[HIGH COURT OF AUSTRALIA.]

FRACKELTON . . . . . APPELLANT;
PLAINTIFF,

AND

ATTHOW AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Dec.* 12.

Griffith C.J., O'Connor and Isaacs JJ.

Costs—Undertaking to pay—Stay.

The plaintiff brought an action against certain persons constituting the Presbytery of Brisbane, a tribunal of a voluntary religious association, for one cause of action, and another action against certain persons representing the Presbytery of Brisbane and the General Assembly of Queensland respectively. The actions were consolidated and judgment was given against all the defendants, who were ordered to pay the plaintiff's costs. An application for a stay of proceedings pending an appeal was granted on the solicitors for the defendants "undertaking to pay all costs which, by the judgment of the Court of appeal, are made payable by the defendants or either or any of them to the plaintiff." On appeal to the Full Court the defendants failed and were ordered to pay to the plaintiff the costs of the appeal, such costs to be recoverable only out of the property (if any) of the General Assembly and the Presbytery respectively, and not against the defendants or any individual member of those bodies respectively. The plaintiff made an unsuccessful demand for payment of the costs of the appeal to the Full Court from the solicitors who had given the undertaking. *Cooper* C.J. ordered these costs to be paid, but the Full Court of Queensland held that although the words of the undertaking were wide enough to have covered the costs of appeal, the Full Court never intended and did not order that the defendants personally should pay any costs, and that their solicitors had not incurred any liability on their undertaking. On appeal—

Held, that upon the order of the Full Court the conditions to which the undertaking applied had not arisen, and the respondents were not liable.

Quære, per Griffith C.J., whether the language of the undertaking was wide enough to cover the costs of the appeal to the Full Court.

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Decision of the Supreme Court of Queensland: *In re Frackelton* v. *Macqueen and others*; *In re a Solicitor*, 1910 St. R., Qd., 1, affirmed.

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APPEAL from the decision of the Full Court of Queensland.

Lilley and *Wassel*, for the appellant. The solicitors are liable under their undertaking "to pay all costs which by the judgment of the Court of Appeal are made payable by the defendants or either or any of them to the plaintiff." The undertaking was embodied in an order of the Court, and must be construed largely. When the respondents gave their undertaking it was meant to cover the costs of the appeal, and when the Full Court deprived the plaintiff of his costs in the Court below and gave him his costs of appeal, to be recovered only out of the property of the General Assembly and Presbytery but not against individual members, it was the respondents' duty—neither the Assembly or the Presbytery having any property—to see that the plaintiff got his costs of the appeal. [Counsel referred to *In re Hilliard* (1); *In re F.C.* (2); *White on Solicitors*, p. 94.]

O'Sullivan A.-G. and *A. D. Graham*, for the respondents. The undertaking was never meant to cover the costs of appeal, but even if it had done so the respondents would not be liable, as, owing to the Full Court's order, no conditions have arisen to bring the undertaking into operation.

Cur. adv. vult.

GRIFFITH C.J. This is an appeal from an order of the Full Court discharging an order made by the learned Chief Justice upon an application made by the appellant against the respondents to enforce the terms of an undertaking embodied in a judgment of the Court. It was correctly pointed out by the learned Judges of the Supreme Court that the only question for determination is the construction of the undertaking. There was some evidence offered to us that it did not exactly express what

(1) 14 L.J.Q.B., 225. (2) (1888) W.N., 77.

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both parties meant, but it is conceded that the only question open here is what is the meaning of the words actually used. In 1907 an action was brought by the appellant against a number of gentlemen described as the members of the Presbytery of Brisbane of the Presbyterian Church of Australia in the State of Queensland. In the following year another action was brought by the same plaintiff against the Right Reverend W. S. Macqueen and another reverend gentleman described as sued on their own behalf and on behalf of all other members of the General Assembly of the Presbyterian Church of Australia in the State of Queensland, and also against two other reverend gentlemen described as sued on their own behalf and on behalf of all other members of the Presbytery. The two actions were consolidated and came on for trial before the learned Chief Justice, who gave judgment, on 18th February 1909, in favour of the plaintiff in both actions, giving relief to the plaintiff, which was of a personal nature, and did not directly involve any question of property, although it indirectly affected his right to the continued enjoyment of his emoluments as a minister of the Church which depended upon the legality of the defendants' acts complained of. Amongst other things the learned Chief Justice ordered: "That the plaintiff do recover against the defendants respectively his costs of these actions to be taxed." That was a personal order against the defendants jointly and severally to pay the costs of both actions. An application was then made by defendants for a stay of proceedings until an appeal could be brought. The case was one in which a stay of proceedings, so far as carrying out the substantive part of the judgment was concerned, would be almost a matter of course. So far as costs were concerned, a stay would prejudice the immediate right of the plaintiff to recover them from the defendants. When the application for a stay was made it was suggested that the plaintiff ought to have something in the nature of security for costs. The solicitors for the defendants thereupon offered to give their personal undertaking, which was accepted, and that undertaking was embodied in the judgment in these words: "And by consent this Court doth further order and adjudge that the execution of this judgment be stayed pending an appeal to be prosecuted by the defendants

before the sittings of the Full Court of Queensland, to be held in the month of December 1908, or before the first sittings of the High Court of Australia, to be held at Brisbane after the thirtieth day of October 1908, the solicitors for the defendants by the counsel for the defendants undertaking to pay all costs, which by the judgment of the Court of Appeal are made payable by the defendants or either or any of them to the plaintiff." All that the plaintiff really lost by this stay was the right to immediate execution for the costs already awarded. The language of the undertaking, if very rigidly criticized, would perhaps not even cover the costs of the trial, because it is limited to costs which by the judgment of the Court of Appeal are made payable. If the appeal had been dismissed *simpliciter* the costs of the action would have made payable by the Court of first instance—not by the Court of Appeal; but there is no doubt that the undertaking was intended to cover those costs if the Full Court left them payable by the defendants—whether it was intended to cover any more is a question to be determined. The case went to the Full Court, who varied the judgment of the learned Chief Justice, and amongst other things struck out the order as to costs, so that the plaintiff was not entitled to recover any of the costs of the actions. They also made an order "that the plaintiff do recover from the defendants his costs of this appeal, such costs to be recoverable only out of the property (if any) of the General Assembly of the Presbyterian Church of Australia in Queensland and of the Presbytery of Brisbane respectively and not against the defendants or any individual member of those bodies personally." The costs of the appeal were taxed, and the respondents were invited to pay them, which they refused to do. Thereupon the learned Chief Justice made an order that they should pay the money into Court, and that order was reversed by the Full Court. From that decision this appeal is brought. Two questions arise for consideration—both matters of construction. The first is whether the undertaking covered anything more than costs incurred up to the time when it was given, the second whether, under the order of the Full Court, any costs were made payable by the defendants or any or either of them to the plaintiff within

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the meaning of the undertaking? One of the learned Judges in the Full Court thought that the words of the undertaking were large enough to cover the costs of the appeal. Another learned Judge expressed a doubt on the subject. To me it seems that, *primâ facie*, such an undertaking is not intended to cover the costs of a possible appeal. When a stay of proceedings is granted on terms, the purpose which the Court and the parties have in view is to leave things *in statu quo*—to secure to the successful party all that he has got by the judgment in the event of the appeal from the judgment being unsuccessful. A party has, under the Rules of the Supreme Court, the right to appeal without giving any security for costs, and I think it would be an entirely unheard of thing to make the granting of a stay conditional upon the unsuccessful party giving security for the costs of an appeal. But that is how the undertaking must be construed if it is to be held to cover the costs of a future appeal. If the matter rested on that alone I should have very great difficulty in coming to the conclusion that the undertaking was intended to cover the costs of the appeal, even if I were forced to the conclusion that they are within the words.

The other point is that the order made by the Full Court for costs did not fall within the terms of the undertaking. That order, as I have already mentioned, was "that the plaintiff do recover from the defendants his costs of this appeal, such costs to be recoverable only out of the property (if any) of the General Assembly of the Presbyterian Church of Australia in Queensland and of the Presbytery of Brisbane respectively and not against the defendants or any individual member of those bodies personally." It may be doubtful whether that order, assuming that those bodies have any property, was within the competence of the Court. It was made, as was pointed out in the appeal *Frackelton* v. *Macqueen and others* (1), under what this Court thought a misapprehension of a case of mandamus in the Court of King's Bench, but I will assume that the order was valid. How could such an order be enforced? What is the meaning of the order—assuming it to be valid? By the rules of the Supreme Court of Queensland (Order 47, Rule 25), it is provided: "Every

(1) 1909 St. R., Qd., 89.

order of the Court or a Judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." Rule 26 provides: "Any person, not being a party to a cause or matter, who obtains any order, or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to such cause or matter; and any person not being a party to a cause or matter, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to such cause or matter."

Now I will assume that the case is to be determined as if the General Assembly and the Presbytery were bodies known to the law, who could be made parties to the suit (although in fact they were not). How then would an order in these terms against them be enforced? In *Daniell's Chancery Practice* (the edition of 1865, the edition before the *Judicature Act*) it is laid down, at p. 1341 (and the position is borne out by the authorities cited):— "Where the costs are to be paid out of a fund not in Court, or out of the estate which is the subject of litigation, the costs . . . may be declared to be a charge on the property, and the tenant for life directed to keep down the interest; or a sufficient part of the fund or estate, to satisfy such costs, will be ordered to be mortgaged or sold: *Cannon* v. *Beely* (1). A direction to this effect, where none is contained in a decree, may be obtained on motion. It is usual, however, to insert a direction for a sale or mortgage of the estate, for the purpose of paying the costs, in the decree or order itself; and an omission to do so may be a ground for a rehearing or appeal": *Burkett* v. *Spray* (2).

The case of *Cannon* v. *Beely* (1), cited in support of this position was as follows:—"Costs were directed to be paid out of the estate: the defendant in whom the estate was vested refusing to pay them, sufficient of the estate was ordered to be sold to pay the costs, as a subpœna would not lie against the defendant for them."

A subpœna for costs was in those days the mode of enforcing a personal order for payment of costs by a party.

(1) 1 Dick., 115.

(2) 1 R. & M., 113.

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It seems, then, that, assuming the order to be valid, it would have had to be followed up by an order that a sufficient part of the funds of those two bodies should be made available and applied in the payment of the costs. That being the meaning of the order, is it an order to pay costs within the meaning of the undertaking to pay all costs which may be made payable by the defendants or either or any of them to the plaintiff? That question seems to me to answer itself. The order is an order for the payment of costs, but not personally; the undertaking is an undertaking to pay any costs which are ordered to be paid by the defendants, or any or either of them personally. No such order having been made, the undertaking did not become operative, and the judgment of the Supreme Court was quite right.

O'CONNOR J. I agree that the Supreme Court took the right view of this matter. Affidavits have been filed on both sides stating what the parties respectively intended by the agreement, but we can know nothing of the intention of the parties except as it is expressed in the agreement; our duty is simply to consider the agreement as embodied in the judgment of the Chief Justice of Queensland, and to interpret its meaning as applied to the subject matter. Now what was the subject matter? The defendants wished to appeal, and in a case such as this it is clear that a Judge of the Supreme Court would grant a stay for the purposes of this appeal if the interests of the respondents were fairly safeguarded. The judgment had ordered the defendants to pay the plaintiff's costs of the actions, and those costs were in the ordinary way payable by defendants personally. Under the circumstances the successful plaintiff was entitled to say, and did say, "I have a right to security before I consent to anything which may prejudice my position to recover these costs when the matter is finally decided." The assertion of that right on the plaintiff's part was the only obstacle in the way of a stay of proceedings, and it was to overcome it that the undertaking was given. Many good reasons might, I think, be urged in favour of construing the undertaking as limited to the payment of such costs of the trial as the Supreme Court ordered to be paid.

That is, however, a more or less controversial matter, and I prefer to base my opinion upon the grounds taken in the judgment of the Supreme Court. I assume, therefore, that "all costs" included the costs of appeal as well as the costs of the trial, and that the undertaking was to pay all costs which might be ordered by the Court of Appeal to be paid by the defendants to the plaintiff. Turning now to the order made, it seems to be plain that it does not order the costs to be paid by the defendants. On the contrary, the order seems to go out of its way to provide that the costs shall not be recoverable against the defendants personally or against any individual member personally of the bodies represented by the defendants. A suggestion was made during the argument that the limitation extends only to the recovery, that is to say, the execution for the costs. I do not read the order in that way. Taking it as it is expressed, its general effect was that the defendants personally should not be liable, but that the costs were to be recovered out of property of the Church, apparently wrongly assumed to be under the defendants' control. Further light may be thrown upon the meaning of the order by considering how costs so ordered to be paid could be recovered—could the defendants by any process be made to pay them personally? Clearly they could not. The only circumstances in which the defendants could be liable would be if there came into their hands property belonging to the General Assembly of the Presbyterian Church of Australia in Queensland or the Presbytery of Brisbane legally available for the payment of the costs, But there is no suggestion that that state of things has arisen. Indeed looking at the order in its essence, it is not an order for personal payment at all, but, as my learned brother the Chief Justice has pointed out, an order purporting to charge with payment of costs the property of the bodies I have mentioned, and directing the defendants to pay the costs out of the property if its proceeds should come to their hands. It is unnecessary to inquire whether the Supreme Court was authorized to make an effective order in that form, for it is clear that the defendants never had in their hands any such properties or their proceeds. Assuming, however, that the order was properly made in that form, it was a conditional order for payment by the

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defendants; but the circumstances have not arisen under which the payment was to be made. For these reasons I am of opinion that the conditions to which the undertaking applies have not arisen, and that it cannot be enforced. I have come to the conclusion therefore that the Supreme Court took the right view, and that the appeal must be dismissed.

ISAACS J. I quite agree in the result my learned brothers have arrived at; but as the line of reasoning which has led me to this result is not precisely the same, I propose to state the grounds of my conclusions. The position, I must say, does not seem to me very clear at first sight, and I do not wonder at the appellant in this case being in doubt as to his rights, but upon the ultimate consideration of the two documents, by which I mean the undertaking of 30th October 1908 and the Full Court order of 18th February 1909, it seems to me that it is not possible to arrive at any conclusion except that this appeal must be dismissed. Now, the first position taken up by the respondents originally was that their undertaking only covered the costs of the trial, and it has been said by *Chubb*, J. (1), in words which represent the contention on that point, that "all that the plaintiff could have issued execution for, if he did it *instanter*, was the costs of the actions up to and including the trial. Unless therefore the question of future costs is expressly raised at the time of the application, and settled, I should say it is opposed to common sense to suppose that the parties have then in their minds the costs of an appeal yet to be heard." With very great deference to that view I think it loses sight of a most important consideration. We know, in the first place, that where a judgment is given in favour of one party, and the other party seeks to stay execution, a stay is frequently ordered upon the terms that the costs shall be paid to the successful party's solicitors, those solicitors undertaking to refund. That would have been the case here if the costs had been paid over to Mr. Frackelton's solicitor, and that gentleman had given an undertaking to refund. Then there is another class of cases, where the unsuccessful party desires to appeal, and when that unsuccessful party is only a

(1) 1910 St. R. Qd., 1, at p. 6.

nominal party—a representative party—he is, under certain circumstances not necessary to detail here, ordered to give security for the costs of the appeal. Now this is a mixed case. The unsuccessful parties, the defendants, desired to have a stay of execution for the costs. The stay of the judgment, and the nature of that judgment, I will consider presently in relation to another question, but I will say this now, that in getting a stay of the judgment there was an advantage to the defendants far beyond the mere payment of the costs. It was also a disadvantage to the plaintiff personally and pecuniarily, but the advantage to the defendants was certainly this, that supposing they should eventually succeed on their appeal in the rejecting of plaintiff's claim, they would have prevented the interim disorganization of their arrangements, and they would have prevented him usurping in the meantime, should it ultimately be decided in their favour, the position of pastor of the Ann Street Church. So in order to secure what was practically a continuation of the hearing up to the appeal and to prevent him from acting as pastor in the meantime, and to avoid having to do acts that they were commanded to do by the judgment of *Cooper* C.J., the very widest words were used in the undertaking, to pay "*all* costs which by the judgment of the Court of Appeal are made payable by defendants or either or any of them to plaintiff." I therefore think there is ample ground for not artificially restricting the natural meaning of these words and for giving them the full force of including the costs of the appeal, if the Full Court had chosen to give those costs. The next question is, how far the order of the Full Court falls within the words of the undertaking? It was suggested, but I did not understand it to be pressed, by the learned Attorney-General that the costs referred to in that undertaking were limited to the costs which were made personally payable by the defendants. I think they include all such costs as by the order of the Full Court the defendants were ordered to pay either absolutely or conditionally so long as the condition was performed, and whether those costs were ordered to be paid as individuals or as members of the Assembly or the Presbytery.

Now, looking at the papers before us, I feel personally clear that neither the Court, nor the parties in regard to that under-

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taking, were addressing themselves to any distinction between individual and representative responsibility for costs. The first action might be said, in one sense, to have been representative, but in another sense it was not, because it included every member of the Presbytery, but they were all described as members of the Presbytery of Brisbane, or of the Presbyterian Church of Australia in the State of Queensland, and in the second action it was undoubtedly representative because it named only Rev. Mr. McQueen and the Rev. Mr. Kerr, who were sued on their own behalf, and on behalf of all other members of the General Assembly, and it named only Rev. Mr. Gillison and Mr. Hall, who were sued on their behalf, and on behalf of other members of the Presbytery, and when we look at the order that was made we see that that representative character is of the very highest importance indeed, because the order of *Cooper* C.J. included provisions affecting and declaring the status of plaintiff in regard to the Ann Street Presbyterian Church congregation, in regard to his attempted supervision as a minister of the Presbyterian Church, and it declares those null and void; and it went on to say: "And that the first-named defendants in the second of the above actions and all other persons being members of the said General Assembly of the Presbyterian Church of Australia in the State of Queensland, and the last named defendants in the second of the above actions, and all other persons being members of the said Presbytery of Brisbane do, and they are hereby commanded and required to do all such acts, matters and things as may be necessary for the purpose of restoring the plaintiff to his said office," &c. So that it goes very much further than an individual order against the particular persons who were actually parties to the action; and, therefore, when we look at the end of this declaration it seems to me to require a little straining to say that the only way in which defendants are to be regarded in this action is merely as individuals. Of course being there they have to bear the brunt of the litigation individually if the Court so requires. Then when we come to the terms of the undertaking we find it to be: "That by consent this Court doth further order and adjudge that the execution of this judgment be stayed on appeal to be prosecuted by defendants"—the meaning of defendants there must be in the character in

which they have been regarded all through as being there for themselves and other persons, because if the appeal is successful the other persons were to go free. The order then proceeds; "to be prosecuted by defendants"—that I should say undoubtedly means that defendants are not referred to in a purely personal sense—and then it goes on further, "the solicitors for the defendants by the counsel for the defendants." Counsel of course had been arguing for the rights of the Assembly of the Presbytery, not for the individual rights of the defendants, and there again it seems to me impossible to separate in the last two references to the defendants the representative character from the personal undertaking to pay "all costs which by the judgment of the Court of Appeal are made payable by the defendants or either or any of them to plaintiff." Well, in the last part I think "defendants" must have the same meaning as in the other part, and, therefore, while I do not disagree with the view that the only effective way of making defendants liable for costs in this case was to make them individually liable, yet when this undertaking was given, I fail to see how it must necessarily be understood in that last part—"the defendants or either of them"—to mean the defendants only in their individual capacities. I will refer again to that presently. I think that it means that the solicitors' undertaking was nothing more nor less than a personal promise that whatever order was made against defendants as to paying costs to plaintiff would be satisfied by the solicitors themselves by actual payment.

Now we come to what the Full Court did order. It ordered "that plaintiff do recover from defendants his costs of this appeal." Of course, if it stopped there there would be no question, but it does not. It proceeds: "Such costs to be recoverable only out of the property (if any) of the General Assembly of the Presbyterian Church of Australia in Queensland, and of the Presbytery of Brisbane respectively, and not against the defendants or any individual member of those bodies personally." That evidences to my mind that the Full Court understood the defendants to stand in a representative capacity, as well as to be liable to an individual responsibility for costs, otherwise it could not have made the order. Mr. *Wassell* cited the case of *In re F.C.*

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(1), a case which comes, to my view, very close to this; but very close does not touch, and the circumstances that separate the two is, in my opinion, fatal. In that case the solicitor, as solicitor for a party, gave an undertaking that a negotiable instrument would be paid out of a certain interest in an estate under the will, I think, of a deceased person, and it was held that that involved a representation that the interest in the estate would be sufficient, irrespective of any other charges upon it, to satisfy the claim, and so Mr. *Wassell* argued the real principle applied here. Now if the Full Court had said that plaintiff do recover from defendants his costs of the appeal, such costs to be recovered from the property of the General Assembly and so on, and had used language which intimated that the order carried with it the construction that the Court intended these costs to be paid, and did it on the basis that the Court understood that that property would be sufficient to do it, then I think, so far as I am able to judge of the matter, that the solicitors did undertake that without going to the trouble of investigating that matter they would pay the costs.

But the Court here has not done that. The Court has said the costs are to be recoverable out of the property, "if any," so that the Court had clearly in its mind that plaintiff might not get any costs whatever, and they made his right to get costs from the defendants dependent entirely upon the question whether there turned out to be any property of the Assembly or the Presbytery, and then only to the extent of that property. That, therefore, is a conditional or provisional order—a qualified order—and I take it that the substance of the Full Court order is this: "If you can get costs out of that property you can have them; but beyond the extent to which you can get costs in that way, we do not order the defendants at all to pay costs." Applying that construction to the undertaking, the solicitors have the right to say that the condition upon which the Court gave costs at all did not exist, and, therefore, that their undertaking never came into operation. For that reason I agree with the judgment of the Court.

Appeal dismissed with costs.

(1) (1888) W.N., 77.

Solicitor, for the appellant, *A. H. Pace.*
Solicitors, for the respondents, *Atthow & McGregor.*

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H. V. J.

[HIGH COURT OF AUSTRALIA.]

HENRY WILLIAM HOGAN . . . . PLAINTIFF;

AND

ALFRED GRAHAM OCHILTREE . . . DEFENDANT.

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SYDNEY, *March* 30.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Judiciary Act 1903 (*No.* 6 *of* 1903), *secs.* 40, 42—*Cause arising under the Constitution, or involving its interpretation—State legislation inconsistent with previous decision of High Court—Case remitted to State Court.*

In August 1909 the High Court, in an appeal from the Supreme Court of New South Wales, held that the plaintiff had no title to occupy the land, in respect of which this action was brought, in the previous June. The legislature of New South Wales subsequently passed an Act declaring, in effect, that the plaintiff should be deemed to have had a title to occupy the lands in question at that date.

Held, that this did not raise any question under the Constitution, or involving its interpretation, within sec. 40 of the *Judiciary Act* 1903. The question of the validity of this Act having been referred to the High Court by the State Court, upon objection taken by counsel for the defendant in that Court that the Act was unconstitutional, the High Court, on the plaintiff's application, remitted the case to the Supreme Court, and ordered the defendant to pay the costs of the application.

APPLICATION by the plaintiff for an order remitting the suit to the Supreme Court of New South Wales in Equity from which it had been removed to the High Court under sec. 40 (1) of the *Judiciary Acts* 1903-7.

In June 1909 this suit was brought by the plaintiff against the defendant in the Supreme Court of New South Wales in Equity