. And its value to him in that regard, though often called prospective, may even be a very present one if he exercises due care and does not exhibit too great anxiety to sell. The plaintiff's witnesses have attributed such a value to the land, and though I do not doubt that they have been sanguine as to amounts, I still think that something should have been allowed the plaintiff in this regard, that is, that it was a factor of the value which *Higgins* J. left out of consideration, but which the plaintiff was entitled to have estimated: See *In re Gough and Aspatria, Silloth and District Joint Water Board* (1), and *In re Ossalinsky (Countess) and Mayor &c. of Manchester* (2). All "reasonably fair contingencies," as *Grove* J. put it in that case, are to be considered; and then he uses these words:—"What it would sell to a willing purchaser for in consequence of its having these additional advantages."

Of course, the price for which land would sell to a willing purchaser is there intended by *Grove* J. to be the test, whether there are special advantages or contingencies to be valued or not. And I should say, in view of the many authorities cited and upon the sense of the matter, that a claimant is entitled to have for his land what it is worth to a man of ordinary prudence and fore-

(1) (1903) 1 K.B., 574.
(2) *Browne and Allan on Compensation*, 2nd ed., App. p. 659, at p. 661.

sight, not holding his land for merely speculative purposes, nor, on the other hand, anxious to sell for any compelling or private reason, but willing to sell as a business man would be to another such person, both of them alike uninfluenced by any consideration of sentiment or need.

But while I think with great respect that His Honor did not take into consideration all the factors that he might have done, or apply principles as broad as such a case required, I am still not satisfied that the plaintiff has proved himself entitled to more than the £3,000 paid into Court. As it is now for this Court to name the sum which will really compensate the plaintiff, I am bound to say that, taking all things into consideration, I think the fair value of this land to such a vendor as I have described exceeded on 1st January 1905 (sec. 19), the sum found by the learned Justice, but that it did not exceed the sum of £3,000 paid into Court. Ordinarily that conclusion would mean a verdict for the defendant, but in view of secs. 17 to 20 of the Act I agree with the Chief Justice that the proper form of judgment is for the plaintiff for £3,086 1s. 2d., being the whole amount, including interest, paid into Court.

As this is a finding that the sum paid in was enough, it is a result which on an ordinary trial by jury would involve the payment of the costs by the plaintiff from the time of payment in. Though *Higgins* J. ordered the sum of only £2,250 to be paid out to the plaintiff, he did not order him to pay costs. But, as we have been unable to agree with his judgment, we cannot say how he would have treated the costs after deciding the compensation on the principles now applied, and as we cannot possibly say how he would then have exercised his discretion, we must use our own. For my part I cannot see any reason why, awarding the plaintiff the £3,086 in Court, we should exempt him from the normal consequence of such a result in costs; while the costs up to payment into Court should be paid by the defendant. I think the respondent should pay the costs of the appeal, as the appellant has succeeded in having the amount awarded to him increased by £750.

As to the question of amendment, I do not see how we could

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possibly allow so radical an alteration in these pleadings at such a stage.

ISAACS J. I agree with the order proposed by the learned Chief Justice. The only issue raised by the pleadings was whether the sum of £3,086 1s. 2d. brought into Court without any denial of liability was enough to satisfy the plaintiff's claim. His claim for compensation was solely for the value of the land itself, and did not include any claim for damage otherwise. The particulars of the sum paid into Court showed that the money was in respect of the identical claim made, and consisted of an amount representing the valuation of the land together with interest at 3% from the date of acquisition of the land until the date of payment into Court.

The amount found by the learned primary Justice as the true value of the land was £2,250, and His Honor directed that judgment should be entered for that sum.

The first question is, whether the plaintiff, notwithstanding the finding that £2,250 was the actual value, is entitled to judgment for the amount of £3,086 1s. 2d. paid into Court.

Section 15 of the *Property for Public Purposes Acquisition Act* 1901, which was in force when this action was tried and until July 1st 1907, prescribed that, in the absence of an agreement as to the amount of compensation, proceedings might be instituted in the High Court in the form of an action for compensation. This brings into application the principle enunciated by *James* L.J. in *Dale's Case* (1). "It was strongly urged that this was a new jurisdiction and a new procedure. According to my view of the case, that is not material, because if a new jurisdiction is given to an existing Court—that is to say, a jurisdiction to deal with some new matters in a different mode and with a different procedure—if that jurisdiction be so given to a well-known Court, with well-known modes of procedure, with well-known modes of enforcing its orders, it must, unless the contrary be expressed or plainly implied, be given to that Court to be exercised according to its general inherent powers of dealing with the matters which are within its cognizance."

(1) 6 Q.B.D., 376, at p. 450.

Subject, therefore, to any special provision contained in the Act itself, the ordinary rules and practice of the Court apply; and in the absence of any express rules or practice governing the procedure, the Court must *pro hac vice* act on its own views of justice and convenience. There is nothing in the Act which in any degree interferes with the constant rule that the Court tries the issues raised, and does not treat as still in contention any matters admitted between the parties on the pleadings as they stand.

What then is the effect to be attributed to the payment of £3,086 1s. 2d. into Court upon the only item of claim made by the plaintiff? Clearly, that the defendant has expressly admitted the value of the land to be at all events £3,000, and that so much in any event ought to be paid to the plaintiff.

Money paid in on a plea not denying liability, so long as the pleading so stands, is, as it always has been, a formal admission that the sum paid in is due.

In the words of Lord *Denman* C.J. in *Steavenson* v. *Berwick Corporation* (1), the defendants say "We do not choose to dispute so much of the demand." The cases are uniform as to this.

Whether in any particular case such a payment has any further effect may depend on the form of the action and of the payment itself. But money paid in simply and without denial of liability is, in the absence of permitted amendment, the money of the plaintiff if he chooses to take it; but if he determines to proceed for more, then he runs the risk of the money, which is his money, being dealt with by the Court so as to protect the defendant from some possible injustice. Apart from that contingency, the unqualified payment into Court is for him, and leaves the money at his disposal.

There having been no amendment of the pleadings, it was not, in my opinion, competent for the defendant to dispute the right of the plaintiff to a judgment for at least £3,000 with interest.

It appears, however, that this view was, by inadvertence, not placed before *Higgins* J., and that it was admitted before him by plaintiff's counsel that under the authority of *Gray* v. *Bartholomew* (2) there was power to order the repayment to the defendant

(1) 1 Q.B., 154, at 159. (2) (1895) 1 Q.B., 209.

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of the difference between £2,250 and £3,086 1s. 2d. Assuming there was power to limit the amount recoverable by the plaintiff to £2,250, there was also power to order the balance to be refunded; and, in any event, if costs were payable to the defendant, there was equally power to order them to be first paid out of the sum in Court before payment out to the plaintiff.

There were no costs so payable; and though the learned Justice was quite justified in asking himself, and indeed bound to ask himself, the true value of the land irrespective of the amount paid in, yet when that was once ascertained to be below the amount paid in, the answer only enabled the Court to determine in favour of the defendant the issue as to sufficiency of the amount paid in. It did not alter the admission of the pleadings up to that amount, or the plaintiff's right to receive the sum paid in. In an ordinary action final judgment would in such a case be given on the issue for the defendant, but here the language of the Act contemplates a judgment for the plaintiff, and in the circumstances the judgment must be for at least the sum paid in.

The plaintiff, however, was not content to accept that sum as sufficient; he denied its sufficiency, and has further contended on the appeal that the learned Justice ought to have given more. Invited to state the minimum amount that would meet the legal requirements of the evidence, learned counsel for the appellant candidly admitted it would be impossible to do so.

It would be profitless to examine the evidence in close detail, but there are some broad considerations to which reference may be directed.

In the first place the ultimate question is, what was the value of the land on 1st January 1905?

All circumstances subsequently arising are to be ignored. Whether the land becomes more valuable or less valuable afterwards is immaterial. Its value is fixed by Statute as on that day. Prosperity unexpected, or depression which no man would ever have anticipated, if happening after the date named, must be alike disregarded. The facts existing on 1st January 1905 are the only relevant facts, and the all important fact on that day is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain, if he desired to

purchase it for the most advantageous purpose for which it was adapted. The plaintiff is to be compensated; therefore he is to receive the money equivalent to the loss he has sustained by deprivation of his land, and that loss, apart from special damage not here claimed, cannot exceed what such a prudent purchaser would be prepared to give him. To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.

In *The Queen* v. *Brown* (1) *Cockburn* C.J. said :—"A jury, whether the dispute be as to the value of land required to be taken by the company, or as to the compensation for damages by severance, in assessing the amount to which the landowner is entitled, have to consider the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied, just as an owner might do if he were bargaining with a purchaser in the market. That is the mode in which the land would be valued." Having mentally placed itself in the position of the bargaining parties as on the critical date, 1st January 1905, the question for the tribunal is, what is the point at which the parties would meet; what is the sum the one would be willing to give and the other to take? That is practically the same as asking what is the highest sum such a purchaser would give, because we must assume the owner would be willing to take the best he can get. The best he can get in those circumstances is the test of

(1) L.R. 2 Q.B., 630, at p. 631.

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what he loses, and it is his loss which must be replaced. It is not, as it seems to me, proper for this purpose to assume that the owner retains his land unsold indefinitely because such an assumption could only be for the purpose of getting an improved value, arising from more favourable circumstances than those existing in January 1905, which is the very thing forbidden by the Statute. If permissible in his favour, it would also be permissible against him, and it would be palpably unjust to him to diminish the price he could actually have got in January 1905 because some time after he could not have obtained so much. What is to be avoided is the supposition that on the specified date there is to be a forced sale, and that is completely guarded against by the considerations I have enumerated. That being so, how has the plaintiff satisfied the onus he undertook in asserting the insufficiency of the amount paid into Court? The value of the land for workmen's cottages as determined by the learned Justice cannot, on the materials present here, be disturbed on the ordinary principles upon which an appellate tribunal acts. It is urged, however, that His Honor was wrong in not accepting the estimates of the plaintiff's witnesses on the basis of a business site. But apart from balancing their relative competency as compared with the gentlemen called for the defendant, by reason of varying personal professional experience of this particular locality, there is ample material to justify the primary tribunal to disregard this aspect of their testimony without being chargeable with error which the appellate Court would correct. As the Privy Council said in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (1) :—"It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity. In such an inquiry as the present, relating to subjects abounding with uncertainties and on which there is little

(1) (1901) A.C., 373, at p. 391.

experience, there is more than ordinary room for such guesswork; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at."

The suitability of the land for a factory site is incontestable. But its inherent suitability, and its money value, for a factory site are two very different matters. No demand for factory sites there existed on 1st January 1905, and therefore no special value could be placed on it for that purpose, unless the hypothetical prudent purchaser would then take into his calculation the future prospects of the land being wanted for such a site. As to this not a single concrete fact leading to such a probability, or likely to influence a would-be purchaser, is adduced. Indeed, one witness for the plaintiff, James Morrison, although his valuation is on the basis of a factory site, says :—"Owing to the neighbourhood, I think of no value except for workmen's cottages."

The evidence for the defendant, equally honest and capable, was precise and clear that the highest price obtainable for the land was for cottage property. There was a general agreement of opinion among the witnesses that for some years past prices of land have come down in the locality and are still on the decline. Reading the judgment as a whole, I understand the learned Justice practically to arrive at a special finding that on 1st January 1905, whatever the property might have fetched as a future factory site, the highest value of the land was for workmen's cottages. This conclusion was founded on conflicting opinions of equally honest competent and confident experts. I entertain no doubt that such a finding cannot be reversed by a Court who do not see the witnesses, and are not in so favourable a position as the learned primary Justice to form what after all is only a judicial opinion of the relative weight to be attached to the opinion of witnesses regarding the estimate they think a hypothetical purchaser would form of the probable use to which the land might in the indefinite future be most beneficially applied. This is altogether too unsubstantial for an appellate Court to act upon in such a case. Unless some error of principle is established, or the evidence on one side so far preponderates over that on the other, by reason of its character, force or quality, as to distinctly outweigh the disadvantages of not seeing and

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hearing the witnesses, it is almost impossible to disturb a finding of the nature now under consideration.

In the result then the special adaptability of the land for factory sites is immaterial, and the general value of the land as workmen's residences prevails, at a sum not exceeding the amount paid into Court.

The question of costs is all that remains. Ordinarily that is also a matter for the discretion of the primary tribunal. But here the plaintiff invokes the general practice of the Court to escape from the specific finding of the learned Justice limiting him to £2,250, and he is entitled to do so; but the same general practice also says that in such a case the ordinary rule is that the plaintiff should get his costs up to payment into Court, and should, if he fail on the issue as to sufficiency, pay them to the other side. That is only the complete statement of the one rule.

As a new feature operating to his advantage has been introduced into the judgment at the instance of the plaintiff to secure a benefit, it is only just to apply it in its entirety unless special circumstances, not appearing here, make it more just to order otherwise. In this sense the order varying the provision of the judgment as to costs is no departure from the well established rule of non-interference with the discretion of the primary Court as to costs. It is not improbable that, if the principle we are acting upon had been urged before *Higgins* J., he would have accompanied its application with the same order as to costs that this Court now makes.

Judgment appealed from varied by directing judgment for plaintiff for £3,082 1*s.* 2*d.*, *being the amount paid into Court. Plaintiff to pay defendant's costs of action after payment in. Respondent to pay costs of appeal, including cost of printing.*

Solicitors, for the appellant, *James & Darbyshire.*
Solicitor, for the respondent, *Barker* (Crown Solicitor).

N. G. P.