H. C. OF A. 1910.

THE KING v. GRILLS.

decision arrived at by the Supreme Court was correct and should be upheld.

Appeal allowed.

Solicitor, for appellant, *J. V. Tillett*, Crown Solicitor.

Solicitor, for respondent, *L. J. Hardiman*, Kempsey, by *J. W. Maund.*

[HIGH COURT OF AUSTRALIA.]

ROBERT LOUDEN BEGLEY . . . . APPELLANT; DEFENDANT,

AND

THE ATTORNEY-GENERAL OF NEW SOUTH WALES . . . RESPONDENT. PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1910.

SYDNEY, *Nov.* 18, 21, 22. *Dec.* 7.

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

Administration—Administration bond—Action against surety—Evidence of breach of conditions of bond by administratrix—Decree against administratrix in administration suit—Admissibility against surety—"Res inter alios acta"—Construction of administration bond—Rest and residue clause—Proof of damage—Assignments of their interests by next of kin to administratrix—Charter of Justice (N.S. W.) secs. XV., XVI.—*Wills, Probate and Administration Act* 1898 (*N.S. W.*) (*No.* 13), *sec.* 155—*Practice—Nominal plaintiff—Relator—Title of proceedings.*

An action was brought against the appellant as surety to an administration bond, which was in the form prescribed by sec. 15 of the Charter of Justice. The breaches alleged were : (1) that the administratrix did not well and truly administer ; (2) that she did not make a true and just account of her administration ; and (3) that she did not dispose of the rest and residue found remaining upon the administration account, after allowance of accounts in due course of administration, or as directed by the Court.

Held, that, in the absence of a special agreement by the surety to be bound by an order made against his principal, a decree of the Equity Court in an administration suit brought by one of the next of kin against the administratrix was not evidence against the surety in support of either the first or third breaches, because the surety was not a party to the proceedings, and, as to the third breach, the decree was not a direction to the administratrix to dispose of the "rest and residue" within the meaning of the bond.

Ex parte Young; *In re Kitchin*, 17 Ch. D., 668, followed.

Per Griffith C.J., *Barton* J. and *O'Connor* J.—The assets for the due administration of which the surety was liable are those of which the Court would take cognisance upon a plea of *plene administravit*. The direction of the Court referred to in the condition of a bond in the form prescribed by sec. 15 of the *Charter of Justice* relates to an ascertained sum which is or has been in the hands of the administrator, and for which the administrator would have been liable to account to a Court of Ecclesiastical Jurisdiction in 1823.

Held, also, that, on the question of the sum which could be recovered in the action, evidence was admissible to prove that the actual loss sustained by the estate was less than that sustained in the decree, and also to prove an assignment of the interests of the next of kin to the administratrix.

Per Griffith C.J.—In an action upon an administration bond under sec. 16 of the Charter of Justice the Attorney-General is a mere nominal plaintiff. The name of the relator, who is the real plaintiff, should appear upon the record as such.

Decision of the Supreme Court: *Attorney-General* v. *Begley*, 10 S.R. (N.S.W.), 135, reversed.

APPEAL by the defendant from the decision of the Supreme Court of New South Wales.

The action was brought in the name of the Attorney-General against the appellant, as surety to an administration bond, dated 31st July 1888, by which Honorah O'Brien, the administratix, the appellant Begley, and one Patrick Haley, and their heirs, executors and administrators, became jointly and severally liable to Her Majesty Queen Victoria for payment of £916. The conditions of the bond were as follows:—"The conditions of the above written bond or obligation are such that if the above bounden Honorah O'Brien the administratrix or intended administratrix of all and singular the estate goods chattels credits and effects of John O'Brien late of 160 Macquarie Street South Sydney in the Colony aforesaid do make or cause to be made a true and perfect

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

inventory of all and singular the estates goods chattels credits and effects of the said deceased which have or shall come to the hands possession or knowledge of the said Honorah O'Brien or into the hands possession or knowledge of any person or persons for her and the same so made exhibit or cause to be exhibited into the Registry of the said Supreme Court of New South Wales within six calendar months from the date of said administration being granted to Honorah O'Brien and the same estate goods chattels credits and effects of the said deceased and all other the goods chattels credits and effects of the said deceased at the time of his death or which at any time hereafter shall come into the hands or possession of the said Honorah O'Brien as such administratix or into the hands or possession of any other person or persons for her shall well and truly administer according to law, and further shall make or cause to be made a true and perfect account of her administration within fifteen months from the date of obtaining letters of administration herein and afterwards from time to time as shall be lawfully required, and all the rest and residue of the said goods chattels credits and effects which shall be found from time to time remaining upon the said administration account (the same being first examined and allowed by the said Court) shall and do pay and dispose of in due course of administration or in such manner as the said Court by its decree or order shall direct or appoint," then the bond should be void and of no effect, but otherwise should be and remain in full force.

Letters of administration were granted to Honorah O'Brien, the widow of the intestate, on 15th October 1888. The intestate left him surviving his widow and five children. Until 3rd October 1902 no accounts were filed by the administratrix. On the last-mentioned date accounts were filed in the Probate Court, showing receipts for rent £1,470, and disbursements £1,620 15s. 6d. These accounts had not been allowed by the Court. On 19th November 1903, Denis O'Brien, one of the sons of the intestate, brought a suit in the Equity Court in which the administratrix and the other children of the intestate were made defendants, praying that the estate of the intestate should be administered by the Court, and that an account should be taken of the

assets of the estate which had come to the hands of the administratrix, or which but for her wilful default and neglect would have so come, and of her dealings therewith. No appearance was entered by any of the defendants, and there was a reference to the Master to take inquiries and accounts on this footing. By decree in this suit, dated 12th February 1907, it was ordered that the administratrix should pay into Court, within fourteen days, to the credit of the suit, the sum of £2,773 6s. 4d., being the balance of the moneys appearing by the certificate of the Master in Equity, dated 30th November 1904, to be due and owing by her to the estate of the intestate.

The breaches of the bond alleged in this action were—(1) that the administratrix did not well and truly administer; (2) that she did not make a true and just account of her administration within fifteen months; and (3) that she did not pay and dispose of, in due course of administration, all the rest and residue of the goods, chattels, credits and effects found from time to time remaining upon the said administration account, after the same being first examined and allowed by the Supreme Court, or in such manner as the said Court by its decree and order did direct and appoint.

At the trial of the action before *Cohen* J. and a jury the proceedings in the administration suit were admitted in evidence, but evidence tendered by the defendant of assignments by certain of the next of kin of their interests in the estate to the administratrix was rejected. The jury by direction assessed the damages under the first and third breaches at £2,773 6s. 4d., and on the second breach (which the defendant admitted) at 1s., and found a verdict for the plaintiff for £916. An application for a new trial was refused by the Full Court. The defendant appealed from this decision upon the grounds: (1) that the proceedings in the administration suit should not have been admitted, as they related to a suit to which the defendant was not a party, and that the order or decree in that suit was not an order or decree within the meaning of the bond; (2) that the evidence of the amount of the intestate's estate received by the administratrix was wrongly rejected.

Sec. 155 of the *Wills, Probate and Administration Act* 1898

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

(No. 13) is as follows:—"Any decree of the Supreme Court in its equitable jurisdiction in an administration suit shall bind the parties, and be of the same force and effect to all intents and purposes as if an order to the same effect had been made in the probate jurisdiction."

The material sections of the Charter of Justice are set forth in the judgment of *Griffith* C.J.

Langer Owen K.C. and *Windeyer*, for the appellant. The decree of the Equity Court in the administration suit between Denis O'Brien and the administratrix was wrongly admitted in evidence, as the defendant was not a party to those proceedings. In the absence of special agreement a judgment against a principal debtor is not binding on the surety: *Ex parte Young*; *In re Kitchin* (1). In an action against the administratrix the surety cannot be joined. The bond must be dealt with as if the surety were a complete stranger. As to the first breach alleged, that the administratrix did not well and truly administer, the ordinary rule must apply, and evidence must be given of the acts of mal-administration relied upon. With regard to the third breach, this is not the kind of decree contemplated by the bond. Under the English law the "residue" would mean the residue of the estate after payment of debts and funeral and testamentary expenses: *Archbishop of Canterbury* v. *Tappen* (2); *Trethewy* v. *Helyar* (3). As the Charter of Justice is based on the *Statute of Distributions* (22 & 23 Car II. c. 10), the bond in the present case should be construed in the same way. If there is evidence of damage to creditors they could recover under the first breach. It is a condition precedent that the decree should be one by which the surety has agreed to be bound. The Court has found that there were certain rents and profits which the administratrix should have received; that is not evidence of a distributable fund in the hands of the administratrix, proof of the existence of which is a necessary preliminary to an order for distribution.

Even if admissible, the decree is not conclusive evidence of

(1) 17 Ch. D., 668. (2) 8 B. & C., 151. (3) 4 Ch. D., 53.

damage. Evidence was wrongly rejected of assignments of their interests by certain of the next of kin to the administratrix.

Knox K.C., *Coghlan*, and *Watt*, for the respondent. The real object of the bond is to secure that the assets of the estate shall be properly collected, protected, and applied. This is all included in the words "well and truly administer." The object of sec. 17 of the Charter of Justice was to provide a summary remedy against an administrator before complete administration. The administrator first files an inventory. He then files accounts of receipts and disbursements. Under sec. 17 the Court can order any moneys to be brought into Court. The Court retains control over the balance appearing at the foot of the accounts during the whole period of administration, and the object of the bond is to secure that any sum which the Court may find to be in the hands of the administrator at any time shall not be mal-administered. The surety is liable for a disobedience of the administrator to an order of the Court dealing with the balance shown at the foot of the accounts. "Rest and residue" means the balance to the credit of the estate or to the debit of the administrator on any such account. The bond being a security for the faithful performance of the duties imposed on the administrator, the damages recoverable are any loss which the estate has suffered at his hands. The estate is the aggregation of assets which the deceased would have had if alive. Here the evidence shows that the administratrix has been ordered to pay £2,773 into Court, and has not done so. That represents the loss to the estate, because this sum should be to the credit of the estate and is not. It may be a loss to creditors or next of kin. Who would be entitled to it if it had been paid in is another question. By sec. 155 of the *Probate Act* 1898 a decree of the Equity Court in an administration suit has the effect of an order made in the probate jurisdiction.

[GRIFFITH C.J.—There is no method by which in the Probate Court administrators accounts can be surcharged.]

The Court can reject the accounts filed, and insist on fresh ones being supplied. If the Court is limited to what the administrator says he has received, the order would be futile.

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

The only Court competent to decide whether there had been a true and just administration is the Equity Court: *Younge* v. *Skelton* (1). A Court of law could not determine whether an estate had been properly administered. The surety engages that the administrator will properly administer. If a competent Court decides that this has not been done, that fulfils the condition of the bond. The decree was admissible and conclusive. The only way the liability of the administrator can be ascertained is by taking his accounts. [They also referred to *Stovall* v. *Banks* (2); *Beall* v. *New Mexico* (3); *Heard* v. *Lodge* (4); *Reichel* v. *Magrath* (5); *Irwin* v. *Backus* (6); *State* v. *Holt* (7).] Under the Charter of Justice the powers of the Court of Chancery, and ecclesiastical jurisdiction were both conferred upon the Supreme Court. The bond was not intended to be limited to such an account as the Prerogative Court could deal with, but the intention was to enable the Court to deal with the administrator *quâ* trustee. Sec. 17 refers to money belonging to the estate of the deceased, not money belonging to the deceased. In 1823, when the Charter of Justice was passed, the Court of Chancery had absolute power to deal with the due administration of assets. If the Prerogative Court had power to make an order for payment to the next of kin, it must have had power to take accounts, and ascertain what was due. The words "examined and allowed" in sec. 15 show that a full investigation of accounts was intended.

The action is brought for the benefit of all persons interested for the damage proved to the estate. It is not limited to the share of Denis O'Brien.

Langer Owen K.C., in reply, referred to *Burns' Ecclesiastical Law*, 8th ed., vol. IV., p. 290; *Attorney-General for N.S.W.* v. *Eyles* (8).

Cur. adv. vult.

The following judgments were read:—

(1) 3 Hagg. Ecc., 780.
(2) 10 Wall., 583.
(3) 16 Wall., 535.
(4) 32 Am. Dec., 197.
(5) 14 App. Cas., 665.
(6) 85 Am. Dec., 125.
(7) 72 Am. Dec., 273.
(8) 6 W.N. (N.S.W.), 87.

GRIFFITH C.J. This was an action brought in the name of the Attorney-General against the appellant as surety to an administration bond dated 31st July 1888, and made upon the grant of administration of the lands and goods of John O'Brien deceased to his widow Honorah O'Brien. The breaches alleged were: (1) that the administratix did not well and truly administer; (2) that she did not make a just and true account of the administration within fifteen months; and (3) that she did not pay or dispose of in due course of administration the rest and residue found remaining upon the administration account after being examined and allowed by the Court or in such manner as the Court by its decree and order did direct and appoint. At the trial the second breach was admitted. The only evidence offered upon the first and third breaches consisted of a decree pronounced in the Supreme Court in its equitable jurisdiction on 12th February 1907 in an administration suit brought by Denis O'Brien, one of the next of kin (who is the real plaintiff or relator in the present action), against the administratrix, by which she was ordered to pay into Court the sum of £2,773 6s. 4d., together with the other proceedings in that suit. The evidence was objected to as inadmissible, but was admitted. The defendant then offered evidence to show (1) that the amount, if any, lost to the estate by failure to make due administration was less than the sum mentioned in the decree, and (2) that the interests of all the next of kin except the plaintiff had been assigned to the administratrix, the plaintiff's interest being less than one-sixth of the whole. The evidence was rejected. The decree was treated as conclusive evidence of the fact or extent of mal-administration, and the damages on the first and third breaches were assessed accordingly. A rule *nisi* for a new trial was granted by the Full Court and discharged. The learned Judges expressed no opinion on the question whether the decree was admissible, and, if admissible, conclusive, on the first breach, but held that it was both admissible and conclusive on the third.

So far as regards the first breach I am of opinion that the decree was *res inter alios*, and therefore inadmissible. The law on the subject was explicitly laid down by the Court of Appeal

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

Griffith C.J.

in the case of *Ex parte Young*; *In re Kitchin* (1). The headnote to that case, which correctly states the effect of the judgments, is as follows:—"In the absence of special agreement a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor."

We were referred to some American decisions, including one of the Supreme Court of the United States. But on examination it appears that all those decisions were based, as was the case of *Ex parte Young* (1), upon the construction of particular instruments, and there is no suggestion of any doubt as to the applicability of the general principle unless it is excluded by the agreement itself.

In most of the American States the administration of the estates of deceased persons is entrusted to the exclusive jurisdiction of Courts called Probate Courts. In all the decisions referred to, as I understand them, the Court held that by the administration bond, properly construed, the surety agreed to be bound by the order of that Court against his principal. In the present case the first condition of the bond is clearly not open to any such construction.

With regard to the third breach, the point for decision is not quite so simple, but it is still a question of the construction of the bond. For a proper apprehension of the point it is necessary to refer in some detail to the Charter of Justice of 13th October 1823, by which the Supreme Court of New South Wales was established. The Charter was issued under the powers conferred by the Act 4 Geo. IV. c. 96, which provided by sec. 10 that the Supreme Court should have power to administer and execute such ecclesiastical jurisdiction and authority as should be committed to it by the Charter.

By Article XIV. of the Charter it was ordained that the Supreme Court should be a Court of Ecclesiastical Jurisdiction with power to grant probates of wills and to commit letters of administration of the estates of intestates or persons who died

(1) 17 Ch. D., 668.

testate but not naming an executor resident in the colony, "and to demand, require, take, hear, examine, and allow, and, if occasion require, to disallow and reject the accounts of them in such manner and form as is now used or may be used in the said Diocese of London."

Article XV. required that before the grant of letters of administration the persons to whom they were granted should give security by bond to the King, the conditions of which were to be that the administrator (1) should make and exhibit an inventory of the estate within the time specified, (2) should well and truly administer the estate of the deceased at the time of his death or which should afterwards come to the hands of the administrator or any person for him according to law, (3) should make a true and just account of his administration within a time specified and afterwards from time to time as should be lawfully required, and (4) "all the rest and residue of the said" estate "which should be found, from time to time, remaining upon the said administration accounts, the same being first examined and allowed of by the said Supreme Court of New South Wales, shall and do pay and dispose of in a due course of administration or in such manner as the said Court shall direct."

Article XVI. provided that, if it should be necessary to put the bond in suit for the purpose of obtaining the effect of it "for the benefit of such person or persons as shall appear to the said Court to be interested therein," such person or persons should on giving security be allowed by order of the Court to "sue the same in the name of the Attorney-General for the time being of the said Colony; and the said bond shall not be sued in any other manner." It is plain that under this article the Attorney-General is a mere nominal plaintiff, and that the real plaintiff is the person who has obtained the order of the Court to put the bond in suit, who may be described as the relator. In my opinion his name should appear upon the record as such, and this case should be dealt with as if it did so appear.

Article XVII. directed that the Court should fix periods when persons to whom probate and letters of administration were granted should pass their accounts before the Courts, and that if

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

Griffith C.J.

the estate was not fully administered within the time fixed by the Court the person to whom probate or administration was granted should dispose of the balances as directed by the Court. It also required the Court from time to time to make orders for the due administration of the assets and for the payment or remittance thereof to any persons entitled as creditors, legatees or next of kin or by any other title.

The bond sued upon in this action followed the form prescribed by Article XV. The question is whether the final condition of the bond prescribed by it bound the surety to see that any order made in an administration suit by the Court in any of its jurisdictions was observed, or was limited to the observance of such orders as a Court of Ecclesiastical Jurisdiction could make at that time (1823). It will be noticed that Article XIV., in which administration accounts are first mentioned, expressly incorporates the practice of the Diocese of London. I think that the direction of the Court referred to at the conclusion of the bond must be read as limited in a like manner. Now, under the law as it existed in 1823 the Ecclesiastical Court could only require that all that the deceased died possessed of should be included in the inventory and account. It could not call for an account of subsequent profits in his business: *Pitt* v. *Woodham* (1). Again, it would not permit witnesses to be examined for the purpose of falsifying the inventory: *Telford* v. *Morison* (2). In my judgment the bond is to be construed in the light of this state of the law. Assuming, without deciding, that an adjudication of the Supreme Court in its equitable jurisdiction is a direction of the Court within the meaning of the bond, it can only be so regarded in so far as it is a decision respecting the subject matter which was within the cognizance of the Ecclesiastical Court, that is, the assets of which the deceased actually died possessed, but not including subsequent profits, or the value of accretions which might have been made by judicious management but were not made. In an administration suit brought against an administrator in the equitable jurisdiction of the Court, on the other hand, the administrator is treated as a trustee, and is held accountable for all profits earned by him and also for money

(1) 1 Hagg. Ecc., 250. (2) 2 Add., 329.

which he might have received but for his wilful neglect or default.

In my opinion the assets for the due administration of which the surety to the administration bond is liable are the same as those of which the Court would take cognizance upon a plea of *plene administravit*, which are thus defined in *Sheppard's Touchstone* (p. 496), in a passage adopted by *Alderson* B. in *Smedley* v. *Philpot* (1):—"All those goods and chattels, actions and commodities which were of the deceased in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor doth get into his hands, as duly belonging to him in the right of his executorship, and all such things as do come to the executor in lieu or by reason of that, and nothing else, shall be said to be assets in his hands, to make him chargeable to a creditor or legatee."

The distinction between legal assets and what are called "equitable assets" is pointed out in *Williams on Executors* (Pt. IV. Bk. 1 Ch. 1), 9th ed., vol. II., p. 1545:—"Hitherto the subject has been confined to the consideration of assets, such as may be reached at law, and such as a creditor, suing the executor in an action at law for a debt, due from the testator, might bring forward in evidence on an issue joined on the executor's plea of *plene administravit.* But there are, besides, various interests frequently forming part of the estate of an executor or administrator, which are not recognized as assets at law; and which, therefore, if administered at all, must be administered in equity: This latter portion of the estate in the hands of an executor or administrator is called equitable assets, in contradistinction to the former, which is called legal assets. In other words, legal assets are such as are liable to debts in the temporal Courts, and were formerly liable to legacies in the spiritual, by the course of law: Equitable assets are such as are liable only by the help of a Court of Equity."

In the case of administration of land I think that the rents actually received would be legal assets, whether they would or would not be within the bond.

There is, therefore, no *primâ facie* presumption that an order made against an administrator in an administration suit is limited

(1) 3 M. & W., 573, at p. 579.

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

Griffith C.J.

to matters over which the Ecclesiastical Court had jurisdiction. It follows that, apart from all other objections, the decree in question affords no evidence of the amount of the assets left by the deceased and not duly administered. For *non constat* that it relates to such assets only.

The difference is well illustrated by the facts of the present case as shown by the evidence which, however, I hold to be inadmissible. The sum of £2,773 includes a sum of £548 charged to the administratix as an occupation rent of land forming part of the estate and occupied by her, and another sum of £500 for profits earned by her from the use of the assets, neither of which matters could have been brought into account by the Ecclesiastical Court of the Diocese of London as it existed in 1823.

But this is not the only difficulty. The bond prescribed by the Charter of Justice is in some respects identical with, and in others departs from, the bond prescribed by the *Statute of Distributions* (22 & 23 Car. II. c. 10).

The first three conditions of the bond prescribed by the Statute are the same as those prescribed by the Charter of Justice. The fourth condition is in these words:—"And all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the Judge or Judges for the time being of the said Court, shall deliver and pay unto such person or persons respectively as the said Judge or Judges by his or their decree or sentence, pursuant to the true intent and meaning of this Act, shall limit and appoint."

In the New South Wales bond the words "from time to time" are inserted between "found" and "remaining," and the words "shall and do pay and dispose of in due course of administration or in such manner as the said Court by its decree or order shall direct or appoint" are substituted for the words "shall deliver and pay unto such person or persons respectively as the said Judge or Judges by his or their decree or sentence, pursuant to the true intent and meaning of this Act, shall limit and appoint."

In the case of *Archbishop of Canterbury* v. *Tappen* (1) the construction of a bond under the Statute was considered. Lord

(1) 8 B. & C., 151, at p. 158.

Tenterden C.J., delivering the judgment of the Court, said:— "From this view of the Statute, it appears that the Ordinary or Judge is to make the distribution among the persons entitled, and that the administrator is to pay according to the sentence of the Ordinary, so that the sentence of the Ordinary is to precede the payment. And this may in many cases be necessary for the information and protection of the administrator, who, where the claimants are numerous and remote in kindred from the intestate, may not know with certainty what particular persons are entitled, or in what proportions, and may, if he pays to a person not entitled, be obliged to pay over again to the person legally entitled. And if the administrator has a right to have the sentence of the Court before he pays, then, inasmuch as such sentence is only to be pronounced upon the residue of the effects, and after the administrator has furnished an account of his *said* administration (which is the language of the condition), the administration thus referred to cannot be an administration comprising a distribution of the effects among the next of kin; and, consequently, the preceding words of the condition to which the reference is thus made, that is, the words *well and truly administer the goods according to law*, cannot be understood of an administration comprising a distribution among the next of kin. It is true that where an administrator intends to act faithfully, and the claims of the next of kin can be, as in general they may be, ascertained without difficulty, he will not put them to the expense and delay of calling for his account, and obtaining the sentence of the Court; and, therefore, it may well be said that it is his duty to make the distribution, although it cannot be said that a forfeiture of the bond is incurred if this be not done."

The Court accordingly held that the concluding condition related only to a distribution amongst the next of kin, and that an assignment of a breach of the bond alleging that the administrator had not distributed the estate amongst the next of kin, but not alleging a decree or sentence of the Court, was bad. In my judgment the same construction should be applied to the bond under the Charter of Justice except so far as the language of it requires a different construction. I think that the condition in question, so far as it refers to a direction of the Court, relates, as

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

Griffith C.J.

does that in the English bond, to an ascertained sum which is or has been in the hands of the administrator and which the administrator is ordered to dispose of.

I do not express any final opinion on the question whether the words "rest and residue" in the New South Wales bond are limited, as in the English bond, to the balance left after payment of debts, or include any balance appearing upon interim accounts, but I will assume that they bear the wider meaning. Indeed, the introduction of the words "from time to time," coupled with the powers conferred by Article XVII. to direct the disposal of balances in the hands of the administrator and to order the payment of debts, would seem to warrant a wider construction of the word "direction," not limiting it to an order for payment of specific sums to next of kin, but including any direction for payment or disposal authorized by the Charter of Justice. But in any view the order must be a direction to dispose of some specific sum for which the administrator was bound to account to the Ecclesiastical Court. The decree relied upon does not even purport to be an order of that kind.

On the questions of what would be an order within the condition, how far the materials on which it is based should appear on the face of it, and how far the finding of the Court in the administration suit would be conclusive as to the amount of the "rest and residue," whatever those words mean, I also reserve my opinion. Hitherto these questions seem never to have come up for decision, and possibly they never will.

It was argued that, if this is the true construction of the bond, creditors and beneficiaries are insufficiently protected. The scheme of the Statute of Distributions has, however, been regarded as sufficient for more than two centuries in England, and that of the Charter of Justice for nearly a century in New South Wales. If it requires amendment it is for the legislature to amend it, and not for the Courts to say that words of the bond mean something different from what they meant in 1823.

With regard to the evidence rejected, I am of opinion that it was admissible and ought to have been received. Even if the decree in the administration suit had been admissible it was not conclusive, and evidence of the actual facts were therefore admis-

sible for the defendant in answer to the supposed *primâ facie* case made by the plaintiff. As to the evidence of the assignment of the interests of all the next of kin except the relator to the administratrix, it was admissible on another ground. The obligation of a surety is not greater than that of his principal. If the principal owes nothing to anybody the surety is not responsible for anything, and the extent of the principal's obligations to other persons is the limit of the surety's liability.

Other interesting questions were touched upon in argument, which I will mention, but upon which it is not necessary to pronounce an opinion; for instance, whether one of the next of kin suing on an administration bond in the name of the Attorney-General as nominal plaintiff can have execution for more than the amount of the actual loss which he has sustained: see *In re Buckland* (1). It is not disputed that on proof of any breach of the bond judgment must be entered for the full amount of the penalty. The relator cannot, of course, obtain for himself more than he has lost. But it is not so clear whether he can or cannot issue execution for a larger sum for the benefit of other persons, or whether they must proceed independently by writ of *scire facias*. Another question is whether when the assets are insufficient for the payment of debts the next of kin can put the bond in suit for the benefit of creditors. It is contended that, when there has been a breach of the condition well and truly to administer, resulting in a deficiency of assets for payment of debts, the next of kin are necessarily losers. But that is not so. If the total assets are insufficient for the payment of debts, they lose nothing. In the present case it is alleged (although there was no admissible evidence of the fact) that there is a secured creditor for £2,000 and upwards. Whether that creditor will be prejudiced by any mal-administration of the administratrix is still problematical. If the assets for the due administration of which the defendant is liable under the bond were sufficient to pay all the debts and to leave a surplus for distribution amongst the next of kin, he will not be prejudiced, but there was nothing to show—even upon the evidence wrongly admitted—what that surplus will be, or for what part of it the administratix is now liable to account

(1) 5 S.C.R. (N.S.W.), 244.

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

Griffith C.J.

to any one. Yet this would, in any view, be the limit of the amount which could be recovered in the action.

For the reasons which I have given I think that the rule *nisi* for a new trial should have been made absolute so far as regards the issues upon the first and third breaches. The award of judgment should be suspended until the new trial has been had.

BARTON J. We are concerned only with the first and third breaches, assigned on the second and fourth conditions of the bond, which is in the terms prescribed by the Charter of Justice, Article XV.

In suing upon such a bond, the real party is not the Attorney-General, but the person interested who has obtained leave from the Court to sue. "The Attorney-General's name only is used as representing the Crown, and his name may be so used by the Court even against his wish, and the Charter not only directs that the bond shall be put in suit in that way, but that it shall be sued upon in no other way. . . . The object of the Court in ordering the bond to be put in suit is to ascertain by the verdict of a jury the extent to which the party interested has been damaged": *per Faucett* J. in *Attorney-General* v. *Reddy* (1). In the same case, the person interested who has by leave put the bond in suit is called by *Manning* J. the relator, and though the name be not strictly applicable, it fairly describes his position in the proceedings. He may be treated as the real *actor*, invoking the law to award him compensation, and giving security for the costs. The Attorney-General is not a party except in name.

The first question is as to the admissibility of the proceedings in the suit brought by O'Brien, now the "relator," and the real respondent, against the administratrix for administration of the estate in equity. As the appellant was not a party to the suit, the true question is whether the decree (for the proof of which the equity proceedings were admitted) was with regard to him *res inter alios acta*.

It certainly was so unless it became admissible by the terms of some special agreement to which he was a party: *Ex parte Young*; *In re Kitchin* (2). In the present case such terms

(1) 2 S.C.R. (N.S.W.), N.S., 87, at p. 90. (2) 17 Ch. D., 668.

could only be found, if at all, in the bond. That document contains no obligation by the terms of which the decree in equity becomes necessary or admissible as evidence of the first breach, that is, of the failure "well and truly to administer according to law." As the proceedings are the only evidence of breaches that was tendered, we may leave the first breach out of consideration and pass to the third. By the terms of the fourth condition, on which the third breach is assigned, the administratrix was bound to "pay and dispose of in due course of administration or in such manner as the said Court" (*i.e.* the Supreme Court) "by its decree or order" should "direct or appoint" "all the rest and residue" of the estate which should "be found from time to time remaining upon the said administration account, the same being first examined and allowed of by the Judge or Judges for the time being of the said Court." The third breach as assigned is that the administratrix did not pay or dispose of the residue in due course of administration or in such manner as the Court by its decree and order directed. It is contended for the respondent that the decree or order intended being that of the Supreme Court, the decree in the administration suit, though made by that Court in its equitable jurisdiction, is within the condition, and that the decree, which admittedly the administratrix had failed to obey, was therefore evidence, and conclusive evidence, of the third breach sued upon. The appellant on the other hand maintains that it is no proof at all of the breach of the fourth condition: that the decree or order which the administratrix bound herself to obey was such a decree as an Ecclesiastical Court would have made when the Charter of Justice prescribed this form of bond. He rightly says that the bond meant when executed what it meant when its form was first prescribed. It was executed in 1888, before the passage of the *Probate Act* 1890, which has no reference to this case. It is therefore necessary to refer to the provisions of the Charter of Justice, issued under the authority of the Act 4 Geo. IV. c. 96, of which sec. 10 empowered the Supreme Court when constituted by the Charter to exercise such ecclesiastical jurisdiction as the Charter should commit to it. The Charter was confirmed by the Act 9 Geo. IV. c. 83, though the Act of 4 Geo. IV. was repealed. Article XIV. ordains that the

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

Barton J.

Supreme Court shall be a Court of Ecclesiastical Jurisdiction, with full power to grant probates of the wills and to commit letters of administration of the effects of persons who die and leave personal effects in New South Wales, "and to demand, require, take, hear, examine and allow, and, if occasion require, to disallow and reject the accounts of them in such manner and form as is now used or may be used in the said Diocese of London," &c. Articles XV., XVI. and XVII. have already been quoted. Article XVI. fully bears out the remarks of *Faucett* J. in *Attorney-General* v. *Reddy* (1), cited at the beginning of this opinion. As Article XIV. prescribes in terms for the Court's adoption, when it exercises its ecclesiastical jurisdiction, the procedure and practice of the Diocese of London, with especial reference to the accounts of executors and administrators, and Article XV. immediately follows, prescribing the conditions of the administrator's bond, one cannot but think that the fourth of the prescribed conditions, in its reference to the administration accounts, means the same accounts, *quoad* administration, as are under Article XIV. to be dealt with, according to the practice of the Diocese of London in the exercise of the ecclesiastical jurisdiction; and that the examination and allowance of accounts required, and the order for payment and disposal, mean in the bond further exercises of the same jurisdiction, and not exercises of the equitable jurisdiction over trusts. To say that the Supreme Court is all one Court proves nothing of itself. Of course the Court meant by the Charter, and therefore by the parties to the bond, is the Supreme Court, but the question is not to what Court, but to what functions of a Court, the instrument refers. *Williams on Executors*, 5th ed., published in 1856, before the *Probate Act* of England, states at p. 884 that: "The Spiritual Court can only require that all the deceased died possessed of should be included in the inventory: It cannot call for an account of the subsequent profits of his business" (*Pitt* v. *Woodham* (2)), nor on the same principle could it order an account of gains not made by the administrator, but which by better management he might have acquired for the estate. As that was the law when the Charter of Justice was granted, I think the bond must be construed with reference to it. Equity, on the other hand,

(1) 2 S.C.R. (N.S.W.) N.S., 87.

(2) 1 Hagg. Ecc., 250.

has wider powers, grounded on its control of the personal representative as a trustee. The decree offered in evidence was an exercise of those powers, and I do not think the bond contemplates that the question of the fulfilment of the conditions should depend on the result of the exercise of that jurisdiction. I cannot come to the conclusion that a decree in an equity suit for administration of an estate, in respect of which the grant of administration and the bond had both preceded the *Probate Act* of 1890 in this State, would be a direction of the Court within the fourth condition; but if it were so, it could only have that effect as to the only assets with which the Ecclesiastical Court could be concerned, namely, those of which the intestate died possessed, and not, for instance, as to any assets which can only be reached and made liable with the help of a Court of Equity. How then could a decree of that Court in an administration suit, when tendered in evidence, be *presumed* to deal only with matters over which the Ecclesiastical Court had control? And without such a presumption it cannot be said that the decree shows what are the assets which were of the deceased and have not been administered, since it is equally open to conclude that it is and that it is not confined to such assets.

The sum ordered to be paid into Court in the equity suit includes not only profits earned by the administratrix herself, but a sum charged against her because of her occupation of land belonging to the estate, and these are matters of which (see Article XIV.) the Court of the Diocese of London could not have compelled an administrator to give an account.

It is well to compare the bond entered into under the Charter of Justice with that prescribed in England by the *Statute of Distributions*. The first three conditions are in identical terms, but in the fourth the instrument under the Act of Charles II. deals with the "rest and residue . . . found remaining," while the New South Wales bond refers to the "rest and residue . . . found *from time to time*" remaining. Then in the final passage of the condition, which in the form of bond in this case, runs thus:—"shall and do pay *in due course of administration* or in such manner as the said Court by its decree or order shall direct or appoint," the words of the bond under the Statute

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

O'Connor J.

relator as one of the next of kin against the administratrix and others of the next of kin. In the first instance there was no appearance for the administratrix or other respondents, and in default of appearance a decree was made for the taking of accounts. On taking of accounts before the Master the administratrix was represented. The defendant in the present suit was served with notice of those proceedings. His solicitor attended merely for the purpose of repudiating liability and then withdrew. The accounts taken by the Master related not only to property and dealings in respect of which the administratrix would have been liable in the ecclesiastical jurisdiction of the Court, but also to the management of the intestate's business by the administratrix for many years after his death, and to other dealings as to which her liability to account was not that of an administratrix, but of a trustee. The Master, having taken all these matters into consideration, certified that £2,773 6s. 4d. was due by the administratrix to the estate. *Cohen* J. thereupon decreed that the administratrix should pay the amount into Court. Both these decrees were after objection admitted in evidence, together with the Master's certificate and other documents necessarily connected with them. They furnished the only evidence of damage, and the jury having taken them into consideration arrived at the findings which the appellant now seeks to set aside. The first question for determination is, was the evidence rightly admitted ?

A person who by leave of the Court is putting an administration bond in suit against the surety in the name of the Attorney-General must, if he wishes to obtain fruit from his judgment, establish to the satisfaction of the tribunal hearing the action, not only that the administrator has committed breaches, but that from them damages have accrued. Whether it is necessary to prove the amount to which the relator has been damaged is a question which need not be determined on this appeal, and I express no opinion about it. But the plaintiff must at all events prove the amount of damage which the estate has sustained, and both breach and damage must be established by evidence legally admissible against the surety. The sole question for our consideration on this part of the case is whether the decrees and

accompanying proceedings were legally admitted against the surety.

Taking the issues in their order, the first may be conveniently summarized in the form—did the administratrix well and truly administer? It was of course admitted that, generally speaking, a judgment against the principal to which the surety was not a party is not admissible in a subsequent action against the surety. But it was contended that the special nature of the facts constituting breaches of an administration bond made such a departure from the ordinary principles of evidence essential to proof of the issue. It was argued that it was only in a suit for administration that the issue arising out of a breach of the bond can be tried, and that a common law Court, which has no power of taking accounts, would be unable to carry out the necessary investigation. The bond must therefore be read, it is contended, as an undertaking that the administratrix shall well and truly administer to the satisfaction of the tribunal which alone has adequate means of determining whether she has well and truly administered, and that the satisfaction of that tribunal can be established only by production of a decree duly made in an administration suit. No authority was produced in support of the contention from any Court administering British law, and I venture to say that no such authority can be found. The American cases cited by Mr. *Knox* do not put the binding effect of the judgment in the administration on the surety as being an exception to the general principles of the law of evidence, but apparently as following from the wording of the bond. It cannot be doubted that a bond may be drawn in such a way as to bind the surety by a judgment of breaches against the administrator, whether the surety was a party to the judgment or not. The English cases, however, would seem to be entirely against the contention. If it were the case that the issue in question could be determined only in an administration suit, then no action could be brought against the surety until a decree in an administration suit had first determined that the administrator had not well and truly administered. But it has been decided that that is not the law. The case of *Archbishop of Canterbury* v. *Robertson* (1) was

(1) 1 C. & M., 690.

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

O'Connor J.

an action on an administration bond conditioned in substantially the same terms as that now before us. There had been no decree of the Ecclesiastical Court, the plaintiff relying simply on evidence of the fact that the administrator had converted to his own use a large sum of the intestate's moneys, which had come to his hands. Lord *Lyndhurst*, who delivered the judgment of the Court, held that the evidence was sufficient to establish the breaches, including the breach that the administrator did not well and truly administer. The case of *Archbishop of Canterbury* v. *Tappen* (1), determining that the administrator in that case was not bound to distribute before a decree of the Ecclesiastical Court directing him so to do had been made, he distinguished on the ground that the decision was founded on the language of the condition. There is in my opinion, therefore, nothing to prevent in this case the application of the general principle of the law of evidence that a person cannot be bound by the judgment in a suit to which he was not a party. For these reasons I am of opinion that the decrees were not admissible in evidence on the first breach.

In dealing with the third breach it becomes necessary to consider the language of the condition under which it arises more in detail. It is in these words:—"And all the rest and residue of the said goods chattels credits and effects which shall be found from time to time remaining upon the said administration account (the same being first examined and allowed by the said Court) shall and do pay and dispose of in due course of administration or in such manner as the said Court by its decree or order shall direct or appoint."

In the course of the argument several interesting questions were discussed as to the meaning and operation of this condition. But, as in the view that I take of the case a new trial must be ordered, I do not think it desirable to express my opinion upon any question which is not necessary for the determination of this appeal. The only question submitted for our decision on this part of the case is whether the decree was properly admitted in evidence in proof of the third breach and the damages assessed thereunder. The condition obviously contemplates that the Supreme Court shall have investigated the accounts of the

(1) 8 B. & C., 151.

administration and have come to a determination with reference to them before any duty of distributing or paying out the rest and residue can arise. I shall assume that, if the accounts of the administratrix had been allowed and the decree or order contemplated by the condition had been made, it would be the duty of the administratrix to obey, that failure to obey would constitute a breach, and that the damage to the estate flowing from the breach would be measured conclusively by the amount which the decree or order had directed the administratrix to pay. What this Court has to determine is whether the examination of accounts, the allowance of them by the Master, and the decrees following thereon tendered in evidence were an allowance, decree or order such as is contemplated by the condition.

I am clearly of opinion that they are not. The sense in which these expressions, all of them having a legal meaning, were used in the bond must be examined in the light of the jurisdiction conferred on the Supreme Court by the Charter of Justice. The giving of the bond is made necessary by a section of the Charter which prescribes the conditions *verbatim*. The Charter, which is dated 13th October 1823, was issued under 4 Geo. IV. c. 96, and provides for the system under which the ecclesiastical jurisdiction of the Supreme Court of New South Wales is to be exercised. It is not a new system; it is the system then existing in England modified to suit the conditions of a judicial establishment suitable for the requirements of a newly-founded British community. The general intent of the Charter in that respect is apparent from Article XIV., which empowers the Court "to demand, require, take, hear, examine or allow" the accounts, etc., in such a manner and form as "is now used or may be used in the said Diocese of London." It is plain on the face of these provisions that the administration accounts, the examination and allowances of them, and the decree or order directing how the balance found is to be disposed of, referred to in the condition we are now dealing with, were the subjects of account of which the English Ecclesiastical Courts then took cognizance, and the allowance, decrees and orders were those which would be allowed or made in the case of similar accounts under the procedure then in force in the Ecclesiastical Court in the Diocese of London. Under that

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

O'Connor J.

system the Ecclesiastical Court could make the administrator responsible only in respect of what were deemed in that Court to be assets in the administrator's hands. My learned brother the Chief Justice has gone fully into that question, and as I entirely agree with his observations I shall not refer to the system in detail. Speaking broadly, it may be said that under the system the assets in the administrator's hands over which the Ecclesiastical Court exercised control included only the property as it came to his hands at the time of the death. It did not include profits earned from the use of assets, nor could it include such an item as the charge against the administratrix of rent for her occupation of the lands of the estate. The right to have such items brought into the account arises from the control of the Court in its equitable jurisdiction over the administratrix as trustee, not from its control over her as executrix. In other words, the accounts, the certificate and the decree tendered in evidence could not have been taken or made in the jurisdiction which the conditions of the bond have in contemplation.

It follows that, in my opinion, those documents were not accounts, certificate, decrees or orders within the meaning of the condition, and were therefore no more admissible under the third condition than under the first.

It remains to deal with the question whether the learned Judge at the trial erred in refusing to admit the evidence tendered to cut down damages. In my opinion he did. In assessing the damage to the estate flowing from the breaches in question the jury had to direct their attention to the real, not to the formal or nominal, damages which the estate had suffered. If the administratrix had become by purchase owner of every interest in the estate except that of the relator, it is obvious that the actual damage arising to the estate from her neglect to distribute the assets or pay them into Court would have to be measured by the relator's share in the assets. The failure to distribute or pay into Court her own share could not be productive of any real damage to the estate or to the relator.

For these reasons the evidence tendered ought, in my opinion, to have been admitted. On the whole case, therefore, I have come to the conclusion that, the finding of the jury having been

arrived at on evidence wrongly admitted, and in the absence of evidence which ought to have been before them, the judgment entered for the Attorney-General as to the first and third breaches cannot stand.

I therefore agree that the judgment entered by the Supreme Court as to those breaches must be set aside and a new trial granted, and that the award of judgment now in existence should be suspended.

ISAACS J. The first question is whether the order of 12th February 1907, whereby the administratrix was ordered to pay into Court to the credit of the administration suit the sum of £2,773 6s. 4d., was—the order being disobeyed—conclusive evidence in this action against the appellant, the surety, as to the amount of damages for which a verdict should be entered—subject of course to the limit fixed by the bond.

In my opinion it was neither conclusive nor even evidence of that fact.

The bond was framed in 1823. Its conditions may be briefly stated thus:—1. Inventory; 2. Well and truly administer according to law; 3. Just and true account at a time to be specified and then from time to time as required; 4. Pay and dispose of rest and residue after allowance of accounts, and either (*a*) in a due course of administration or (*b*) as the Court directs.

There are therefore three portions of the conditions which have to be separately considered in relation to this question, viz.: the second condition, the first alternative of the fourth condition, and the second alternative of the fourth condition.

As to the second condition and the first alternative of the fourth, there is admittedly no express undertaking to be bound by the order, and therefore as to these its effect as contended for by the respondent must arise, if at all, on general principles.

Mr *Knox* called in aid of the argument several American cases relating to administration bonds, in which the surety was held bound by a judgment against the administrator. The weight of opinion in America, as I read the decisions, must, I think, be conceded to be in favour of his view, including the great authority of

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

Isaacs J.

the Supreme Court of the United States. *Stovall* v. *Banks* (1) decided that whatever concludes the principal concludes the surety. The judgment appears to be founded on principles which, if accurate, apply to every case of principal and surety. And that appears to be the settled view of the United States Supreme Court. In *Drummond* v. *Prestman* (2), an ordinary case of guarantee, the chain of reasoning is that the liability of the guarantor is dependent on that of the principal, and as the principal's liability might be proved by his confession, much more may it be proved by a judgment. The Court there dissented from the English case of *Evans* v. *Beattie* (3). But though *Drummond* v. *Prestman* (4) and *Stovall* v. *Banks* (1) have been quoted with approval and in conjunction as late as 1887 in *Washington Ice Co.* v. *Webster* (5), they are directly opposed to the reasoning and decisions of English cases such as *King* v. *Norman* (6); *Parker* v. *Lewis* (7); and *Ex parte Young*; *In re Kitchin* (8), and cannot be taken as representing English law. The principal's confession is no doubt evidence of his liability, but only as against himself, and where the American cases part company with the established English rules of law on this subject is in assuming for this purpose such identity of interest between the principal and the surety as to make the admissions of the former proof, and judgments against him conclusive proof against the latter. (See *Taylor on Evidence*, 10th ed., par 786).

It follows from what I have said, that, as to the two portions of the bond referred to, the judgment is not even evidence against the surety.

Then as to the third part, which expressly refers to the Court's direction. A very serious and difficult problem might present itself, how far an order such as is contemplated by that part of the condition would be binding or evidentiary as against the surety except on the question of fact that such an order was made. (See *Taylor on Evidence*, 10th ed., par. 1667). But it does not arise here, because the order of 12th February 1907 was not a direction answering the necessary description. It is not a

(1) 10 Wall., 583.
(2) 12 Wheat., 515, at pp. 519, 521.
(3) 5 Esp., 26.
(4) 12 Wheat., 515, at p. 519.
(5) 125 U.S., 426, at p. 446.
(6) 4 C.B., 884.
(7) L.R. 8 Ch., 1035.
(8) 17 Ch. D., 668.

direction to pay and dispose of the "rest and residue"—whatever that may mean—found remaining on the administration accounts after examination and allowance by the Court; the accounts referred to being accounts which the administratrix as such was lawfully required to make, and did accordingly make, within the meaning of the bond.

The conclusions which I have stated render it unnecessary to say anything as to what assets are the subject of such a direction or as to the persons whose interests may be taken into account in arriving at the *primâ facie* amount which represents the loss occasioned by any breach on the part of the administratrix. But I am by no means satisfied that any of the persons at whose instance the suit is brought ought to be regarded as relators or parties to the action, or that the Attorney-General is not to be taken to be the sole plaintiff for the benefit of the estate generally, and the sole person entitled to execution. This I reserve till it becomes necessary. But however that sum is arrived at in the first instance, it is clear that one of the essential factors in arriving at that loss is the extent of the breach with respect to the persons, whoever they may be, whose interests are the proper subject of consideration, and no administrator can be charged with wasting the estate in respect of assets which he was entitled to retain for himself. If all the next of kin have assigned their interests to him he cannot be charged with mal-administration merely because he does not distribute to them what they have so assigned. Consequently, assuming no other fault than that can be found with his administration, I am of opinion he may—and if he may so also may his surety—always deduct the shares so assigned in computing the ultimate amount of liability.

To make the administrator, and through him the surety, responsible to pay the total amount, including the assigned shares, into the estate, if that be the proper course as contended for by the respondent, would involve a circuitous proceeding of first compelling the surety to pay in the damages, then permitting the administrator to receive the shares as assignee, and then ordering him to pay it over to the surety as indemnity for the corresponding sum paid in by the latter under the judgment.

I say nothing about the meaning of the words "rest and

H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

Isaacs J.

residue" in the fourth condition of the bond. In view of the difference between the language of the Charter and that of the bond under the *Statute of Distributions*, I am not prepared to say these words may not include whatever appears to be unadministered upon any of the administrator's accounts whether debts are then paid or not, and not merely the balance for distribution among beneficiaries. I leave this question open. This appeal should for these reasons be allowed.

Appeal allowed.

Foll *Australian Broadcasting Corp* v *Comalco Ltd* 68 ALR 259

Appl *ALH&MWU (WA Branch)* v *Mulligan* (1996) 15 WAR 385

Cons *Heytesbury Holdings* v *City of Subiaco* (1998) 100 LGERA 223

Refd to *Kay* v *Chesser* [1999] 3 VR 55

Refd to *Feo* v *Pioneer Concrete (Vic) Pty Ltd* [1999] 3 VR 417

Solicitors, for appellant, *Russell & Russell.*
Solicitor, for respondent, *C. A. Coghlan.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

BARNES & CO. LIMITED AND OTHERS . APPELLANTS; PLAINTIFFS,

AND

SHARPE AND OTHERS . . . . RESPONDENTS. DEFENDANTS,

H. C. OF A. 1910.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

BRISBANE, *April* 26, 27.

MELBOURNE, *June* 6.

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

Defamation—Corporations—Representative action—Practice — Misjoinder — Non-joinder — New trial — Nonsuit — Evidence — Misdirection — Non-direction— Damages — Innuendo of conspiracy by corporations — Queensland Criminal Code of 1899, *sec.* 543*—Queensland Rules of the Supreme Court, Order III., rr.* 1, 4, 5, 6, 10 *and* 11; *Order IV., r.* 7; *Order XV., r.* 7; *Order XXXI., r.* 5; *Order LIV., r.* 1.

The appellants, who were seven limited companies, suing in their corporate names respectively, nine co-partnership firms, suing in their firms' names respectively, and two individuals, brought an action against the respondents for defamation, describing themselves as bringing the action on behalf of themselves and all other members of the Queensland Farm and Dairy Produce Merchants and Agents Association—an unincorporated trade association constituted by the plaintiffs and one other firm, which was not otherwise made a party to the action. The defendants were the Farmers Co-operative Distributing Company of Queensland Limited, Sharpe, the manager, and Nielsen, a director of the company. Damages were claimed in respect of two separate defamatory publications. One of these was contained in a circular issued by the respondent Sharpe to customers of the plaintiffs and published in several newspapers, accusing the plaintiffs of having entered into a conspiracy to prevent farmers from obtaining a fair price for their produce. The other was contained in a letter written by the respondent Nielsen to the same effect and published in other newspapers. The defendants joined in their defence and appeared by the same counsel and solicitors. At the trial it was proved that both of the publications were made with the company's authority and by or at the instigation of Sharpe. It was also proved that Nielsen had published the letter, but it was not proved that he had authorized the publication of the circular. The jury found in favour of the plaintiffs with £1,000 damages. The Supreme Court of Queensland on appeal directed judgment of nonsuit to be entered.

Held, that the imputation of conspiracy was defamatory and actionable in accordance with the rule laid down in *South Hetton Coal Co. Limited* v. *North Eastern News Association Limited*, (1894) 1 Q.B., 133 ; and that the fact that a corporation cannot be prosecuted in a Criminal Court for conspiracy does not prevent it from maintaining or joining in an action for defamation imputing that offence.

Quaere, whether a representative action such as this can be taken under Order III., r. 10 ; but *held* that under Order III., r. 1, the plaintiffs were not wrongly joined for want of common interest.

Held, also, that objections for misjoinder and non-joinder cannot be successfully taken after judgment when the point is one of form and not of substance, and no substantial injustice has been occasioned by it.

Held, further, that damages should have been assessed against Nielsen separately from those against the other defendants ; but that, that course not having been pursued, the Court had power under Order III., r. 5, and Order IV., r. 7, to order the judgment against Nielsen to be set aside and a re-assessment of damages ordered as against him, leaving the judgment against the other defendants undisturbed—the plaintiffs being restricted in the final result from recovering more than the original amount of the verdict from all the defendants.

Evidence, which might have been given in chief and was not in contradiction of the defendants' evidence, was given in reply :

H. C. OF A. 1910.

BARNES & CO. LTD. v. SHARPE.

Held, that this was a matter in the discretion of the Judge, and was not a ground for a new trial.

A witness Brown gave evidence of a conversation with one Clarke—neither of them being parties to the action—tending to prove the date of another conversation between Clarke and the defendant Sharpe.

Held, that when the existence of a fact, otherwise irrelevant, tends to prove the existence of another fact relevant to the case, the existence of the first fact is also relevant; and evidence of what would otherwise be only *res inter alios acta* may be admissible to prove it.

Decision of the Full Court of Queensland: *Barnes & Co. Ltd.* v. *Sharpe*, 1910 St. R. Qd., 38, reversed.

APPEAL from a judgment of the Full Court of Queensland setting aside the verdict of a jury given to the plaintiffs for £1,000 and entering judgment of nonsuit. The facts are fully stated in the judgment of *Griffith* C.J.

Macgregor, *Stumm* and *Fowles*, for the appellants. Order III., r. 10 of the Queensland Rules of the Supreme Court provides for a representative action, and the absence of a common pecuniary interest does not prevent plaintiffs being joined: Order III., r. 1, and *Booth* v. *Briscoe* (1). All of the defendants were represented by the same solicitor and counsel. The Supreme Court Rules provide for amendment of pleadings at any stage of the proceedings upon such terms as may be just, and a defendant cannot successfully object to a misjoinder or non-joinder after the case is over unless there has been some miscarriage of justice caused thereby.

A corporation is entitled to bring a suit for a defamation which is calculated to injure its reputation in the way of its business without proof of special damage: *South Hetton Coal Co. Ltd.* v. *North Eastern News Association Ltd.* (2). Although it was not proved that Neilsen had anything directly to do with the publication of the circular, he was still liable, because as a director he was responsible in law, and he ratified the act; but even if he were not responsible for the circular, damages could have been assessed separately against him. Damages were not increased by Nielsen being joined as a defendant. At most a new trial for

(1) 2 Q.B.D., 496. (2) (1894) 1 Q.B., 133.