[HIGH COURT OF AUSTRALIA.]

PILLAR . . . . . APPELLANT;

AND

ARTHUR . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1912.

SYDNEY, *July* 30, 31; *Aug.* 12.

Griffith C.J., Barton and Isaacs JJ.

Practice—Costs—District Court of New South Wales—Costs where sum sued for exceeds £10 *but sum recovered does not exceed* £10—*District Courts Act* 1901 (*No.* 4) (*N.S.W.*), *secs.* 32, 105, 106—*District Court Rules* 1899 (*N.S.W.*), *rr.* 365, 366.

Sec. 32 of the *District Courts Act* 1901 (a Consolidating Act) provides that:—"The fees to be allowed to barristers and attorneys practising in any District Court for appearing or acting on behalf of any person in any actions in such Court, and the expenses to be paid to witnesses, shall be fixed by scale in the rules of Court:

"Provided that no such fees to barristers or attorneys shall be allowed in any case where the sum sued for does not exceed £10."

Sec. 105 provides that:—"All the costs of any action not herein or otherwise provided for shall be paid by or apportioned between the parties in such manner as the Judge thinks fit, and in default of any special direction shall abide the event of the action or result of the decision, and such costs may be recovered in like manner as any debt adjudged to be paid can be recovered."

Held, that the proviso to sec. 32 only applies to a case where the amount sued for does not exceed £10, and not to a case where the amount sued for exceeds £10, but the amount recovered does not exceed £10.

Ex parte Goebel, 2 S.C.R. (N.S.W.), 82, approved.

Emery v. *Binns*, 7 Moo. P.C.C., 195, distinguished.

Rule 365 of the *District Court Rules* 1899 provides that:—"Where the demand is unliquidated, and the plaintiff recovers less than the amount claimed, the Judge may order that his costs be taxed on the scale applicable to the amount claimed, or any intermediate scale."

Held, that the rule is not *ultra vires*.

Three scales of costs were fixed by the Rules, the lowest applying where the "subject matter or the sum recovered" exceeded £10 and did not exceed £30, the next applying where such subject matter or sum exceeded £30 and did not exceed £75, and the highest applying where such subject matter or sum exceeded £75.

Held, that in a case where the amount sued for was over £10 and the amount recovered was under £10 the District Court might, under Rule 365 and sec. 105 of the Act, award costs on the lowest of such scales.

Decision of the Supreme Court of New South Wales: *Ex parte Pillar*, 11 S.R. (N.S.W.), 559, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the District Court at Tenterfield in New South Wales by John Arthur against John Pillar claiming £30 for trespass to land, in which a verdict was given for £2 with "costs on the lower scale." An objection was taken that the District Court Judge had no power to grant costs. An order *nisi* for a writ of prohibition was obtained by the defendant on the ground that the District Court Judge had no jurisdiction to make an order granting the costs of the action on the lower scale inasmuch as the sum recovered in the action was less than £10. The order *nisi* was discharged by the Full Court: *Ex parte Pillar* (1).

From this decision the defendant now by special leave appealed to the High Court.

Loxton K.C. (with him *Alroy Cohen*), for the appellant. The decision of the Supreme Court in *Ex parte Goebel* (2) was wrong. *Emery* v. *Binns* (3) was not cited in that case, and is directly contrary to it. The words "sued for" in the proviso to sec. 32 of the *District Courts Act* 1901 means "recovered," as was held in *Emery* v. *Binns* (3) in relation to a similar provision. See also *Woodhams* v. *Newman* (4). The intention of the Act is that where the amount received is less than £10 no professional costs are to be allowed. The case of *Ex parte Goebel* (2) is not applicable now because the *District Court Rules* 1899 are quite different from the rules then in force.

(1) 11 S.R. (N.S.W.), 559.
(2) 2 S.C.R. (N.S.W.), 82.
(3) 7 Moo. P.C.C., 195.
(4) 7 C.B., 654, at p. 665.

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There is no scale of costs which is applicable to a case where the sum recovered is less than £10. Rule 365 is *ultra vires*, for it is a delegation to one Judge of the power to make rules. Even if it were not *ultra vires*, none of the scales can under it be applied to a case where the sum recovered is under £10.

[He also referred to *Cross* v. *Collins* (1); *Shaddick* v. *Bennett* (2); *The Young James* (3); *Clune* v. *Smyth* (4); *Peschla* v. *Dodd* (5); *Keogh* v. *Blake* (6); *Foster & Bonthorne's District Court Practice*, p. 173.]

Lamb K.C. (with him *Mocatta*), for the respondent. It has always been the practice of the District Court to make an order with reference to professional costs where the amount recovered is under £10. *Ex parte Goebel* (7) was rightly decided. There is no reason for departing from the plain meaning of the words of the proviso to sec. 32. The Judge has power under sec. 105 to order how the costs shall be apportioned and under rule 365 he may when the sum recovered is less than £10 order them to be taxed on the lowest of the three scales. The Judge having had general power to make an order, if he made an erroneous order prohibition will not lie: *Farrow* v. *Hague* (8); *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (9).

Loxton K.C. in reply referred to *Palmer* v. *Whitfield* (10).

Cur. adv. vult.

The following judgments were read:—

August 12. GRIFFITH C.J. The respondent in this case brought an action against the appellant in a District Court, claiming £30 damages for trespass. The learned District Court Judge gave a verdict for £2, with costs on the lower scale. It is common ground that this means such professional costs and witnesses' expenses as are prescribed by a scale applicable when "the subject matter or the sum recovered" exceeds £10 and does not exceed £30.

(1) 5 Bing. N.C., 194.
(2) 4 B. & C., 769.
(3) L.R. 3 A. & E., 1.
(4) 15 W.N. (N.S.W.), 229.
(5) 18 W.N. (N.S.W.), 53.
(6) 6 Qd. L J., 213.
(7) 2 S.C.R. (N.S.W.), 82.
(8) 3 H. & C., 101.
(9) 6 Ry. & Can. Traff. Cas., 133.
(10) 7 S.C.R. (N.S.W.), 21.

Sec. 32 of the Act now in force (No. 4 of 1901) is as follows:—

"The fees to be allowed to barristers and attorneys practising in any District Court for appearing or acting on behalf of any person in any action in such Court, and the expenses to be paid to witnesses, shall be fixed by scale in the rules of Court:

"Provided that no such fees to barristers or attorneys shall be allowed in any case where the sum sued for does not exceed ten pounds."

Sec. 105 is as follows:—

"All the costs of any action not herein or otherwise provided for shall be paid by or apportioned between the parties in such manner as the Judge thinks fit, and in default of any special direction shall abide the event of the action or result of the decision, and such costs may be recovered in like manner as any debt adjudged to be paid can be recovered."

These sections are transcripts of secs. 74 and 73 of the original *District Courts Act* 1858 (22 Vict. No. 18).

The appellant contends that the proviso to sec. 32 prohibits the recovery of any costs by a plaintiff who recovers a sum not exceeding £10.

In 1863 the Supreme Court of New South Wales (then constituted by *Stephen* C.J. and *Milford* and *Wise* JJ.) held that a plaintiff who sued for a sum exceeding £10 in an action for a tort and recovered less than that amount was entitled to costs according to the lower scale then in force, which was primarily applicable in actions where the sum recovered exceeded £10 but did not exceed £30.

They thought that the proviso should be read literally, and that it only applied when the sum "sued for" did not exceed £10, in which case professional costs were not recoverable by either party, and that there its application ended. When the sum sued for exceeded, but the sum recovered did not exceed, £10, they thought that the case was governed by the first clause of the section. And, as a matter of construction of the Rules prescribing the Scales then in force, they held that the lower scale was applicable to such a case. They apparently thought that under sec. 73 of the Act 22 Vict. No. 18 (now sec. 32) costs followed the event unless otherwise prescribed by law or directed

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by the Court, provided that there was a scale applicable to the case: *Ex parte Goebel* (1).

The appellant contends that this case was wrongly decided, and is inconsistent with the decision of the Judicial Committee in *Emery* v. *Binns* (2), which was not cited to the Court, and in which it was held, on the construction of a local Statute of Jamaica, which provided that a plaintiff suing in the Supreme Court in an action within the jurisdiction of the local Court of Common Pleas could not recover greater costs than if the action had been brought in that Court, that a plaintiff who had in fact claimed £3,000, an amount beyond the jurisdiction of the Court of Common Pleas, and had only recovered 40s., was not entitled to greater costs than if he had sued in that Court. The Board thought that the Act should be construed as applying to a case where it appeared by the verdict that the Court of Common Pleas had jurisdiction over the plaintiff's real claim as finally established. Other cases were also referred to, depending upon particular enactments. In my opinion these cases do not govern the present. In *Emery* v *Binns* (2) it was pointed out that any other construction would have had the result that a plaintiff's right to costs would depend upon his formal claim and not upon his real rights against the defendant, which would or might lead to manifest injustice. Apart from these reasons I should hesitate to overrule the decision in *Ex parte Goebel* (1), which was pronounced by a very competent Court, and has stood so long unimpeached, especially as the legislature had after an interval of nearly 40 years re-enacted that section in identical language.

In my opinion, therefore, the proviso to sec. 32 has no application to the present case, which must depend upon the construction of sec. 105. We are not asked to express any opinion upon the question whether the omission to prescribe a scale for costs applicable to such a case is necessarily a bar under all circumstances to an award of costs, whether by a way of a lump sum named or by way of a sum to be calculated by reference to a scale primarily applicable to different circumstances. The question to be determined in the present case is whether, under the Rules of Court now in force prescribing scales of costs, any scale

(1) 2 S.C.R. (N.S.W.), 82. (2) 7 Moo. P.C.C., 195.

is prescribed applicable to the circumstances. Those Rules (of 1899) prescribe three different scales, respectively headed as follows:—"Where the subject matter or the sum recovered exceeds £10 and does not exceed £30, A;" "Where the subject matter or the sum recovered exceeds £30 but does not exceed £75, B;" and "Where the subject matter or the sum recovered exceeds £75, C." Rule 366 provides that when the costs of a defendant are being taxed the word "recovered" whenever it occurs in the Scale shall be deemed to be "claimed." Rule 365 provides that where the demand is unliquidated and the plaintiff recovers less than the sum claimed the Judge may order that his costs be taxed on the scale applicable to the amount claimed or on any intermediate scale. This Rule, obviously, operates as a qualification, by way of expansion, of the heading of the Scale which enumerates the cases to which it is to be applicable. All the Rules must be read together. It is, however, contended for the appellant that this is not the true construction of Rule 365, which, it is said, should be read as applying only to a case where there is a scale, A or B, already applicable, that is, in effect, that "any intermediate scale" should be read "the intermediate scale," since Scale B would in that view be the only possible "intermediate scale." But I cannot see any reason for refusing to give full effect to the plain words "the amount claimed." The succeeding words are, indeed, necessary to provide for the case where the amount claimed exceeds £75 and the sum recovered does not exceed £30, and to confer a further discretion upon the Judge in that case.

It is further contended that, so construed, Rule 365 is *ultra vires*. I do not think so. The Act does not prescribe a pecuniary basis as the only basis for discrimination. We all know that in many instances in British Courts, both in the United Kingdom and Australia, where two or more scales of costs have been prescribed, the differentiation is often made to depend, in whole or in part, on quite different lines. It is, indeed, manifest that strict adherence to a mere pecuniary basis might work injustice. The real foundation for this argument is an unintentional reliance upon the proviso to sec. 32, which, as I have already said, is irrelevant.

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In my opinion, therefore, Rule 365 is not *ultra vires*, and, properly construed, applies to the present case.

The appeal should therefore be dismissed with the usual consequences.

Barton J.

BARTON J. The respondents sued the appellants in the District Court, claiming £30 damages for trespass; and recovered £2. The learned Judge ordered the appellant to pay the respondent his costs, to be taxed "on the lower scale." The question is whether the Judge had jurisdiction to make this order, so far as it relates to professional fees.

The *District Courts Act* 1901 consolidates the previous Statutes as to District Courts. Secs. 32, 105 and 106 are secs. 74, 73 and 75 respectively of the Act of 1858.

The appellant contends on the authority of *Emery* v. *Binns* (1), and other cases, that the words "the sum sued for" in the proviso to sec. 32 must be read as "the sum properly sued for" as shown by the result of the action: that is to say that they mean the sum recovered. To the cases cited for the appellant may be added *Fairbrass* v. *Pettitt* (2), per *Parke* B. The authorities referred to were all actions for liquidated sums.

So far back as in 1863 this contention as to the effect of the proviso was unsuccessfully raised in the Supreme Court of this State in *Ex parte Goebel* (3), in which the sections mentioned were discussed, and in which cases decided in England were cited in support of the contention, not however including the decision of the Judicial Committee in *Emery* v. *Binns* (1). In delivering the judgment of the Supreme Court *Wise* J. said (4): —"In some of the Acts relating to Courts of Requests and other inferior Courts there is no doubt that the sum 'sued for' or 'claimed' has for the purpose of determining the right to costs been held to be the sum ultimately recovered. But on looking at the various sections of the *District Courts Act*, we think that there is no reason for departing from the natural and ordinary meaning of the words of sec. 74."

In the present case *Pring* J., in the Supreme Court, *Gordon* J.

(1) 7 Moo. P.C.C., 195.
(2) 12 M. & W., 453.
(3) 2 S.C.R. (N.S.W.), 82.
(4) 2 S.C.R. (N.S.W.), 82, at p. 86.

and *Ferguson* A.J. concurring, pointed out that *Ex parte Goebel* (1) has been followed from the time of its decision up to the present, and apparently has not been questioned until now. It had stood for 38 years when the consolidating Statute, in which it and the other material sections were re-enacted *verbatim*, became law. It is difficult to suppose that when the re-enactment took place the legislature were not aware of a judicial interpretation of such long standing and acceptance. If the question were free from these considerations it would be difficult to distinguish the English decisions. But in the circumstances which exist I think the legislature has re-enacted the proviso in the sense given to it so many years ago in the Supreme Court. I am of opinion therefore that the proviso did not of itself prohibit the learned District Court Judge from allowing professional fees in the present case, since the sum sued for exceeds £10.

In *Ex parte Goebel* (1) the Judge had ordered the expenses of witnesses, but had made no order as to costs. The Registrar had declined to tax the plaintiff's costs, and the Supreme Court ordered him to tax, on the ground that, in view of sec. 73 (now 105) the costs must abide the event. The case here is different in this respect, that the learned District Court Judge has granted the plaintiff costs "on the lower scale." On this difference the appellant raises another point. Seeing that professional fees as well as witnesses' expenses are to be "fixed by scale in the Rules of Court" (sec. 32), and that "no costs or charges shall be allowed which are not sanctioned by the scale then in force" (sec. 106), he points to the scales of costs fixed by the Rules of Court, which provide for the fees to counsel and attorneys under three headings, namely "where the subject matter or the sum recovered exceeds £10 and does not exceed £30," where it exceeds £30 and does not exceed £75, and where it exceeds £75. He says that the "subject matter" means, not the sum sued for, but something different from a sum certain in money in the sense of debt or liquidated damage, for instance, the value of goods of a plaintiff detained by a defendant, or the subject of an interpleader proceeding, which is defined in rule 362. I will assume for the purpose of this appeal, without so deciding, that the appellant is

(1) 2 S.C.R. (N.S.W.), 82.

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right there. Then he says that, the alternative being "the sum recovered," the lowest such sum provided for in the scales is £10, and consequently that there is no scale to meet the present case; that sec. 106 precludes the allowance of any costs here, and the Judge's order in that regard is nugatory. In answer to this the respondent reminds us that by sec. 105 of the Act all the costs of any action "not herein or otherwise provided for" are to be "paid by or apportioned between the parties in such manner as the Judge thinks fit, and in default of any special direction shall abide the event of the action or result of the decision." Next, he says that "otherwise provided for" in this section means otherwise than by the Act itself, and this phrase must include, if, indeed, it means anything more than, provision by the Rules of Court, which the Act directs to be made. There he is clearly right. Then he turns to r. 365, and, whether sec. 105 applies or not, I think the rule does, and, notwithstanding Mr. *Loxton's* objections, it seems obvious that it is valid. Well, in the terms of that rule, this demand is "unliquidated," and the plaintiff has "recovered less than the amount claimed." The rule authorizes the Judge in such a case to order costs "on the scale applicable to the amount claimed, or any intermediate scale." The rule is clumsily drawn, but we must give it some meaning. In strictness no scale "applicable to the amount claimed" has been provided by the authority which made both rule and scales. But it is clear the draftsman did intend to provide a scale to apply to the amount claimed in this and other cases of unliquidated demands. Otherwise the rule is meaningless, and we cannot hold that. So some scale provided was intended to apply, and there are no other scales to apply than these. In my view the meaning of the rule is that where the demand and the result are as stated, the Judge may apply these scales in respect of the amount claimed, notwithstanding their headings. The amount claimed in this case exceeds £10, and does not exceed £30, and the scale applicable is the lowest of the three, which the learned Judge has described in his order as "the lower scale." No doubt His Honor was reminiscent of the time when that which is now the lowest was properly called the lower scale, for under the old rules there were only two.

It is unnecessary to discuss the words "or any intermediate scale," at the end of Rule 365. They do not apply to the position which arises in this case, but they might call for construction if the sum claimed exceeded £75 and a less sum were recovered.

For the reasons given I am of opinion that the learned Judges of the Supreme Court were right in discharging the rule for a prohibition, and that the appeal should be dismissed.

ISAACS J. Sec. 105 of the *District Courts Act* 1901 makes a general enactment as to costs. First, it excludes from its provisions all costs not therein or otherwise provided, an exclusion the meaning and application of which will have to be considered. Then as to all other costs, the Judge may direct them to be paid or apportioned as he thinks fit—a discretion which indicates that the legislature expects the Judge who tries the case shall exercise his mind as to granting or allotting costs with reference to the circumstances. But if he makes no order, then, says the section, the successful party is to get them.

Sec. 105 concerns itself only with the right to get costs, and does not concern itself with their amount. Throughout this case the two questions, the right to costs and the ascertainment of their amount, must be carefully distinguished. Now the excluded costs are costs the *right* to which is separately provided for. Such, for instance, are costs of a judgment creditor in certain cases (sec. 101). The first sub-section of sec. 32 does not purport to deal with the right to costs, nor yet with their amount. In other words it says nothing about costs. It relates to fees and expenses, that is the fees to which barristers and attorneys are to be entitled from the persons employing them and the expenses which are to be paid to witnesses by the party compelling their attendance. Indirectly no doubt this controls the amount which the opposite party may have to recoup, but primarily the enactment does not relate to party and party costs. Such is the effect of sec. 74 as it stood originally, because it refers to "fees" to be allowed "to" barristers and attorneys, and not to "costs" for their attendance; and still more clearly does it appear in the Act of 1901 where sec. 32 was separated from the division as to "costs" and tranferred to follow sec. 31 dealing with the employ-

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ment of professional advisers and forbidding others to receive remuneration for so acting. This is a consolidation Act, but nevertheless must be construed as enacted, as Lord *Macnaghten* for the Privy Council said in a similar case, and cannot be taken to pieces and re-arranged to produce a different effect: *Williams* v. *Permanent Trustee Co. of New South Wales Ltd.* (1). Sec. 32 is under the general sub-heading "Barristers and Attorneys," which, though not co-extensive with the full provisions of the section, because witnesses are also dealt with, is quite distinct from the subdivision "Costs" under which we find secs. 105 and 106. Then in order to understand sec. 32 we have to look at other legislation *in pari materia*. The *Small Debts Recovery Act* 1846 limited the jurisdiction of Courts of Petty Sessions with respect to debts, demands, and damage, whether liquidated or unliquidated, to £10, unless by consent, in which case it could go to £30.

By sec 44 each of the parties might appear and conduct the case by himself, his clerk or servant; or might employ professional assistance. But, said the section, no attorney should take more by way of *fees* for work done by him than was provided in Schedule C. which set out a scale; and the same section also directed that the *costs* of professional assistance should be paid by the person requiring it; so that fees and costs were quite distinct. The *Small Debts Recovery Act* 1899, which consolidated several Acts, including an extension of jurisdiction in the case of debts to £30, but leaving cases of demand and damage other than debt as before, repeated in sec. 9 the provision of sec. 44 of the earlier Act. The meaning then of sec. 32 of the *District Courts Act* 1901 becomes perfectly plain. It first directs the Judges to fix a scale of fees for professional advisers practising in the Court, as well as for expenses to witnesses, and it means so far that those are the fees which may be taken by such advisers. What the effect would be as between client and attorney in the absence of such scale I do not say. But the Judges' scale is to stand in a similar position, with respect to the District Court, as the legislature's own scale does with regard to the Petty Sessions Court. Then there is a proviso which altogether forbids the Judges

(1) (1906) A.C., 249, at p. 253.

allowing any fees where the amount sued for does not exceed £10. Obviously it applies to both plaintiff and defendant; and, equally so, it applies irrespective of the result of the proceeding. The legislature has taken so much upon itself with regard to the permitted scale, that if the amount sued for is under £10 the scale is not to provide for any payment at all, and everyone can see at once whether the proviso applies to the case. The Petty Sessions Court is supposed to be the normal Court for those actions, and whatever the client may in fact pay voluntarily there is not to be any compulsion so far as the scale is concerned to pay fees in a matter so small as a £10 claim. Reference to the rule-making power fortifies this view. The special powers in the various rule-making sections, viz. sec. 102 of the Act of 1858, sub-sec. 1 (b) of sec. 113 of the Act of 1901, and sub-sec. 1 (b) of sec. 60 of the Act of 1905, all indicate that it is *fees* as such to be regulated. Primarily this applies as between solicitor and client whether costs as between party and party are ultimately involved or not; but where they are, this regulation necessarily controls them to that extent.

The first position advanced by the appellant was that the proviso to sec. 32 enacted that its privative provisions applied where the sum recovered did not exceed £10. It was contended that the words "sum sued for" meant "sum recovered." If as already indicated, it applies primarily to the relation of solicitor and client, it is obvious that the construction given to it by the appellant is an impossible one. The parties and their advisers must know when the professional assistance is undertaken what the remuneration is to be. Apart then from any prior decision this is the conclusion I would draw from the words of the Act as applied to the subject matter. But there is also previous authority supporting it. The case of *Ex parte Goebel* (1) is a decision of long standing and operation, and the legislature has, with that judicial interpretation of its language, repeated the enactment, and so the decision should be upheld both on the ground of its original correctness, and on that of its subsequent legislative recognition. Many cases illustrate this latter position as for instance *Ex parte Campbell*; *In re Cathcart* (2); *Greaves*

(1) 2 S.C.R. (N.S.W.), 82.

(2) L.R. 5 Ch., 703, at p. 706.

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v. *Tofield* (1); *Clark* v. *Wallond* (2); and *North British Railway Co.* v. *Budhill Coal and Sandstone Co.* (3). I shall quote the words of *Loreburn* L.C., in the last mentioned case. His Lordship said (4):—"When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense."

The position so far then is, that sec. 105 provides the general right to these costs but not their amount; that the proviso to sec. 32 does not exclude them directly or indirectly, and so it remains to be seen whether their amount is affirmatively provided for.

Sec. 106 requires all costs to be taxed, and forbids the allowance of any not sanctioned by the scale in force—which means the scale appropriate to the case.

It is said for the appellant no such scale exists, because no scale when looked at applies in terms to a case where a plaintiff recovers less than £10. But the difficulty has been foreseen and provided for by Rule 365, by which in the case of an unliquidated demand, where the plaintiff recovers less than the amount claimed —which happened here—the Judge may "order that his costs be fixed on the scale applicable to the amount claimed, or any intermediate scale." In other words, the Judge, in a case where he thinks justice requires it, may apply the scale applicable to "amount recovered" as if it read "amount claimed"; that is he may by special order do in respect of a plaintiff's costs what Rule 366 itself does for a defendant; or at his discretion he may apply any intermediate scale in the same way. The learned Judge exercised his power by ordering "lower scale," that is the lowest scale.

Lastly Mr. *Loxton* challenged this as *ultra vires*, because it amounted he said to a delegation to one Judge of a power confided by the legislature to four Judges. But the power so confided is a rule-making power, a general legislative power affecting the "practice and procedure" of the Court, and it is a novel notion that Rules of Court required to be made by all or a specified number of the Judges of a Court cannot entrust to the presiding

(1) 14 Ch. D., 563, at p. 571.
(2) 52 L.J. Q.B., 321, at p. 322.
(3) (1910) A.C., 116.
(4) (1910) A.C., 116, at p. 127.

Judge the power—he being the only person capable of exercising it—to adapt the general elastic provisions of the rules to the special requirements of a particular case. While the scales are to be framed for general application, and within themselves to regulate the details of the various classes of cases to which they are to be applied, yet the granting of power to a single Judge of determining whether in a given instance one or the other scale is on the whole to be the best measure of justice is one which is of too constant recognition to be seriously doubted. *Emery* v. *Binns* (1) depended on the particular words of the enactment, and cannot control the Statute now under consideration.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor, for the appellant, *R. Harris.*

Solicitors, for the respondent, *Wilkinson, Osborne & Rundle* for *J. F. Thomas,* Tenterfield.

B. L.

(1) 7 Moo. P.C.C., 195.