[HIGH COURT OF AUSTRALIA.]

DARLING ISLAND STEVEDORING & LIGHTERAGE COMPANY LIMITED } APPELLANT;
RESPONDENT,

AND

JACOBSEN . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 3.

MELBOURNE, *Oct.* 11.

Rich, Starke, Dixon, McTiernan and Williams JJ.

Workers' Compensation—Injury—Journey between place of abode and place of employment—Default or wilful act—Onus of proof—Workers' Compensation Act 1926-1942 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 13 *of* 1942), *s.* 7 (1) (*b*).

Section 7 of the *Workers' Compensation Act* 1926-1942 (N.S.W.), as amended by s. 3 of Act No. 13 of 1942, provides, *inter alia*, that, where a worker has received injury "without his own default or wilful act" on any of the daily or other periodic journeys referred to in the section, the worker or his dependants in case of his death shall receive compensation from the employer.

Held, by *Rich*, *Dixon*, *McTiernan* and *Williams* JJ. (*Starke* J. dissenting), that the onus of proving that a worker received injury by reason of "his own default or wilful act" lies upon the employer: it is not for the worker (or his dependants) to prove that the injury was received without such default or wilful act.

Decision of the Supreme Court of New South Wales (Full Court): *Jacobsen* v. *Darling Island Stevedoring & Lighterage Co. Ltd.*, (1945) 45 S.R. (N.S.W.) 264; 62 W.N. 154, by majority, affirmed.

APPEAL from the Supreme Court of New South Wales.

An application under the *Workers' Compensation Act* 1926-1942 (N.S.W.) was made on 13th February 1943 to the Workers' Compensation Commission by Natalie Jacobsen, on behalf of herself and two infant dependants, for compensation claimed to be payable by Darling Island Stevedoring & Lighterage Co. Ltd. in respect of the death of her husband, Arthur Edward Jacobsen, aged twenty-eight years,

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from injuries received by him whilst he was on a daily journey between his place of abode and the place where he was employed by that company as a wharf labourer.

The company denied liability and, at the hearing before the Commission, relied upon the following grounds: (*a*) that no injury was sustained by Jacobsen on 6th February 1943 on a daily or other periodic journey between his place of abode and place of employment, and (*b*) that no such injury was sustained by him on that date without his own default or wilful act.

The Commission made the following findings of fact:—

(*a*) that Jacobsen left home about 7.40 p.m. on Saturday 6th February 1943, to catch the 7.52 p.m. electric train from Hurstville to St. James Station on his daily journey from his place of abode to his place of employment;

(*b*) that the driver of an electric train which left Central Station at 8.8 p.m. on 6th February 1943 and which was travelling westward on a set of rails adjacent to the rails used by the said 7.52 p.m. train from Hurstville saw an object on the line, on which his train was travelling, at a point about halfway between Central Railway Station and Redfern Railway Station;

(*c*) that the said 8.8 p.m. train passed or ran over the said object;

(*d*) that the said object was recovered from under the train and was found to be the dead body of Jacobsen;

(*e*) that there was an alcohol content in Jacobsen's urine at and immediately preceding his death;

(*f*) that Jacobsen had taken a considerable amount of alcohol during the last few hours preceding his death; and

(*g*) that the said 7.52 p.m. train was crowded and some passengers were standing.

From the evidence the Commission drew the inferences:—

(i) that Jacobsen caught the 7.52 p.m. train from Hurstville to St. James Railway Station;

(ii) that the said 7.52 p.m. train was travelling at its usual speed at the approaches to the place where Jacobsen was lying before being passed or run over by another train;

(iii) that at the approaches to, and about the place where Jacobsen was lying the rails were practically straight and such as not to be likely to cause any material sway or jolting of the train;

(iv) that Jacobsen, at the time of his death, was in a state of moderate intoxication including diminution of control, mental confusion, and disorders of co-ordination; and

(v) that Jacobsen was well under the influence of alcohol at and prior to his death.

There was not any evidence before the Commission or there was not any evidence to satisfy it as to the following :—(*a*) how Jacobsen actually got on the railway line, and (*b*) the actual circumstances, that is the immediate causal factors, which led to Jacobsen being on the railway line.

In view of the fact that Jacobsen was travelling in a crowded train, with some passengers standing, and that he was under the influence of alcohol, at the time of and prior to his death, the Commission was not satisfied on the balance of the evidence that Jacobsen got on to the railway line or met his death without his own default or wilful act, and held that the applicant had not discharged the onus of proving that the injury sustained by Jacobsen was received by him without his own default or wilful act.

The Commission made an award in favour of the respondent company.

At the request of the applicant, the Commission stated a case under the provisions of s. 37 (4) of the *Workers' Compensation Act* 1926-1942 (N.S.W.), and referred the following questions for the decision of the Supreme Court :—

(1) Did the Commission err in law in holding that the onus of proving absence of default or wilful act lay on the applicant ?

(2) Did the Commission err in law in refusing to make an award for the applicant ?

The Supreme Court answered each question in the affirmative : *Jacobsen* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (1).

From that decision, the company appealed to the High Court.

Relevant statutory provisions are sufficiently set forth in the judgments hereunder.

Barwick K.C. (with him *Monahan*), for the appellant.

Dwyer K.C. (with him *Nolan*), for the respondent.

Cur. adv. vult.

Oct. 11.

The following written judgments were delivered :—

RICH J. The main question arising in this case is whether the onus of proof that the injury, resulting in his death, was received by the worker's own default or wilful act. The fact is that the injury was received by him on a daily journey between his place of abode and place of employment. The answer to the question depends on the true construction of sub-s. 1 of s. 7 of the *Workers' Compensation Act* 1926-1941 as amended by No. 13 of 1942. The

(1) (1945) 45 S.R. (N.S.W.) 264; 62 W.N. 154.

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amendment in question added a new class of liability. It is a liability to a worker or his dependants where he " has received injury without his own default or wilful act on any of the daily or other periodic journeys " between his place of abode and place of employment.

The appellant company bases its case on the contention that the form in which this provision is drafted is such that the absence of default or wilful act must be treated as part of the description of the injury with the consequence that the burden of negativing default or wilful act is placed upon the worker or his dependants in exactly the same way as that of proving that he received injury on a periodic journey described in the section. The argument is that the form of expression adopted by the legislature is decisive. The same argument on the definition of " injury " in the same legislation was addressed to us on a previous occasion. " Injury " was defined to mean personal injury arising out of and (now or) in the course of the employment and to include a disease . . . otherwise than a disease caused by silica dust. The argument was thus stated : " The Act, by adopting a definition of the word ' injury,' limits the area or ambit of disease for which the employer shall be responsible, and the onus of proving that he is within this area or ambit lies upon the worker in just the same manner as it lies upon him to prove that the injury arose out of and in the course of his employment. . . . The condition of liability is qualified. The disease for which the employer is responsible is a disease other than a disease caused by silica dust, and the burden—the whole burden—of proving the condition essential to that liability ' rests upon the worker and upon nobody else ' " : *Pye* v. *Metropolitan Coal Co. Ltd.* (1). In the Privy Council, Sir *Sidney Rowlatt*, speaking for the Judicial Committee, having stated this view, said—" That, in the opinion of their Lordships, is to mistake the scope of this legislation." He proceeded to point out that the intention was to provide compensation in every case of injury (including disease) arising out of and in the course of a workman's employment, and that the statute formed a general law for compensating such injuries. He said that " to hold otherwise would have the result that where, as in this case, medical evidence shows that the disease is due to dust, but cannot specify the kind of dust, the workman is left without any compensation at all, though undoubtedly suffering from a disease arising out of and in the course of his employment. This is to leave a gap which destroys the intended completeness of the scheme " (2). This

(1) (1934) 50 C.L.R. 614, at pp. 620, 621.

(2) (1936) A.C. 343, at p. 351 ; 55 C.L.R. 138, at p. 142.

appears to me, as it did to *Halse Rogers* J. in the Supreme Court, to be conclusive against the view that the manner in which the grounds of liability are determined or described is decisive. It provides too what *Halse Rogers* J. describes as a line of reasoning to be followed. This seems to me to be but another case in which we should weigh the substantial meaning against the form of its expression. I am clearly of opinion that the substantial meaning of the provision is to lay down a general rule of liability arising from the nature of the journey on which the worker was engaged when he sustained the injury. That rule is simple and all embracing. Having adopted it as a principle of general application, the legislature proceeded to introduce by way of exclusion the case of such an injury so sustained having been caused by a special element, namely the default or wilful act of the worker. It is a special exemption, exception or exclusion from the operation of the rule on a new and additional factor, namely fault or wilfulness. These are things which, according to the sense of fairness and justice which inspires the common law, we usually require to be proved against not disproved by the worker, or in the case of his death, his representatives. The substantial nature of the provision is more demonstrative to my mind than the form of draftsmanship, which was probably determined more by the craving for brevity than the consciousness of the niceties of the rules affecting the burden of proof.

The appeal should be dismissed and with costs.

STARKE J. The question in this case is whether the burden of proving that injuries sustained by a worker on a periodic journey between his abode and his place of employment were sustained " without his own default or wilful act " or whether that burden rests upon the employer.

The question depends upon the true interpretation of the *Workers' Compensation Act* 1926-1942. That Act provides that a worker who has received an injury, which includes a personal injury arising out of or in the course of the employment whether at or away from his place of employment, and his dependants in case of his death shall receive compensation from his employer, and that, where a worker has received injury without his own default or wilful act on any daily or other periodic journey mentioned in the Act and the injury be not received during or after what may be shortly described as an interruption or break in any such journey unconnected with his employment or reasonably incidental to the journey, the worker or his dependants in case of his death shall receive compensation from the employer (See Acts 1929 No. 36, s. 7 ; 1942 No. 13, s. 3).

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Before approaching the interpretation of these provisions, it is as well to look for a moment at some earlier and also some other provisions of the *Workers' Compensation Act*. The Act (No. 15 of 1926, s. 7) provided that a worker who receives personal injury (a) in the course of his employment whether at or away from his place of employment or (b) without his own default or wilful act on the daily or other periodic journey between his place of abode and his place of employment, and his dependants in case of his death, should receive compensation from his employer. But compensation was not payable in respect of an injury received during a substantial interruption or deviation from the journey mentioned if the interruption was for a reason unconnected with the worker's employment.

In 1929, the Act No. 36 of 1929, s. 3, omitted the provision for compensation on periodic journeys but it was restored in 1942 in the form in which it appears in the Act No. 13 of 1942 above set forth. Another provision is the proviso to the sub-section dealing with injuries received when the worker was acting in contravention of some legislative provision or without instructions if the act was done for the purpose of and in connection with his employer's trade or business. "Provided that . . . if it is proved that the injury to a worker is solely attributable to the serious and wilful misconduct of the worker, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed and no compensation shall be payable on account of any injury to or death of a worker caused by an intentional self-inflicted injury": s. 7 (3) (b), (c). The Act of 1926 provides clearly enough, I venture to think, the constituent elements of the worker's rights to compensation. That is clearly so in the case of a worker who receives personal injury in the course of his employment. There the burden is on the worker to prove that the injury was sustained in the course of his employment (*Pomfret* v. *Lancashire and Yorkshire Railway Co.* (1)). A different construction in the case of a worker who receives personal injury without his own default or wilful act on the daily or other periodic journey between his place of abode and his place of employment cannot be easily justified. And in *Wilson* v. *W. Winn & Co. Ltd.* (2) the Supreme Court of New South Wales held that the onus of proving that the injury was caused without the worker's own default or wilful act lay upon the worker. The Act does not provide that a worker who has received injury on daily or periodic journeys between his place of abode and his place of employment or other place shall receive compensation, but, on the contrary, limits the right of the worker and the liability of the

(1) (1903) 2 K.B. 718. (2) (1928) 28 S.R. (N.S.W.) 470; 45 W.N. 145.

employer in several directions. The injury must have been received without the worker's own default or wilful act. And compensation is not payable in certain cases the proof of which on the frame of the particular provision would, I should think, fall upon the employer. The Act of 1942 does not indicate any change of policy though the provisions, as already appears, are not identical. The limitations in the Act of 1942 are not expressed as provisoes or exceptions to the right conferred as in the proviso to s. 7 sub-s. 2 in respect of contravention of legislative provision or acts without instructions. They are expressed in a form that delimits the right conferred upon the worker and are necessary or constituent elements of that right; they qualify the liability of the employer.

In *Bagot* v. *Commissioner for Railways* (1), the Supreme Court reconsidered the case of *Wilson* v. *W. Winn & Co. Ltd.* (2) and announced that it should no longer be regarded as an authority upon the question here involved. And in *Ex parte Ferguson*; *Re Alexander* (3), the Supreme Court considered the matter more at large. It was recognized, I think, that the solution of the question depends upon the construction of the legislative provision in every case. No doubt the proper construction of the provision depends not only upon its form, but upon its substance and nature. But in *Ex parte Ferguson* (4) it was said that, "if, in the statement of the conditions in which a person is invested with a civil right, a condition for the absence of fault or fraud on his part is included, this is not in general regarded as a factor which must be established as a necessary ingredient of the right, so as to throw the burden of proof in this respect on him." This proposition is based, I think, upon the case of *Metropolitan Coal Co. Ltd.* v. *Pye* (5), which turns upon the construction of the particular statute there in question, and *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (6), where the question was, to adopt the statement of Lord *Russell of Killowen*, whether the doctrine of frustration in the law of contract was "frustration will excuse unless proved to be self-induced . . . or whether frustration will not excuse unless it is proved not to be self-induced" (7). But, in the present case, we are not in search of the true principle or doctrine, for the statute itself has prescribed the rule and the function of the Court is to construe it. Still it is said that the proving of a negative is an exceptional burden

(1) (1943) 44 S.R. (N.S.W.) 173; 61 W.N. 109.
(2) (1928) 28 S.R. (N.S.W.) 470; 45 W.N. 145.
(3) (1944) 45 S.R. (N.S.W.) 64; 62 W.N. 15.
(4) (1944) 45 S.R. (N.S.W.), at p. 65; 62 W.N., at p. 16.
(5) (1936) A.C. 343.
(6) (1942) A.C. 154.
(7) (1942) A.C., at p. 177.

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to impose on a litigant (*Constantine's Case* (1)), and that the ordinary rule is that a man is not held guilty of a fault unless fault is established and found by the Court (2). Another of these rules is that, if a matter is peculiarly and solely within the knowledge of a party, then the burden is upon that party to prove it whether it be of an affirmative or a negative character (*Taylor* on *Evidence*, 11th ed. (1920), p. 292 ; *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (3), per *Isaacs* J. ; *Williamson* v. *Ah On* (4), per *Isaacs* J). But these rules are not of universal application, as may be gathered from such cases as *Official Assignee of Estate of Cheah Seo Tuan* v. *Khoo Saw Cheow* (5), and distinctions which have been taken in criminal cases (*R.* v. *James* (6) ; *Archbold, Criminal Pleading Evidence & Practice*, 22nd ed. (1900), pp. 72, 73, 278, 279).

In truth, the rules are, as in this case, but an aid to construction and cannot overcome the legislative provision if it be clear, as here I think it is. Otherwise a heavy burden is cast upon the employer in respect of injuries that normally are peculiarly within the knowledge of the worker and are not within the knowledge of the employer, and that do not even occur on his premises. Thus, to take the facts stated in the present case, the worker was proceeding by train from his place of abode to his place of employment, a train proceeding in an opposite direction passed over some object on the railway line, and the dead body of the worker was subsequently found under the train. The worker had taken a considerable quantity of alcohol shortly before his death. But the employer knew and can know nothing of the manner of the worker's injury, whether it was or was not due to his own default or wilful act. The dependants of the worker are in the same position as the employer, but the death of a worker by injury, though not uncommon, is nevertheless unusual, and the burden of proof cannot alter according to the result of the injury. The discharge of that burden will not, I think, prove so onerous as was suggested in argument. " The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause ; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proof offered in support or denial of the main fact to be established " (*Davis* v. *Bunn* (7)). Here presumptions have their full scope. And the burden may be discharged if evidence be given of the circumstances in which the injury was caused which do not disclose any

(1) (1942) A.C., at p. 177.
(2) (1942) A.C., at p. 192.
(3) (1914) 18 C.L.R. 646, at p. 661.
(4) (1926) 39 C.L.R. 95, at p. 113.
(5) (1931) A.C. 67.
(6) (1902) 1 K.B. 540.
(7) (1936) 56 C.L.R. 246, at p. 254.

default or wilful act on the part of the worker (see *Wilson* v. *W. Winn & Co. Ltd.* (1)).

This appeal, in my opinion, should succeed and each of the questions in the case stated by the Workers' Compensation Commission should be answered in the negative.

DIXON J. I am unable to assent to the contention advanced for the applicant that, even if it were incumbent upon her to prove that the fatal injury to her husband occurred without his own default or wilful act, she is, nevertheless, entitled to a finding that there was not on his part any such default or wilful act. It is for the Commission to find the facts, not for the Court. Upon a case stated, the Court considers questions of law, and it is not a question of law whether proofs supporting an issue not only suffice to discharge the onus but are so strong that it would be unreasonable not to be satisfied of the fact. A court exercising control over juries can set aside a verdict as unreasonable or perverse and order a new trial, or, where under statute it has obtained the power, it may, instead of sending the case down for a new trial, draw the inferences of fact for itself, make the necessary finding and enter judgment accordingly. But, when the court performs this duty, it is not deciding a question of law; it is supervising or reviewing the findings of a tribunal of fact.

The case, therefore, appears to me to depend upon the onus of proof in proceedings under s. 7 (1) (b). Must the worker, or his dependants, prove affirmatively that he received the injury without his own act or default, or is it enough for him to prove that he received injury while on a periodic journey filling the description contained in the enactment?

The answer depends upon the interpretation of the provision. For the burden of proof is a legal consequence of the nature of the qualification placed by the words "without his own default or wilful act" upon the general conditions of liability stated in the clause. If these words are but part of the legislative attempt to define the conditions upon which the worker's right to compensation arises, then, like all other ingredients or elements in a cause of action or title to claim, proof of the fulfilment of the conditions they describe must lie with the claimant. But if the true nature of the qualification is to introduce new matter, not as part of the primary grounds of liability, but as a special exception or condition defeating or answering liability otherwise existing, then the onus of proof lies with the party setting up default or wilful act by way of answer.

(1) (1928) 28 S.R. (N.S.W.) 470; 45 W.N. 145.

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The form in which the clause is cast, no doubt, favours the view that the words in question express part of the description of the primary or general grounds of liability. For they occur in the formulation in a single proposition of the conditions in which the worker or his dependants "shall receive compensation from the employer." But, although in such a question the form in which an enactment is thrown is a consideration of much importance, it is by no means decisive. The substance of the provision must be considered and weight must be given to the nature of the general conditions laid down and to the substance and real effect of the particular qualification. Further, an interpretation is to be preferred which will give the provision an operation consistent with the principles of the common law. Notwithstanding the form of the clause, I think that the considerations of substance show that the qualification, expressed by the words "without his own default or wilful act," amounts to a particular exception or answer, the proof of which lies upon the employer.

There are, I think, three matters which lead to this conclusion. First: the clause expresses a general principle or policy that injury received on the periodic journey, as defined, shall entitle the worker to compensation. The existence of default or wilful act does not go to the character of the journey nor to the definition of "injury." It involves a new factor, a factor which would be otherwise irrelevant, namely, the causation of the injury, and, moreover, causation by conduct on the part of the injured man. In other words, the primary grounds of liability remain true, but their consequence is avoided by the addition of a new and special fact.

Secondly: the new and special fact is described negatively. As a general rule the proof of a negative is not imposed upon a party. Although it is by no means uniformly true, yet it is not usual for the law to require disproof of a fact.

Thirdly: the fact in question involves fault or misconduct. Again, it is a general principle that absence of default or wrongdoing is presumed and proof is required when its absence is made a qualification of a right. It is in accordance with principle to regard fault as a particular exception defeating the right only when alleged and proved. It may be said that default means no more than negligence and that want of reasonable care may be imputed without blame. But the category includes wilful act and, after all, the basis of the qualification is moral responsibility.

The combined effect of these considerations appears to me to overcome the inference which might be drawn from the form of the provision considered independently of its substance.

Earlier authorities appear to have given greater attention to the form in which a qualification or condition is cast, but I think that a slowly yet steadily growing tendency to place greater reliance upon substance is discernible over the long period in which the courts have been troubled with this kind of difficulty and the kindred, but not always interdependent, difficulty of deciding whether in civil or criminal pleadings an exception need be negatived.

In this instance, I think the substance prevails and the burden of proving default or wilful act lies upon the employer.

The appeal should be dismissed with costs.

McTIERNAN J. The appeal raises a question as to the onus of proof in an application under s. 3 of Act No. 13 of 1942. This section extended the provisions of s. 7 of the *Workers' Compensation Act* 1926-1941. The question is whether, in order to establish a claim for compensation under the provisions inserted by s. 3 into s. 7, there must be proof, not only that the worker received an injury on a journey within the scope of these provisions, but also that the injury was received without the worker's own default or wilful act, or whether it suffices to prove the first proposition, leaving it to the employer, if he can, to prove that the injury was received not without the worker's own default or wilful act.

The answer to this question is governed by the interpretation of the words " without his own default or wilful act." If the words " without his own default or wilful act " are to be interpreted as a condition precedent to the right which is created by s. 3, the onus is on the applicant to prove that the injury was received without the worker's own default or wilful act. But if the words are to be interpreted as providing a ground for excluding or disqualifying the applicant, whether a worker or any dependant, from the benefit of the section, the onus is on the employer to prove that the injury was received by the worker's own default or wilful act.

The question whether the former or the latter interpretation should be adopted does not depend merely on the formal arrangement of the words of s. 3. The question is one of legislative intention which is to be collected from the whole Act of which s. 3 forms part. It seems to me that, as s. 3 extends the area of the employer's liability to include an injury received on a journey within the scope of the section, it would be a departure from the principle of the Act to make the conduct of the worker a condition precedent to the right to receive compensation. Although the words " without his own default or wilful act " are not in point of form added as a proviso to the enactment of the new right to receive compensation from the employer,

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their position in the section does not preclude the view that such a departure was not intended. I think that it is in accordance with the sense and reason of the provisions to read the words as meaning that injury on a journey within the purview of the section will give rise to a right to receive compensation, provided that the compensation shall be disallowed if the worker received the injury by his own default or wilful act.

This view as to what is to be presumed to have been the intention of the legislature is supported by the considerations which *Jordan* C.J. stated in the course of his reasons in *Ex parte Ferguson* (1): "Again, if, in the statement of the conditions in which a person is invested with a civil right, a condition for the absence of fault or fraud on his part is included, this is not in general regarded as a factor which must be established as a necessary ingredient of the right, so as to throw the burden of proof in this respect on him." See *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (2).

In my opinion, the decision of the Supreme Court in *Bagot* v. *Commissioner for Railways* (3), which the Supreme Court affirmed in the present case on the question of the onus of proof, was right. In my opinion, the appeal should be dismissed.

WILLIAMS J. I have had the advantage of reading the judgment of my brother *Dixon* and concur in it. I am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Dawson, Waldron, Edwards & Nicholls.*
Solicitor for the respondent, *A. J. Devereux.*

J. B.

(1) (1944) 45 S.R. (N.S.W.), at p. 65; 62 W.N., at p. 16.
(2) (1942) A.C., at pp. 192, 193.
(3) (1943) 44 S.R. (N.S.W.) 173; 61 W.N. 109.