used in Acts of Parliament: when they do so, they make, but do not construe, the laws."

So in this case we have only to concern ourselves with what Parliament has said, and when that is fairly and faithfully construed it leaves no course possible except to give effect to the unmistakable meaning of the later Act.

H. C. OF A. 1908.

BENNETT v. MINISTER FOR PUBLIC WORKS (N.S.W.)

Solicitor, for the appellant, *C. L. Tange.*

Solicitor, for the respondent, *The Crown Solicitor for New South Wales.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

THE WESTERN AUSTRALIAN BANK . APPELLANTS;

AND

THE ROYAL INSURANCE COMPANY . RESPONDENTS.

H. C. OF A. 1908.

PERTH, *Nov.* 3, 10.

Griffith C.J.

IN CHAMBERS.

Practice—Costs—Review of Taxation—Costs of sending solicitors' managing clerk from State where appeal set down to another State to which hearing transferred by order of Court.

Where the hearing of an appeal other than on a question of abstract law has been transferred, by order of the Court acting on its own initiative and not at the request of parties, to a State other than that of origin, the successful party to whom costs were given, may in a proper case be allowed the costs and expenses of sending the managing clerk of their solicitors in the State of origin to instruct counsel at the hearing of the appeal. The matter is primarily one for the exercise of the taxing officer's discretion, but this discretion will be freely reviewed by the Court employing its own knowledge of the special circumstances of the case.

Principles suggested for the guidance of the Taxing Officer in arriving at the amount of costs to be allowed.

H. C. OF A. 1908.

WESTERN AUSTRALIAN BANK v. ROYAL INSURANCE CO.

SUMMONS for review of taxation.

The hearing of the appeal in this case was transferred from Perth to Melbourne, not at the request of parties but by the direction of the Court, owing to the discovery being made that a member of the Court as constituted in Perth had at one time advised in the matter.

The appellants were successful and were allowed the costs of the appeal. On taxation, a charge for the expenses and attendance of the appellants' Perth solicitors' managing clerk was disallowed; a review of this decision of the taxing officer was now asked for.

Pilkington K.C. for the appellants, in support of the summons. The circumstances of this case were unique and in no way analogous to the case of an appeal to the Privy Council. The High Court of Australia differs from other Appeal Courts in that it sits in different States. Very peculiar circumstances existed in this case, and the presence of some person from Perth who was well acquainted with the matter materially aided counsel to put the matter before the Court so that a correct decision might be arrived at. Though the matter is within the discretion of the taxing officer, his decision is always subject to review by a Justice.

Downing, for the respondents. It was for the taxing officer to say whether the charge was one which came within the rule of the State where the appeal was heard (see Order XLVI., r. 14, under the *Procedure Act* (3 Edw. VII. No. 7)), and he decided that the costs and expenses in question were not necessary or proper for the attainment of justice, or for defending the rights of the party, but were unusual expenses within the meaning of the Victorian rule.

[The following cases were referred to:—*In re Blyth and Fanshawe*; *Ex parte Wells* (1); *Wakefield* v. *Brown* (2); *Donohoe* v. *Britz* (*No.* 2) (3); *Kirkwood* v. *Webster* (4); *In re Foster*; *Ex*

(1) 10 Q.B.D., 207.
(2) L.R. 9 C.P., 410.
(3) 1 C.L.R., 662.
(4) 9 Ch. D., 239.

parte Dickens (1); *Ex parte Snow*; *In re Sherwell* (2); *In re Storer* (3).]

Cur. adv. vult.

GRIFFITH C.J. It is not disputed that there is no English precedent for the allowance of such a charge as that in question. Indeed, the only analogy that could be invoked is that of an appeal to the Sovereign in Council, and I do not know that it has ever been suggested that on an appeal from a Dependency the expenses of a party's legal adviser sent from the Possession from which the appeal is brought should be allowed. The claim must therefore be based on the special circumstances of the Commonwealth and the manner in which the appellate jurisdiction of the High Court is at present exercised.

Differing in this respect from other Courts of final appeal, this Court sits in the several States, endeavouring to give suitors in all the States, however distant from the seat of Government, equal facilities for obtaining its judgment. After five years experience I am of opinion that this system is beneficial both to suitors and to the Court. It is no small advantage to have an appeal argued by counsel familiar not only with the history of local legislation, where, as often happens, that history is material, but also with the facts of the case and the manner in which it was presented to the Court from which the appeal is brought. Indeed, in many cases I think that this Court might have fallen into error but for such assistance. Instances are not wanting (I say it with all respect) in which judgments of the Judicial Committee have been based upon a view of facts which would not have been even suggested in the presence of counsel fully acquainted with the actual circumstances of the litigation. In the absence of counsel so acquainted the want may, in some cases and to some extent, be supplied by the attendance of the solicitor or his managing clerk. The first question is then whether, when an appeal is directed by this Court to be heard in a State other than that in which the decision appealed from was given, the costs of such attendance can be allowed in any case.

In my opinion, in order to put suitors in all parts of the Com-

(1) 8 Ch. D., 598. (2) W.N. (1879), 22. (3) 26 Ch. D., 189.

H. C. OF A. 1908.

WESTERN AUSTRALIAN BANK v. ROYAL INSURANCE CO.

monwealth on an equal footing as far as practicable, such costs should in a proper case be allowed as costs which a litigant of ordinary prudence would incur to secure the proper presentation of his case to the Court. If any other rule were adopted, the parties to an appeal transferred from the State of origin to another might be placed at a serious disadvantage. There are, no doubt, many cases in which such a charge would be unreasonable; as, for instance, an appeal upon a question of abstract law. But in some cases it may be reasonable and proper to be allowed.

The remaining question is whether the present appeal was one in which such costs might properly be incurred. The Registrar thought that in his discretion he ought not to allow the charge, even if he had power to do so. But he was of opinion, as I read his memorandum of reasons, that such a charge could not be allowed in any case. In this I do not agree with him, although I think that in the absence of any authority to the contrary he was justified in following English practice. I also agree that the matter is one for the exercise of discretion, but I think that the discretion of the taxing officer should be freely reviewed by the Court, and that the discretion of the Court should be exercised upon its own knowledge of the circumstances of the particular case.

In the present case I think that the Court was in fact assisted in coming to a right conclusion by the presence of the gentleman in respect of whose attendance the costs in question were incurred. It became important in the course of the hearing of the appeal to inquire as to various incidents in the trial and in the Full Court, which were not disclosed by the transcript, but as to which important information would have been given by counsel if the case had been heard at Perth. I am not, indeed, sure that the same result would have been arrived at by the Court in the absence of the information thus afforded—at any rate, not without adjournment and further argument upon further information.

I think, therefore, that in the present case something should be allowed in respect of the attendance in question. The amount is primarily for the discretion of the taxing officer, but I suggest for his guidance, not by way of direction, but as an intimation of my own view, that a lump sum should be allowed, not necessarily

based upon the length of absence from the State or on the footing of a daily allowance, although both these matters are elements to be taken into consideration in fixing the lump sum.

The application to review the taxation will therefore be allowed, but as the case is one of first impression, and I cannot blame the respondents for taking the objection, I make no order as to costs.

The question raised by this application being one of general importance, I have consulted my learned brothers *Barton* and *O'Connor* before coming to a conclusion. They authorize me to say that they concur in my view as to the rule which should be followed in such cases.

Solicitors, for the appellants, *Stone & Burt.*

Solicitors, for the respondents, *Downing & Downing.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

LEE FAY . . . . . APPELLANT;
DEFENDANT,

AND

VINCENT . . . . . RESPONDENT.
INFORMANT,

CASE STATED, TRANSMITTED FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Factories Act (*W.A.*), (*No.* 22 *of* 1904), *sec.* 46—*Case removed under sec.* 5 *of Judiciary Act* 1907 (*No.* 8 *of* 1907)—*Judiciary Act* 1903 (*No.* 6 *of* 1903), *sec.* 18—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 117—*Discrimination between residents of different States.*