[HIGH COURT OF AUSTRALIA.]

HAMPTON COURT LIMITED . . . . . APPELLANT ;
DEFENDANT,

AND

CROOKS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1957. SYDNEY, *April* 5; *May* 6. Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

Negligence—Personal injuries—Licensed premises—Invitee—Female—Retiring room—Wet, greasy substance on floor—Fall by female—Cause—Unusual danger—Proof of negligence—Owner—Liability—Knowledge—Reasonable care—Evidence—Sufficiency—Verdict for female—Appeal—Point not taken at trial—If so taken point fatal to female's case—New trial—Futility—Full Court—Jurisdiction—Setting aside verdict—Entry of judgment for appellant owner—Supreme Court Procedure Act 1900 (*N.S.W.*), *s.* 7—*Supreme Court Rules* 1953, *O. XXII, rr.* 1, 15.

The plaintiff slipped and fell on the floor of a wash-room in the defendant's hotel where she had been having dinner. She brought an action for damages for injuries suffered. Evidence was given by her and others that there was some greasy water on the floor where she slipped; the existence of the water was denied by the defendant and others. The accident happened at 8.00 p.m. and there was evidence that care had been taken to see that the wash-room was clean and washed out as late as 7.00 p.m. At the trial the defendant did not apply for a verdict and the jury found for the plaintiff.

Held: (1) that although the jury could find that the water was there and constituted an unusual danger it was not established that the defendant had actual knowledge, and since it was not possible to conclude what the substance was on the floor or how it got there it was not open to the jury to find that the defendant ought to have known it was there; in the circumstances the defendant had exercised the reasonable care he was bound to exhibit.

(2) that the objection, if taken at the trial, would have been fatal to the respondent's case and a new trial would have been futile; in the circumstances the Full Court had jurisdiction under s. 7 of the *Supreme Court Procedure Act*

H. C. OF A. 1957. HAMPTON COURT LTD. v. CROOKS.

1900 (N.S.W.), to set aside the verdict of the jury and to direct that judgment should be entered for the appellant.

Supreme Court Rules 1953 (N.S.W.), O. XXII, rr. 1, 15, discussed.

Per Dixon C.J.: (1) A plaintiff is not relieved of the necessity of offering some evidence of negligence by the fact that the material circumstances are peculiarly within the knowledge of the defendant. Slight evidence may be enough unless explained away by the defendant and the evidence should be weighed according to the power of the party to produce it.

(2) In a clear case where, on the state of the evidence as the plaintiff has necessarily left it, the defendant is entitled to a verdict, there is no reason why a verdict in favour of the plaintiff who has not made out a cause of action should stand simply because at the trial the defendant has gone to the jury without asking for a direction. At worst it is a matter of costs.

Decision of the Supreme Court of New South Wales (Full Court), reversed.

APPEAL AND CROSS-APPEAL from the Supreme Court of New South Wales.

Hilda Crooks brought an action in the Supreme Court of New South Wales against Hampton Court Limited to recover damages for personal injuries sustained by her on 6th December 1952 when she slipped and fell on the floor of the ladies' retiring room at the Hampton Court Hotel, Kings Cross, which hotel was owned and controlled by the defendant. The plaintiff alleged that on the occasion in question she was present in the hotel as an invitee of the defendant and that her injuries resulted from an unusual danger then existing in the hotel, namely the presence on the floor of the ladies' retiring room of a wet substance of a greasy nature, of which the defendant knew or ought to have known. At the trial of the action the plaintiff recovered a verdict in the sum of £4,961 including, as the jury stated, the sum of £361 for out-of-pocket expenses.

Upon an appeal by the defendant the Full Court of the Supreme Court (*Owen*, *Herron* and *Manning* JJ.) set aside the verdict on the ground that the sum of £4,600 was out of all reasonable proportion to the damage sustained, and granted a new trial limited to the issue of damages. A submission that judgment should be entered for the defendant on the ground that the plaintiff had not made out her case was rejected, that point not having been taken at the trial.

From that decision the defendant, by special leave, appealed, and the plaintiff, in respect of that part of the judgment and order which directed a new trial limited to the issue of damages, cross-appealed to the High Court.

In an affidavit filed on behalf of the defendant in support of the application for special leave to appeal it was submitted, alternatively to other matters, that in the light of the reasons given by *Owen* J., with which *Manning* J. concurred, having regard to the fact that the only issue on knowledge was whether the defendant ought to have known, their Honours should in law have entered a verdict for the defendant under the provisions of s. 7 of the *Supreme Court Procedure Act* 1900, and it was submitted that such a procedure would have been in accordance with the principle laid down in, *inter alia*, *Shepherd* v. *Felt and Textiles of Australia Ltd.* (1), and that the Court had made a serious error of substance.

Further relevant facts appear in the judgments hereunder.

G. Wallace Q.C. (with him *H. E. E. Reimer*), for the appellant. The issue here was whether the defendant ought to have known of the danger. The court below should have entered a verdict for the defendant under s. 7 of the *Supreme Court Procedure Act* 1900, even though the point was not taken during the trial. Section 7 overcomes the failure to take the point, it being purely one of law, namely whether there was any evidence from which a jury could have drawn the inference that the defendant ought to have known. Rule 151B of the *Supreme Court Rules* does not apply; it was inserted after the decision in *Holmes* v. *Jones* (2) and is identical with O. XXII, r. 15 enacted in 1952. [He referred to *Shepherd* v. *Felt and Textiles of Australia Ltd.* (1); *Hocking* v. *Bell* (3) and *Huddart Parker Ltd.* v. *Cotter* (4).] The passages indicated in those cases establish that wherever there is a question of law in a case then the Full Court may either enter a non-suit or enter a verdict for the defendant notwithstanding in effect what took place at the trial. The only cases where the court ought not to exercise its powers under s. 7 are those where, had the point been taken at the trial, the alleged defect might have been cured by evidence: see *Donohoe* v. *Smith* (5) and *Bailey* v. *Willis* (6). As to weight of evidence, see *Hocking* v. *Bell* (7) and *Bell* v. *Thompson* (8). The plaintiff could only obtain a legitimate inference that the defendant ought to have known by showing that the greasy pool in question was there before the toilet attendant left. That was quite impossible on the evidence. Nor was the defendant's system so defective as to

(1) (1931) 45 C.L.R. 359.
(2) (1907) 4 C.L.R. 1692.
(3) (1945) 71 C.L.R. 430, at pp. 440-444, 488.
(4) (1942) 66 C.L.R. 624, at p. 660.
(5) (1947) 48 S.R. (N.S.W.) 236, at p. 239; 65 W.N. 51, at p. 53.
(6) (1930) 30 S.R. (N.S.W.) 131; 47 W.N. 23.
(7) (1945) 71 C.L.R., at pp. 498-501.
(8) (1934) 34 S.R. (N.S.W.) 431, at pp. 436, 437; 51 W.N. 138, at p. 139.

H. C. OF A. 1957. HAMPTON COURT LTD. v. CROOKS.

prevent the defendant from knowing that something was wrong. The only other way in which one could assign or attribute knowledge to the defendant would be upon the basis that from the evidence the defendant ought to have had some other system. There was no issue of fact remaining for the jury in this set of circumstances. The onus is on the plaintiff to lead such factual evidence from which some conclusion as to negligence can be properly drawn. The mere happening of the accident is no reason why the Court should say that there is a duty on institutions of this sort to have continuous supervision.

C. R. Evatt Q.C. (with him *J. H. Staunton*), for the respondent. The appeal should be dismissed and the verdict of the jury restored *in toto*. The verdict given by the jury was a perfectly proper one, and the amount awarded was not so extravagant or perverse as to warrant the ordering of a new trial limited to damages. The verdict is amply supported by the evidence. The negligence on the part of the appellant was its failure to keep the place clean. The obligation applicable to this type of case—the duty here—would require supervision, inspection of the toilet at all reasonable hours (*Burton* v. *Melbourne Harbour Trust Commissioners* (1); *Swinton* v. *China Mutual Steam Navigation Co. Ltd.* (2)). It is somewhat significant that no application was made at the close of the plaintiff's case upon the ground that a prima facie case had not been made out. None of these matters was raised after the trial judge's charge to the jury. In the circumstances, and having regard to the evidence of what the respondent suffered and will suffer, the verdict on damages should be allowed to stand. Applying the well-established principle laid down by this Court to an appeal on the quantum of damages, the vital principle has not been transgressed here at all. It was not so excessive as to expose the jury to the charge that they had transgressed the bounds of reason. The classical well-established heads of damage are that the respondent is entitled to take into consideration potential losses in business, potential future earnings or chances, on the question of earnings, and pain and suffering. She has the prospect of increased pain. The amenities which she has enjoyed, as, for example, tennis, golf, will be considerably reduced. A somewhat similar case is *Wollongong Corporation* v. *Cowan* (3). Other relevant cases are *Campbell* v. *Shelbourne Hotel Ltd.* (4); *Walker* v. *Midland Railway Co.* (5);

(1) (1954) V.L.R. 353, at p. 371.
(2) (1951) 83 C.L.R. 553.
(3) (1955) 93 C.L.R. 435, at pp. 441-444.
(4) (1939) 2 K.B. 534.
(5) (1886) 55 L.T. 489, at p. 490.

Stowell v. *Railway Executive* (1); *Woodward* v. *Mayor of Hastings* (2) and *Haseldine* v. *C. A. Daw & Son Ltd.* (3). Regard should be had to the dangerous nature of the terrazzo floor. The verdict for the plaintiff on the question of damages should be restored.

G. Wallace Q.C., in reply. The amount awarded to the plaintiff as general damages was so great as to necessitate interference by the Full Court. On the point of the liability this case is altogether different from *Gorman* v. *Wills* (4).

C. R. Evatt Q.C., by leave.

Cur. adv. vult.

May 6.

The following written judgments were delivered:

DIXON C.J. I have had the advantage of reading the judgment prepared by *McTiernan*, *Fullagar*, *Kitto* and *Taylor* JJ. and agree in it subject to two observations which I desire to make. The first is that on the assumption, which I accept, that the jury might reasonably find the cause of the plaintiff's injuries to be the presence on the floor of a wet substance of a greasy nature covering an area of eighteen inches by two or three inches, I do not think that proof of this fact was enough to enable the jury to infer negligence on the part of the defendant: proof was necessary of some additional circumstances tending, for example, to raise a probability of its having been there long enough to be seen if reasonable supervision were practised, or to show that so many people were likely to use the lavatory in the preceding hour that closer control was called for, or that the dropping of some such substance was common or inherently likely to occur. But very little might have been enough. For the case is one where the facts can hardly be within the knowledge of the plaintiff and, at all events so far as concerns the care and control of the premises and the precautions taken, must be peculiarly within the knowledge of the defendant: cf. per *Isaacs* J., *Morgan* v. *Babcock & Wilcox Ltd.* (5) and the cases there cited. But a plaintiff is not relieved of the necessity of offering some evidence of negligence by the fact that the material circumstances are peculiarly within the knowledge of the defendant; all that it means is that slight evidence may be enough unless explained away by the defendant and that the evidence should be weighed according to the power of the party to produce it, in accordance with the often

(1) (1949) 2 K.B. 519, at pp. 521, 522.
(2) (1945) K.B. 174, at p. 181.
(3) (1941) 2 K.B. 343.
(4) (1906) 4 C.L.R. 764.
(5) (1929) 43 C.L.R. 163, at p. 178.

H. C. OF A. 1957.

HAMPTON COURT LTD. v. CROOKS.

Dixon C.J.

repeated observation of Lord *Mansfield* in *Blatch* v. *Archer* (1): cf. *Parker* v. *Paton* (2); *Ex parte Ferguson*; *Re Alexander* (3).

But notwithstanding this principle I think that there is no evidence adduced by the plaintiff which will suffice to support the jury's verdict.

The second matter which I desire to mention is the power of the Full Court to enter a verdict for the defendant despite the fact that the defendant did not request the judge at the trial to direct the jury to find a verdict in the defendant's favour. At common law the Court *in banc* could not enter a verdict unless power to do so was reserved at the trial. Such a reservation was based upon a convention, although a traditional convention: see *Edmond Weil Inc.* v. *Russell* (4) and the authorities there cited. The statutory power conferred upon the Supreme Court by s. 7 of the *Supreme Court Procedure Act* 1900 takes the place of this practice. It is an independent power residing in the Full Court and is intended to avoid the necessity of a new trial existing at common law if no reservation had been made. To my mind O. XXII, r. 15 of the Rules of the Supreme Court does not assume to control the exercise of the power. Of course if the Full Court is of opinion that the plaintiff might have mended his hand at the trial, had the insufficiency of his evidence been pointed out on an application either for a verdict by direction or for a non-suit, doubtless that would affect the exercise of the power. But in a clear case where, on the state of evidence as the plaintiff necessarily left it, the defendant is entitled to a verdict, I do not see why a verdict in favour of a plaintiff who has not made out a cause of action should stand simply because at the trial the defendant went to the jury without asking for a direction. At worst it is a matter of costs.

McTIERNAN, FULLAGAR, KITTO AND TAYLOR JJ. On Saturday, 6th December 1952 the respondent, in company with another female and two males, went to the appellant's licensed premises known as Hampton Court Hotel. According to the respondent's evidence they arrived there shortly after 7 p.m. and about 8 p.m. she suffered the injuries in respect of which she subsequently sought to recover damages from the appellant. The intervening period between 7 p.m. and 8 p.m. was spent by the respondent and her companions at dinner. The public dining room in which they were served is, apparently, on the ground floor of the premises and not far distant,

(1) (1774) 1 Cowp. 63, at p. 65 [98 E.R. 969, at p. 970].
(2) (1941) 41 S.R. (N.S.W.) 237; 58 W.N. 189.
(3) (1944) 45 S.R. (N.S.W.) 64; 62 W.N. 15.
(4) (1936) 56 C.L.R. 34, at p. 46.

along a passage or hallway, is, what was called in the evidence, a ladies' retiring room. The retiring room is entered through a door opening to the hallway and, through an internal lobby, access is obtained to a wash-room fitted with two wash-basins on the far wall and to two separate toilet cubicles nearby. The floor of the retiring room is said to have been constructed of a hard composition known as " terrazzo " and, in colour, to have been " brown and white flecked ". It was to this room that the respondent repaired about 8 p.m. and, upon leaving one of the cubicles with the intention of proceeding to a wash-basin, she slipped and fell and, in so doing, fractured her left leg.

According to the respondent there was at the place where she fell " a sort of discoloured path of water, a sort of pool ", or, " dirty water—a sort of greasy or oily base ". This, she says, she did not see until after the accident and then she observed that it had a " slip mark through it ". One of her companions who gave evidence described the " wet substance " as " of a greasy nature " and said that there was " a distinct mark . . . a couple of inches wide, by the skid or slip ". It was he said about eighteen inches long. Witnesses called on behalf of the appellant denied there was any such substance or mark on the floor.

In seeking to impose liability upon the appellant for her injuries and consequent loss the respondent alleged that on the occasion in question she was present upon the appellant's premises as an invitee and that her injuries resulted from an unusual danger then existing thereon of which the appellant knew or ought to have known. Upon the trial of the issues tendered by these allegations the jury found a verdict for the respondent for the sum of £4,961 which sum included £361 out-of-pocket expenses. A subsequent appeal to the Full Court met with qualified success ; the appellant obtained an order for a new trial limited to the issue of damages but its submission that judgment should be entered for it on the ground that the respondent had failed to make out her case was rejected.

The particular ground upon which the appellant sought to support the latter submission was that there was no evidence that the appellant either knew or ought to have known of the condition of the floor as deposed to by the respondent and her supporting witness. In the course of the reasons given in disposing of the appeal to the Full Court *Owen* J. observed :—" It was conceded that there was no evidence of actual knowledge by the defendant or any of its employees, and the question therefore was whether the defendant should have known of the existence of this allegedly

H. C. OF A. 1957.

HAMPTON COURT LTD. v. CROOKS.

McTiernan J. Fullagar J. Kitto J. Taylor J.

unusual danger on the floor of the room. If the point had been taken at the trial that there was no evidence on which the jury could find that the defendant should have known of the existence of the danger and a verdict for the defendant by direction had been asked for, such a direction might well have been given. As at present advised I find it difficult to see that there was any such evidence, but since this point was not taken at the hearing it is not now open to the appellant."

With these observations *Manning* J. agreed and accordingly the appeal on this ground failed. All three judges, however, concluded that the damages awarded were excessive and, accordingly, an order for a new trial limited to this issue was made. From the order of the Full Court the appellant now appeals to this Court whilst the respondent, in turn, cross-appeals and seeks to have the verdict of the jury restored.

For reasons which will be given presently we are of opinion that the appellant was not precluded by the course of the trial from seeking judgment on the ground that the respondent had not succeeded in making out her case but it is convenient to consider whether the substance of the submission is sound before indicating why the appellant was not so precluded.

The first thing that should be said about the case is that, despite the clear and definite conflict of evidence concerning the state of the floor of the retiring room, there can be no doubt that the jury was entitled to find that there was present upon it some substance which should not have been there and, further, that it was this substance which caused the respondent to slip. Moreover they were, we think, entitled to find, in the circumstances of the case, that the presence of this substance constituted an " unusual danger " in the sense in which that expression is used in relation to cases of this character. But it was not open to the jury to find what the substance actually was or how it came to be there ; upon the evidence these matters were left entirely to speculation but they were of considerable importance in considering whether the state of the floor, as deposed to, was something of which the appellant ought to have been aware. There is no question that the respondent did not establish actual knowledge on the part of the appellant and her claim should have failed unless it appeared that the danger complained of " would have been known but for the failure (of the appellant) to exercise reasonable care and skill " : per *Pickford* J. in *Cole* v. *De Trafford* [*No.* 2] (1).

(1) (1918) 2 K.B. 523, at p. 528.

The respondent's argument on this branch of the case is put on a broad basis. The retiring room, it is said, is a public room in licensed premises; it was under the sole control of the appellant and, in the nature of things, it was a room which must be taken to have been much frequented by customers of the hotel. But whether this be so or not, once it is said, the case remains where it was. The accident to the respondent occurred at about 8 p.m., some two hours after the general closing time for licensed premises, and there is no reason for thinking that conditions at that hour in any way resembled conditions before 6 p.m. or that the same degree of supervision was necessary or, in fact, exercised in the retiring room at all hours of the day and night. There was, however, evidence that for some three hours before 6 p.m. on each Saturday it was the sole duty of a female employee of the appellant to attend in the retiring room, to keep it clean and to wash it out before finally ceasing work at 7 p.m. This evidence may be beside the point so far as the appellant's submission is concerned but it does serve to emphasise that the respondent's complaint must be viewed in the light of the fact that, although the hotel was at liberty to have its dining room open at the time of the accident, the licensed premises generally were not open. And, it should be said, it does not appear from the evidence, and there is no reason to assume, that the retiring room was, at that time, in constant or frequent use or, so far as we can see, that the exercise of reasonable care required the continuous attendance of an employee in the room at that hour to ensure the safety of those who used it.

Whether or not such a course should have been pursued depended, of course, upon the risks which, otherwise, would have been involved and, when this inquiry is made, it is impossible to conclude that any risk was involved in not maintaining constant supervision at all hours. There is nothing in the evidence to suggest that there was and the fact that the appellant met with an accident in the manner in which she did advances the case no further. Her complaint is not that the floor was itself unsafe or dangerous or, indeed, that it might be made so in the ordinary course of its use by people resorting to it; her complaint is that it was made so by the presence of some "greasy" or "oily" substance the character and origin of which remain unidentified. The evidence does not support the inference that it was of such a character as to be deposited on the floor in the ordinary use of the room or that it remained there as a residue after the completion of washing operations. Consequently, both the character of the "greasy or oily base" and how it came to be there remains in obscurity. Yet the respondent maintains

H. C. OF A. 1957. HAMPTON COURT LTD. v. CROOKS. McTiernan J. Fullagar J. Kitto J. Taylor J.

that it was open to the jury to find that, prior to the accident, the appellant should have known about it. It could, of course, have known of it only if a constant vigil had been maintained in the retiring room but, if there was no reason for thinking that the ordinary use of the room might render the floor dangerous, why should this have been done ? The appellant was under no absolute duty to ensure the safety of persons using the room ; its duty was discharged by the exercise of reasonable care and it is impossible to see why the performance of this duty should oblige it to provide a constant guard against mere chance events which could not be foreseen. And, it may be said, that upon the respondent's evidence not merely is the conclusion open that the greasy or oily substance on the floor might have been the result of some unusual or chance event but that that is the most likely inference.

The facts of the case are quite dissimilar from those where plaintiffs have recovered in respect of injuries caused by slipping on a highly polished floor (cf. *Weigall* v. *Westminster Hospital* (1)); or upon a floor made slippery by the carrying on of washing operations (cf. *Beaumont-Thomas* v. *Blue Star Line Ltd.* (2)) where the condition of the floor is proved to have been the result of operations deliberately undertaken by the defendant's employees. They differ, again, from cases where a plaintiff has slipped on some substance against the presence of which it was reasonable to expect a defendant to guard (cf. *Turner* v. *Arding & Hobbs Ltd.* (3)). In the present case it is, as we have already said, impossible to conclude what the substance was or how it got there and it is therefore quite impossible, from the evidence, to conclude that its presence was not the result of some equally fortuitous event as that established by the evidence in *Simons* v. *Winslade* (4). In the circumstances we are of opinion that it was not open to the jury to conclude that there was any lack of reasonable care on the part of the appellant.

The question still remains whether the appeal to the Full Court should have succeeded on this point. As already appears a majority of the court disposed of the question merely by saying that as the point had not been taken at the trial it was not open to the appellant on appeal. No doubt their Honours had in mind r. 15 of O. XXII of the Rules of the Supreme Court which provides that " No direction, omission to direct, or decision as to the admission or rejection of evidence given by the judge presiding at trial shall, without the leave of the Court, be allowed as a ground of appeal unless objection was taken at the trial to such direction, omission,

(1) (1936) 52 T.L.R. 301.
(2) (1939) 3 All E.R. 127.
(3) (1949) 2 All E.R. 911.
(4) (1938) 3 All E.R. 774.

or decision by the party on whose behalf the notice of motion has been filed." This rule, as in the case of its progenitor in the earlier rules, is to be found in a part of the rules dealing with applications for new trials, for judgment *non obstante veredicto*, to enter a verdict, to increase or reduce the amount of a verdict and with appeals from the order of a judge (O. XXII, r. 1) and it is at least doubtful whether the restriction specified in r. 15 applies in any other cases. The earlier rules made it clear that the operation of r. 151B was limited to motions of the character specified in r. 150 and, although r. 15 incorporates some change of verbiage, the change does not, we think, extend its operation beyond applications of the character specified in r. 1 of O. XXII. Since the appellant's motion to the Full Court, in so far as it sought an order that judgment should be entered for it on the ground already discussed, was not a motion for a new trial, or a motion for judgment *non obstante veredicto*, or to enter a verdict, or to increase or reduce the amount of a verdict the rule did not, in our view, debar the appellant from taking this ground.

But even if the provisions of r. 15 applied the case was one in which leave to raise the point should have been granted. Rule 151B was promulgated only in 1925 but the principle upon which it rests had then been long established and observed in dealing with appeals and motions for new trials. (See *Dwyer* v. *Herman* (1); *Trafford* v. *Pharmacy Board* (2); *Sydney Harbour Trust Commissioners* v. *Wailes* (3), per *Isaacs* J. and *Measures* v. *McFadyen* (4), per *O'Connor* J. The practice was that a ground of appeal which had not been raised upon the trial would not be entertained if it related to a defect which might have been cured at the trial. But if the objection was one which could not have been overcome it was thought proper to allow it to be taken for the purpose of doing justice between the parties.

In the present case it is apparent that the objection, if taken at the trial, would have been fatal to the respondent's case and it is equally clear that a new trial would be futile. In these circumstances the Full Court had jurisdiction under s. 7 of the *Supreme Court Procedure Act* 1900 to set aside the verdict of the jury and to direct that judgment should be entered for the appellant (*Shepherd* v. *Felt and Textiles of Australia Ltd.* (5)). This is the order which should have been made and, accordingly, the appeal should be allowed. That being so it is unnecessary to consider the submissions made on the cross-appeal.

(1) (1881) 2 N.S.W.L.R. 280.
(2) (1902) 2 S.R. (N.S.W.) 418.
(3) (1908) 5 C.L.R. 879, at p. 889.
(4) (1910) 11 C.L.R. 723, at p. 733.
(5) (1931) 45 C.L.R. 359, at p. 379.

H. C. OF A. 1957. HAMPTON COURT LTD. v. CROOKS.

Since the appeal to the Full Court was made necessary by the failure of the appellant at the trial to take the point upon which it has now succeeded the costs of both parties in that appeal ought to be borne by it, but as the appellant's costs in this appeal and, perhaps, of the trial, should be borne by the respondent we think that, in all the circumstances of the litigation, the parties should abide their own costs throughout.

Appeal allowed. Cross-appeal dismissed. Order of the Supreme Court of New South Wales discharged. In lieu thereof set aside the verdict of the jury and enter a verdict and judgment for the defendant the appellant in this Court. The parties to abide their costs in this Court and of all proceedings in the Supreme Court.

Solicitors for the appellant, *A. S. Boulton, Lane, Rex & Co.*
Solicitors for the respondent, *Abram Landa & Co.*

J. B.