[HIGH COURT OF AUSTRALIA.]

FIELD . . . . . APPELLANT;
PLAINTIFF,

AND

COMMISSIONER FOR RAILWAYS FOR NEW SOUTH WALES . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1957.

SYDNEY, *Nov.* 15, 18, 19; *Dec.* 19.

Dixon C.J. McTiernan, Webb, Kitto and Taylor JJ.

Evidence—Action for negligence—Personal injuries—Negotiations for settlement—Examination of plaintiff by medical practitioner retained by defendant—Admission going to cause of action made by plaintiff to medical practitioner in course of examination—Admissibility of evidence from medical practitioner concerning admission—Whether privileged—Communication in course of "without prejudice" negotiations—Nature and extent of protection afforded.

Practice—Charge to jury—Invitation to consider inherent probability of plaintiff falling otherwise than alleged if story true—Question of fact depending upon conditions arising out of ordinary experience obtained by observation—Question for jury—No ground for new trial—Allegation that plaintiff's story recent fabrication—Direction that as defendant challenged story as recent fabrication plaintiff thereby enabled to lead evidence of statements made to other persons as to how accident occurred—Claim that insufficient foundation for direction existed—Plaintiff given no adequate opportunity of meeting suggestion—Challenge to correctness of judge's view as to what occurred at trial—Necessity of basing objection squarely on such a ground—Accuracy of direction in circumstances.

In an action for damages brought against the Commissioner for Railways F. alleged that whilst lawfully alighting from a train run by the commissioner he was thrown on to the station and permanent way and suffered serious injury. Solicitors for the commissioner opened negotiations for settlement of the action on a compromise basis in a letter marked "without prejudice" and sought a medical examination of F. by a medical specialist appointed by the department. After further negotiations by correspondence headed "without prejudice" an appointment was made for F. to attend the rooms of a medical specialist for examination. At such examination F., in giving a history of his injury to the specialist, stated that he stepped out of a slowly

H. C. OF A. 1957. FIELD v. COMMISSIONER FOR RAILWAYS FOR N.S.W.

moving train as it had overrun the platform at which he desired to alight and he thereby sustained injury. At the trial the plaintiff was asked in cross-examination without objection whether he had given this version of the happening to the specialist, to which he answered in the negative. The commissioner called the specialist who, having stated that he had obtained a history from the plaintiff, was then asked to narrate that history. Objection was taken to this evidence by F's. counsel upon the ground that the interview with the specialist was privileged as being "without prejudice". The trial judge overruled the objection and the specialist gave the version of the occurrence set out above. Upon appeal,

Held, by *Dixon* C.J., *Webb*, *Kitto* and *Taylor* JJ., *McTiernan* J. dissenting, that the evidence was admissible in that it was not reasonably incidental to the settlement negotiations that such an admission should be protected.

The scope of the protection from disclosure conferred on admissions made in the course of negotiations to settle litigation discussed, and *Thomas* v. *Austen* (1823) 1 L.J. (O.S.) K.B. 99; *Kurtz* v. *Spence* (1888) 58 L.T. 438, at p. 441; *Paddock* v. *Forrester* (1842) 3 Man. & G. 903, at p. 919 [133 E.R. 1404, at p. 1411]; *Hoghton* v. *Hoghton* (1852) 15 Beav. 278, at pp. 314, 315 [51 E.R. 545, at p. 559]; *In re River Steamer Co.*; *Mitchell's Claim* (1871) L.R. 6 Ch. App. 822, at pp. 831, 832; *Walker* v. *Wilsher* (1889) 23 Q.B.D. 335, at pp. 337, 338, referred to, by *Dixon* C.J., *Webb*, *Kitto* and *Taylor* JJ.

In the course of his summing up the trial judge invited the jury to consider as a guide, in testing the conflicting versions given them as to how the accident happened, the inherent probability of F. falling, if his story were true, not as he did down the ramp but in the opposite direction.

Held, by *Dixon* C.J., *Webb*, *Kitto* and *Taylor* JJ., *McTiernan* J. expressing no opinion, that the trial judge was putting to the jury a matter of fact depending upon conditions arising out of ordinary experience obtained by observation upon which the jury could form its own conclusion and the verdict ought not by reason of the invitation to be set aside.

In the course of his summing up the trial judge directed the jury that as the defendant's case was that the plaintiff's story was a recent fabrication evidence was admissible on behalf of the plaintiff that he had told other persons how the accident had occurred before he had made the alleged admission to the defendant's medical specialist. At the conclusion of the summing up objection was taken on F's. behalf that as a matter of law the evidence was inadmissible except when fabrication was suggested. On appeal the direction was challenged as lacking a sufficient foundation, in that recent fabrication had not been suggested, and it was further objected that the plaintiff had no adequate opportunity of meeting such a suggestion by the calling of evidence.

Held, by *Dixon* C.J., *Webb*, *Kitto* and *Taylor* JJ., *McTiernan* J. expressing no opinion, that there was nothing before the Court to cast doubt upon the correctness of the trial judge's view that such evidence had become admissible.

Where a party denies the correctness of the view of the judge as to what has occurred at the trial it is essential that objection should be taken to such view upon that specific ground and in such a way that no doubt can exist as to the basis of the objection in fact.

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

APPEAL from the Supreme Court of New South Wales.

On 13th April 1953, Percy Walter Field brought proceedings in the Supreme Court of New South Wales against the Commissioner for Railways for New South Wales to recover damages for injuries sustained by him when he fell whilst alighting from a train in which he was a passenger. The material allegation in his declaration was that " whilst the plaintiff was lawfully alighting from the said train he was thrown on to the station and permanent way and was thereby seriously wounded etc."

The action came to trial on 24th to 27th April 1956 before *Brereton* J. and a jury of four, when a verdict was returned by the jury for the defendant and judgment entered accordingly.

The plaintiff moved the Full Court of the Supreme Court (*Owen* J., *Roper* C.J. in Eq. and *Manning* J.) for a new trial upon grounds which included the wrongful admission of evidence and misdirection. The motion was refused, whereupon the plaintiff appealed to the High Court.

The material facts are fully set out in joint judgment hereunder.

E. S. Miller Q.C. and *L. K. Murphy*, for the appellant.

N. A. Jenkyn Q.C. and *A. H. S. Conlon*, for the defendant.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered :—

DIXON C.J., WEBB, KITTO AND TAYLOR JJ. This appeal is brought by the plaintiff in an action against the Commissioner for Railways for New South Wales, who is the respondent, for the recovery of damages for personal injuries sustained through falling as he was alighting from a train in which he was a passenger. The action was tried before *Brereton* J. in Sydney from 24th to 27th April 1956. The jury returned a verdict for the defendant. The plaintiff applied to the Full Court of the Supreme Court for a new trial on grounds which included wrongful admission of evidence and misdirection. The application was refused and it is from the order dismissing the motion for a new trial that the present appeal is brought by the plaintiff.

H. C. OF A. 1957.

FIELD v. COMMISSIONER FOR RAILWAYS FOR N.S.W.

Dixon C.J. Webb J. Kitto J. Taylor J.

The accident occurred on Sunday 4th January 1953. At that time the plaintiff was a man of fifty-three years of age. He lived at a small township called Daroobalgie, situated some fifteen miles from Parkes on the railway line to Forbes. There is an unattended railway station at Daroobalgie. The plaintiff left Sydney on Saturday, 3rd January, by train. As the train did not always stop at this siding on a Sunday morning, the plaintiff informed the guard at Parkes that he wished to alight there. The guard however said that in any case it would stop. The train consisted of four vehicles and the plaintiff rode in the last before the guard's van. According to the plaintiff's story, when the train arrived at Daroobalgie it pulled up with the carriage in which he was riding not opposite the platform. Two intending passengers got into the carriage next the engine. The train then moved on and the last carriage, that in which the plaintiff had ridden, stopped opposite the platform. A passenger intending to alight then got out of the carriage and the plaintiff followed him. The plaintiff said that he had his leg off the step, that is, one leg in the air, his bag in his right hand, and that just as he was about to leave the train, the train started. He said that he fell on the platform and rolled down the incline, namely, the ramp at the end of the platform.

The case for the defendant Railway Commissioner was that the plaintiff got out before the train stopped on the second occasion. The guard gave evidence that the train first pulled up with the last carriage and the brake van short of the platform. The platform was on the left-hand side but the line curved so that you could see the engine only from the right-hand side of the brake van. When the train first stopped he saw the plaintiff standing in the middle door of the carriage next the brake van. After the two passengers had got into the leading carriage, the guard crossed to the other side of the brake van and signalled the engine to go forward slightly. The fireman on the right-hand side took the signal and repeated it to the engine-driver, and the guard then by signals stopped the train so that the leading carriage was opposite the platform. He then walked to the opposite side of the brake van and from that point saw the plaintiff lying on the ground. He went up to the plaintiff and asked him why he did not wait till the train stopped. The plaintiff gave an offensive answer which was open to the construction that he had admitted not having done so. The engine driver confirmed the evidence of the guard as to the movements of the train. Until he stopped the train on the second occasion he was looking at the fireman on the opposite side of the engine but

as soon as he stopped the train he looked out of his window and saw the plaintiff lying on the ground.

In his charge to the jury *Brereton* J. put the whole case as depending upon the question whether the train started while the plaintiff was in the act of getting off. His Honour said: "The result of this case depends on one single question; one question which can be stated quite shortly although it cannot be answered quite so easily, and that question is this: did that train start while the plaintiff was in the act of getting off it? If it did then it is virtually conceded by the defendant that the plaintiff ought to have a verdict". In concluding his summing up his Honour said: "I repeat: the question is did that train start while the plaintiff was in the act of stepping off? If you think the balance of evidence is in favour of the view that it did, you will find for the plaintiff . . . If you cannot make up your minds one way or the other you find for the defendant. If you think it did not, you again find for the defendant".

Three points were made in support of the plaintiff's contention that the jury's verdict should be set aside. The first point was that a piece of evidence given by a medical witness who had been appointed by the defendant to examine the plaintiff had been admitted wrongly. The evidence contained an admission attributed to the plaintiff that he was getting off the train while it was in motion. The contention for the plaintiff is that the conversation with the doctor who gave the evidence was the subject of privilege because it formed a part of or an incident in an attempt to settle litigation by negotiations without prejudice. The second point made was that a misdirection had occurred in a passage in the charge to the jury in which the learned judge had invited the jury to consider the inherent probability of the plaintiff falling if his story were true not as he did down the ramp but in the opposite direction. The third ground on which the validity of the verdict was attacked also rested upon a direction in the charge to the jury. In the course of his summing up the learned judge had informed the jury that as the defendant's case was that the plaintiff's story was a recent fabrication, evidence was admissible on behalf of the plaintiff that he had told other persons how the accident had happened before he had made the alleged admission to the defendant's doctor. This direction was challenged as lacking a sufficient foundation and as liable to lead the jury astray.

It is convenient to deal with the three complaints in the foregoing order. The plaintiff's writ was issued on 13th April 1953 and

H. C. OF A. 1957.

FIELD v. COMMISSIONER FOR RAILWAYS FOR N.S.W.

Dixon C.J. Webb J. Kitto J. Taylor J.

his declaration filed on 23rd September of the same year. The critical allegation in the declaration was that whilst he was lawfully alighting from the train he was thrown on to the station and the permanent way and was thereby seriously injured. By a letter dated 8th October 1953 and marked " without prejudice ", the solicitors for the defendant Railway Commissioner informed the plaintiff's solicitors that without admitting any liability the commissioner in order to avoid litigation was prepared to negotiate a settlement of the action on a compromise basis. The letter drew attention to the plaintiff's allegation of injury and asked whether his solicitors would please indicate whether the plaintiff was prepared to submit to a medical examination in Sydney by a specialist appointed by the Department's Director of Medical Services. The letter proceeded to deal with certain other questions of special damage and ended by stating that it was assumed that the plaintiff's solicitors would be agreeable that the time for filing pleas should not run pending a reply and the outcome of any negotiations. This was followed by other correspondence marked " without prejudice " which it is unnecessary to recapitulate. The outcome was an arrangement for suspending the proceedings whilst the plaintiff submitted to a medical examination by a specialist nominated on behalf of the defendant. The arrangements included terms as to the defendant's paying the expenses of the plaintiff's journey to Sydney for the purpose. The result was that on 17th November 1953 the plaintiff attended the consulting rooms of Dr. L. G. Teece, an orthopaedic surgeon practising in Sydney. At the trial Dr. Teece was called to give evidence of amongst other things the opinion he had formed of the plaintiff's condition. But during the cross-examination of the plaintiff the plaintiff had been asked without objection a series of questions concerning what he had said to Dr. Teece as to the manner in which he had met with his injury. He was asked specifically whether he had told Dr. Teece that on 4th January 1953 he had stepped out of a slowly moving train when it overran the platform at which he desired to alight. The plaintiff's answer was " No ". When Dr. Teece gave evidence he was asked, " Did you get a history from the plaintiff ? " He answered, " Yes ". " Will you tell us what the history was that you got from him ? " To this question an objection was raised on the ground that the interview with Dr. Teece was privileged as being " without prejudice ". The objection was overruled. Dr. Teece then said : " He told me that on 4th January 1953 he stepped out of a slowly moving train as it had overrun the platform at which he desired to alight. He fell down on the track and states

that he sustained a fracture of the spine". Dr. Teece then proceeded to deal with the nature of the plaintiff's injury, and what he had said about it. In cross-examination the notes taken by Dr. Teece were obtained by the plaintiff's counsel and put in evidence. The notes ran: "4.1.53. Stepped out of moving train as it had overrun platform; fractured spine". The notes then proceeded to deal with the injuries sustained.

No doubt the plaintiff's legal advisers hardly expected that the consequence of submitting their client to medical examination would be that the specialist by whom he was examined would give evidence of a crucial admission going to the cause of action. Had this been anticipated doubtless they would have been reluctant to allow their client to go unattended. On the other hand it seems equally clear that the purpose of the medical examination was to enable the defendant commissioner to see for himself what the plaintiff's injuries were and what was his present condition as the result of the accident. It can hardly be doubted that both parties understood that, if, as in the event happened, the negotiations for settlement should break down, then Dr. Teece might give the evidence of his actual observations of the plaintiff's bodily condition and the opinion he formed of his injuries. In this sense the examination had a double aspect. Primarily it was to enable the defendant to obtain a medical report in order to form an estimate of his injuries for the purpose of making an offer of settlement. Failing settlement, the purpose was to enable the defendant's medical expert to give evidence of what he saw. The law relating to communications without prejudice is of course familiar. As a matter of policy the law has long excluded from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties engaged in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them. The law relieves them of this embarrassment so that their negotiations to avoid litigation or to settle it may go on unhampered. This form of privilege, however, is directed against the admission in evidence of express or implied admissions. It covers admissions by words or conduct. For example, neither party can use the readiness of the other to negotiate as an implied admission. It is not concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence. But it is concerned with the use of the negotiations or what is said in the course of them as evidence by

H. C. OF A. 1957

FIELD v COMMISSIONER FOR RAILWAYS FOR N.S.W.

Dixon C.J. Webb J. Kitto J. Taylor J.

way of admission. For some centuries almost it has been recognised that parties may properly give definition to the occasions when they are communicating in this manner by the use of the words " without prejudice " and to some extent the area of protection may be enlarged by the tacit acceptance by one side of the use by the other side of these words: see *Thomas* v. *Austen* (1); *Kurtz & Co.* v. *Spence & Sons* (2); *Paddock* v. *Forrester* (3); *Hoghton* v. *Hoghton* (4); *In re River Steamer Co.*; *Mitchell's Claim* (5); *Walker* v. *Wilsher* (6). Needless to say, the privilege is a matter to be raised by objection to the admissibility of the evidence. For the purpose of deciding such an objection the judge may take evidence on the *voir dire*. The problem in the present case is whether what according to Dr. Teece the plaintiff said to him as to the manner in which the accident occurred is within the protection of the privilege. Looked at antecedently the question may be stated as being whether what he might unexpectedly say to Dr. Teece should be regarded as within the area of protection. In the first place as a matter of ordinary knowledge it must have been within the contemplation of the parties that some statement would be made by the plaintiff to Dr. Teece concerning the nature of his injuries. It could hardly be expected that an orthopaedic surgeon would not ask questions about symptoms, pain, capacity to move and so forth, and such matters must have formed part of the material upon which Dr. Teece would form his opinion. Clearly enough, these were not matters which were considered by the parties to fall within the protection of without prejudice negotiations. For it is plain that Dr. Teece was expected to give evidence of the opinion he formed should the negotiations for settlement break down. The question, however, does not depend altogether upon the expectations of the parties. It depends upon what formed part of the negotiations for the settlement of the action and what was reasonably incidental thereto. On the one hand it is contended that it was reasonably incidental to the negotiations to place the plaintiff without reserve in the hands of Dr. Teece and allow him to talk freely. On the other hand it is pointed out that Dr. Teece's function was wholly medical, that no one anticipated the plaintiff discussing the cause of action with him, that he had no function to perform in relation to the settlement except to report his medical judgment of the

(1) (1823) 1 L.J. (O.S.) K.B. 99.
(2) (1888) 58 L.T. 438, at p. 441.
(3) (1842) 3 Man. & G. 903, at p. 919 [133 E.R. 1404, at p. 1411].
(4) (1852) 15 Beav. 278, at pp. 314, 315 [51 E.R. 545, at p. 559].
(5) (1871) L.R. 6 Ch. App. 822, at pp. 831, 832.
(6) (1889) 23 Q.B.D. 335, at pp. 337 338.

plaintiff's condition, past, present and future, and that he was not a general agent of the defendant but was appointed only *ad hoc* to make a medical examination. Further, for purposes of the medical examination it was not necessary or reasonable that the plaintiff should state anything touching his cause of action.

The question really is whether it was fairly incidental to the purposes of the negotiations to which the medical examination was subsidiary or ancillary that the plaintiff should communicate to the surgeon appointed by the Railway Commissioner the manner in which the accident was caused. To answer this question in the affirmative stretches the notion of incidental protection very far. The defendant's contention that it was outside the scope of the purpose of the plaintiff's visit to the doctor to enter upon such a question seems clearly right. On the whole the conclusion of the Supreme Court that the plaintiff's admission fell outside the area of protection must command assent as correct. It was not reasonably incidental to the negotiations that such an admission should be protected. It was made without any proper connexion with any purpose connected with the settlement of the action. In these circumstances it appears that the evidence of Dr. Teece on this subject was admissible.

The objection made to the learned judge's inviting the jury to consider the inherent probabilities of the manner in which the plaintiff fell is of an altogether different order. It involves no question of law. It depends entirely on a matter of fact. The objection can be best dealt with by setting out the material passage in the charge. What his Honour said was this : " One of the ways in which you can test stories is by looking at the inherent probabilities. It is only a guide ; it is only some help ; because it often happens that what actually occurred is less probable than what you think might well have occurred, but it is always of assistance to look at the inherent probabilities. . . You must look at the inherent probabilities. The plaintiff says this : he was standing in the doorway. He had his suitcase in his right hand. He had his left foot in the air. The locomotive is up there and the guard's van down there and the platform there, and the end of the ramp is there. The train suddenly starts. Now you may or you may not have been standing passengers from time to time in electric trains. You will ask yourselves which way does a man tend to fall when the train starts, forward towards the driving end or back towards the brake van. Then recall that the plaintiff here fell on his suitcase. He says he fell on his suitcase and the suitcase is in his right hand, and he therefore fell to his right and was precipitated down the

H. C. OF A. 1957.

FIELD v. COMMISSIONER FOR RAILWAYS FOR N.S.W.

Dixon C.J. Webb J. Kitto J. Taylor J.

incline forward towards the locomotive." It is hardly necessary to do more than cite this passage to show that his Honour was putting to the jury a matter of fact depending upon conditions arising out of ordinary experience obtained by observation. The appeal was not to science but to common knowledge and ordinary observation. Whether his Honour was right or not was for the jury to judge and it is not a matter on which the plaintiff can successfully complain as a ground for setting aside the verdict.

The third ground of complaint depends upon a passage in the summing up which also must be set out. It is as follows: "There is this to be borne in mind also. The basis of the cross-examination of the plaintiff on this matter was that that was in fact a true story, that he had stepped from a moving train and that this story he told you in court was a recent fabrication. That being so it was open to the plaintiff, open to his counsel, to give evidence of any occasion on which the plaintiff had given to anybody else before he saw Dr. Teece or on the same date that he saw Dr. Teece, an account of the accident consistent with what he said here today, and that has not been done. We do not know what account of the accident he gave Dr. Callow (an orthopaedic surgeon who first examined the plaintiff in November 1953). We do not know what account of the accident he gave Dr. Delohery, (a doctor practising at Forbes who saw the plaintiff very shortly after the accident) and indeed, the first account, if you accept it, in point of time that has been related in court here is the account given to Dr. Teece." The objections made to this passage are that in the first place it was incorrect that the attack on the plaintiff's evidence was that it had been fabricated after his interview with Dr. Teece and secondly that the plaintiff had no adequate opportunity of meeting such a suggestion by the calling of evidence. Both these questions were investigated by the Supreme Court during the hearing of the appeal to that Court. It is however just the kind of thing that can only be elucidated at the trial. If a party denies the correctness of the judge's view of what occurred at the trial as the foundation of such a comment, the objection must be definitely made on that ground. It may be that the record of the evidence will suffice to put a court of appeal in as good a position to decide the matter as was the judge at the trial. But that is unlikely to be so and is not the case here. It is therefore essential that the two points now relied upon should be clearly made at the trial, namely, that neither in cross-examination nor in addressing the jury did the defendant suggest a recent adoption by the plaintiff of his present story and that in any case the plaintiff had no proper opportunity of adducing the evidence.

It is essential that such points should be made in such a way that no doubt can exist as to the basis of the objection in fact. In the present case the objection was taken at the trial that as a matter of law the evidence was not admissible except when fabrication was suggested. But the matter was passed over, without anything going on the notes enabling a court of appeal to form any judgment of its own as to the correctness of the judge's observation that the course pursued had opened the way to evidence of earlier statements made by the plaintiff bearing out his present story. It may be perhaps doubted whether the failure of the plaintiff's advisers to avail themselves of the admissibility of that evidence was a safe ground for drawing the inference that the plaintiff had not told his story at an earlier stage. It might have been safer had his Honour warned the jury more specifically of the uncertainty of the inference to be adduced from the failure to call the evidence which his Honour indicated. But there is nothing before this Court which entitles us to doubt the correctness of the view which his Honour took, namely, that such evidence had become admissible. After all on that footing the inference to be drawn and the use to be made of the matter was a question for the jury. The summing up as a whole placed before the jury in a clear form the arguments for and against the acceptance of the plaintiff's version and the passages that have been quoted above form only two of the matters dealt with by his Honour. In their context they would not strike the jury as of overwhelming importance. They do not contain any misdirection in law. They relate in the end to inferences of fact lying within the province of the jury and it would not be in accordance with proper practice to treat them as matters which go to the validity of the verdict. The result is that the appeal should be dismissed.

McTiernan J. The first question is whether the statement which according to the evidence of Dr. Teece the plaintiff made as to how the accident happened was admissible in evidence. The doctor's evidence was that the statement was made at his medical examination of the plaintiff on 17th November 1953. The statement was highly prejudicial to the plaintiff and it is clear that if it was wrongly admitted into evidence there should be a new trial of the action. It is argued for the plaintiff that he submitted to the medical examination as a step in the negotiations which the parties entered into, on the initiative of the defendant, for the settlement of the action and that consequently the privilege of a " without prejudice " communication was applicable to the statement. On the other hand, it is argued for the defendant that the statement was

H. C. OF A. 1957.

FIELD v. COMMISSIONER FOR RAILWAYS FOR N.S.W.

McTiernan J.

not made expressly without prejudice and the privilege does not apply because the medical examination was made not only for the purpose of the negotiations but also to enable the doctor to ascertain the nature and extent of the plaintiff's injuries and give evidence of the facts which he found upon the examination, if the negotiations failed. Having read and considered the correspondence between the parties in which the real purpose of the medical examination is to be found, I have come to the conclusion that the medical examination was induced by the representations of the defendant's solicitor that the defendant desired to avoid this litigation and to settle the action by a compromise. I am also of the opinion that the statement of the plaintiff, if made, was relevant to and connected with the medical examination, and accordingly has the privilege of an admission made during negotiations entered upon with a view to the compromise of an action. It was not made expressly without prejudice, but admissions during such negotiations must be taken to be made upon the tacit understanding that they are not to be used if the negotiations break down. That principle is well established by the decisions which were cited by Mr. *Miller* during the argument.

The action was one of negligence. The plaintiff alleged that he sustained serious injuries when he was alighting from a train at Daroobalgie station on 4th January 1953 and he claimed damages for the injuries and the pecuniary losses resulting from them. After the declaration in the action was served, the plaintiff's solicitors received a letter dated 8th October 1953 from the defendant's solicitor with reference to the action. The letter was marked "without prejudice". There was in the letter an introductory negation of liability on the part of the defendant coupled with an assertion that the plaintiff's own negligence caused the injuries. But it would appear that the defendant was not certain of his ground of defence. The letter in the plainest terms said that in order to avoid litigation the defendant was prepared to enter into negotiations for the settlement of the action "on a compromise basis". The letter went into details of what the defendant desired the plaintiff to do in order to advance the settlement of the action.

First, the defendant desired to know whether the plaintiff would submit himself to a medical examination by a specialist appointed by the defendant's Department, and the defendant promised to defray the travelling expenses incurred by the plaintiff in order to undergo the examination. Secondly, the letter inquired for figures and estimates of the plaintiff's pecuniary losses. It went as far as to ask for a list of expenses incurred by the plaintiff since the

declaration was filed. Furthermore, there was in the letter a request for a statement " as to the lowest amount " which the plaintiff would accept " in full settlement ". The letter also promised promptitude in considering the matter and claimed the indulgence of the plaintiff's solicitors in respect of the entry of a plea pending the outcome of the negotiations.

The letter which the plaintiff's solicitors wrote in reply showed the readiness of the plaintiff to enter into the negotiations for a settlement which the defendant had set on foot. It informed the defendant's solicitor that the plaintiff would submit to the proposed medical examination. The letter proposed some modification of the arrangement desired by the defendant about the time for filing pleas, in order that the hearing of the action would not be delayed too long, if the negotiations failed. The next letter from the defendant's solicitors expressed appreciation of the attitude of the plaintiff's solicitors on the extension of time for pleading. The letter said this : " The offer in my letter to you of the 8th instant to negotiate for settlement on a compromise basis was made with the express intention not only of avoiding the incurring of legal costs herein but also of disposing of the matter on an amicable basis. It is presumed therefore that as the defendant is filing a plea denying liability herein forthwith, you are agreeable, pending the outcome of the forthcoming medical examination to the defendant filing an amended plea if necessary . . . and that you are agreeable that brief will not be delivered to counsel pending the outcome of negotiations . . . ". A week later the defendant's solicitor wrote another letter to the plaintiff's solicitors stating that an appointment had been made for the plaintiff to be examined by Dr. Teece on 17th November 1953. The letter gave details of the travelling arrangements which the defendant had made for the plaintiff. The plaintiff's solicitors acknowledged the receipt of that letter. They suggested that the time for filing the pleas should be limited to twenty-one days from the medical examination and that after that time they would file a replication and set down the action for trial.

It is clear that the fixing of these times for the completion of the pleadings in the action did not mean that the negotiations had terminated. The object of the plaintiff's solicitors was clearly to avoid any more delay than was necessary in getting the action tried if the negotiations did break down. They added this : " Pending the outcome of settlement negotiations we certainly will not incur any more expense than is reasonably necessary . . . brief on hearing will not be delivered . . . until the question of settlement has been fully explored ". The letter contained the

H. C. OF A. 1957. FIELD v. COMMISSIONER FOR RAILWAYS FOR N.S.W. McTiernan J.

information which the defendant's solicitor requested by his letter of 8th October about the plaintiff's pecuniary losses. It stated that the plaintiff was to be examined by a specialist nominated by his own doctor and that until that examination was made the plaintiff could not " estimate a reasonable figure for settlement ". This was said because, as stated above, it was one of the things which the defendant's solicitor in his letter of 8th October 1953 asked the plaintiff's solicitors to let him have.

There is before the Court the letter of instructions which the defendant wrote to Dr. Teece for the purpose of the medical examination of the plaintiff. It stated that he was claiming damages in the sum of £5,000 " for injuries sustained when he either jumped or fell from a moving train as his carriage was drawn past Daroobalgie station on 4.1.53 ". It does not appear what was the reason for the failure of the negotiations for the settlement of the action. At the trial, Dr. Teece was asked whether he saw the plaintiff on 17th November 1953 and whether that was the first occasion on which he saw him. Then he was asked whether on that occasion he got " a history from " the plaintiff. He replied in the affirmative. These questions were asked without any reference to the letter of 8th October 1953, the " without prejudice " letter from the defendant's solicitor which induced the plaintiff to submit to the medical examination by the witness. Dr. Teece was then asked " What history did you get ? " The plaintiff's counsel objected to this question and relied upon the letter of 8th October 1953 to support the objection. The objection was disallowed. The answer of the witness to the question was that the plaintiff told him that on 4th January 1953 he stepped out of a slowly moving train as it had overrun the platform at which he desired to alight and fell down on the track. Having failed in his objection, Counsel obtained the production of the doctor's memorandum of the examination. It began as follows " 4.1.53. Stepped out of moving train as it had overrun platform ". The rest of the memorandum is a summary of medical facts.

Counsel did not object to the witness giving evidence of the medical facts found by him on the examination of the plaintiff. This did not involve any waiver of the privilege which he claimed in respect of the statement the doctor said that the plaintiff made to him as to the cause of the accident. The statement was one made on an occasion which arose by reason of and in the course of the negotiations into which the parties entered for the settlement of the action. For the reasons which are stated above, I am of the opinion that the privilege of a " without prejudice " communication

was applicable to the statement here in question, and that it was wrong to receive it in evidence. In this view it is not necessary for me to deal with the grounds of the appeal which concern the directions to the jury of which the plaintiff complains. I would allow the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *R. O. Palmer & Hall*, Forbes, by *Clayton Utz & Co.*

Solicitor for the respondent, *Sydney Burke*, Solicitor for Railways.

R. A. H.