

STERN AND ANOTHER V. J. A. REDPATH  
AND SONS LTD. AND OTHERS.

1949, March 24, August 4. Court of Appeal, Wellington. Sir Humphrey O'Leary C.J., Kennedy, Northcroft, Cornish and Stanton JJ.

*Wages Protection and Contractors' Liens—Abandonment or repudiation of head contract—Subcontractors for entire contract for supply of materials unable to charge moneys payable thereunder—Wages Protection and Contractors' Liens Act 1939, ss. 20, 21, 24, 26, 28, 31, 32—Statutes Amendment Act 1940, s. 59.*

Section 32 of the Wages Protection and Contractors' Liens Act 1939 (as amended by s. 59 of the Statutes Amendment Act 1940) requires every employer to retain until the expiration of thirty-one days after the completion of the work "one-fourth of so much of the contract price as has for the time being become immediately payable". This section would be a complete answer to a contractor suing for moneys so retained on a progress payment and he could only succeed in compelling payment of this money at the expiration of thirty-one days after the completion of the work. If the contractor never completes the work he can never compel payment of the 25% of the contract price which the employer was bound to retain whatever the terms of the actual contract.

Considering the joint effect of the contract and the statute, no moneys were payable to the contractor by the employers, and consequently the subcontractors were not entitled to recover any amount from the employers. Further, if the contractor could not enforce payment of a progress payment without deduction of damages claimable by the employers, neither could the lienors. *Taupo Totara Timber Co. v. Smith and Egden* (13 G.L.R. 240, 30 N.Z.L.R. 77); *McAndrew v. Tudehope* (7 G.L.R. 556) and *Allomes and Tarrant v. Goldsbury* (16 G.L.R. 607) applied. *Waters v. Gunn* (12 G.L.R. 669; 29 N.Z.L.R. 468) distinguished.

So HELD by the Court of Appeal (Sir Humphrey O'Leary C.J., Northcroft and Stanton JJ. per Stanton J.).

Per Kennedy and Cornish JJ. (dissenting):—That there were before the Court as claimants all who might possibly claim a charge or lien and in making claim to the moneys paid into Court they waived or renounced the benefit of s. 31 of the Wages Protection and Contractors' Liens Act 1939 and their rights must be determined as if that section did not apply and, as if the moneys were immediately payable. The contrary conclusion was that the owner must retain certain moneys for the benefit of sub-contractors and workers and retaining them for ever, must effectually deprive them of any benefit. *Waters v. Gunn* (*supra*) followed.

This was an appeal by special leave from the judgment of Christie J. (1949, G.L.R. 127) and was allowed.

*Harding* for appellants.

*Cresswell* for respondent J. A. Redpath and Sons Ltd.

*Stephenson* for respondent The Wellington Joinery Coy. Ltd.

*N. A. Morrison* for respondent The Residential Construction Co. Ltd.

*Harding* for appellants:

This appeal raises three questions: (i) Whether, if the head work is never completed, any contractor can get a charge on moneys retained under s. 32 of the Wages Protection and Contractors' Liens Act 1939. (ii) Whether a sub-contractor whose contract is entire and uncompleted is entitled to a charge at all. (iii) Whether upon the architect's certificate in

this case there were any chargeable moneys owing by the appellant to the contractor. Subsection (2) of s. 20 defines what is meant by "completion of work". Refers to s. 21 (1). The sub-contractor must show that at the material time there is, or was, money owing by the builder under the sub-contract. I submit: None of the parties were entitled to any charge upon the £337 10s. paid into Court and that it should go back to the building owner. The charge attaches when the notice is given: *Re Williams* (1 G.L.R. 224; 17 N.Z.L.R. 712). The charge is a floating charge until the work is done and notice is given. In order to found a sub-contractor's charge three things are required: (1) There must be a present prospective liability to the sub-contractor by the head contractor. (2) That liability must arise under the sub-contract, and not otherwise. (3) At the time when notice is given there must be money payable to the head contractor under the head contract, and not otherwise. At the material time, viz. November 18, there were no moneys chargeable in favour of the sub-contractors. Eighteen days previously the contractor had repudiated the contract, and that extinguished the appellants' liability to him. The repudiation gave the appellants the option (i) to treat the repudiation as an offer to rescind and to accept that offer, in which case the contract would be at an end, and each party would keep what he had received; or (ii) to sue for damages for the breach: see *Smith's Leading Cases* (13th ed., vol. 2, p. 35). If the contract was not completed there could be nothing owing to the contractor. If sued for damages, the measure would be the total cost of erection less contract price. *Hudson on Building Contracts* (7th ed. 343). In that event also there can be no question of any moneys being payable to the contractor, so that unless the notice of lien had been given on the date of the certificate and before the contract was repudiated, there could be no charge upon the moneys certified for. Where the contract is not completed, no sub-contractor ever gets a charge on moneys retained under s. 32, as amended by the Act of 1940. The £337 10s. was retainable under the section until the completion of the work, and the work has not been completed. There is no question of any surplus in fact. See *Taupo Totara Timber Co. v. Smith and Egden* (13 G.L.R. 240; 30 N.Z.L.R. 77). *Carrara Ceiling Coy. v. Taranaki Amusement Coy.* (1918, G.L.R. 200, 201). Upon the contractor's repudiation of the Wellington Joinery Co.'s sub-contract there could be no claim by the company under that contract. A claim for *quantum meruit* would be a claim *de hors* the contract: see *Taupo Totara Timber Co.'s case* (*supra*, p. 243); *Anson on Contracts* (17th ed. 384). The architect's certificate does not create a debt. It is addressed to the mortgagee, not to the owner. The qualification is clear warning to any person who wishes to act upon the certificate that it is issued subject to claims, or possible claims, of all kinds as between the owner and the contractor. The amount stated in the certificate is nothing more than an estimate of what the architect considers to be the value of the work. It cannot be treated as creating an immediate liability for the payment of an ascertained sum by the owner to the contractor. The judg-

ment of Christie J. makes no reference to the *Taupo Totara Timber Co.'s case* (*supra*) which concludes this matter. If the certificate created a debt, it created that debt on October 30, and on October 31 it was extinguished by the repudiation of the contract under which the debt had accrued. It is clear that the Wellington Joinery Co. was a sub-contractor. I do not contest the proposition that the Wellington Joinery Co. was entitled to sue on a *quantum meruit*.

*Cresswell* for Redpath and Sons Ltd.:

This is the first case to come before the Court in respect of the 1939 Act. At common law a sub-contractor or worker had no remedy against the owner of the land on which work had been done. The Contractors and Workmen's Liens Act 1892 created the right to a lien in favour of a contractor, sub-contractor, or workman on the interest of the "employer" in land or a chattel in respect of which work was done: see s. 2. By s. 5 of the Act the right was given to a charge by sub-contractors and workers upon the moneys payable by an employer to the head contractor. From the outset it was designed that the person against whom a lien or charge might be directed should hold a fund available for the payment of sub-contractors and workers: see s. 12 of the original Act. If a contractor were solvent, the sub-contractors and men had their common law remedy. In 1908 the Act, together with other Acts, was consolidated. The Act was amended in 1914, and, by s. 3, s. 51 of the original Act, which created a charge in favour of a sub-contractor, was amended. It had been found that the object of the Act might be defeated by the contractor giving an assignment of the moneys payable to him. *Collins v. Cooper and Another* (1912, G.L.R. 295). See now s. 24 (1) of the Act of 1939. The effect of the Act of 1939 was to remove many limitations as to time and to avoid the particularity with which notices of liens and charges were given, and also to stop various loopholes tending to defeat the principle of a fixed sum being available to sub-contractors and workers. *Farmers Union Trading Co. Ltd. v. A. W. Bryant and Co.* (1925, G.L.R. 313; 1925, N.Z.L.R. 290). The loophole disclosed by that case was closed by s. 20. A further material amendment which appears in the Act of 1939 is s. 24 (2). By the Statutes Amendment Act 1940, the section which had previously cast upon the employer a duty only in respect of the contract price enlarged that duty by making it clear that it extended, not only to the contract price, but also to moneys that had become immediately payable. The Legislature must by the amendment have had in mind the possibility that a contract might be abandoned, and to have intended to safeguard the workers in those cases. I submit: (1) The object of the Act is clearly to protect the right of sub-contractors and workers to be paid for their services, irrespective of the solvency of the contractor; and in this respect I adopt the language of Christie J. (2) On October 30, 1947, £300 became in fact payable to the contractor in terms of the contract, and under s. 21 (1) of the Act that sum became subject to charge by the sub-contractors if appropriate action were taken by them. (3) By virtue of s. 22 of the Act the moneys payable were enlarged to £337

10s., as £37 10s. had been paid in contravention of s. 32 of the Act as amended. (4) Such moneys never ceased to be payable to the contractor by the building owner. The question whether the architect's certificate had been properly given was not raised either before Christie J. or before the Magistrate. I rely on the terms of the contract that the certificate was duly given in conformity with the contract and made the moneys payable. *Halsbury's Laws of England* (2nd ed., vol. 3, p. 246, para. 429). *Hudson on Building Contracts* (7th ed. 269). *Baskett v. Gibbs Beach Gold Dredging Co.* (4 G.L.R. 193; 21 N.Z.L.R. 201, 204). *Weston's Contractors' and Workmen's Liens Act* (2nd ed., p. 6). Clause 4 of the contract points to an immediate liability on the part of the owner on the architect's certificate being given. The right to payment became vested in the contractor, and there is nothing in the contract to indicate that it was to be divested by subsequent events. The Legislature indicated by s. 24 (2) that the fund was to be preserved intact, and that when any person contracts to pay out more than 75% of the moneys payable to a contractor, as the employer did in this case, he does so at his peril. As to the effect of a section such as s. 24 (2), see *Gathercole v. Smith* (17 Ch.D. 1, 7). To allow the setting up of a counterclaim where it would tend to defeat the claim of a sub-contractor would be contrary to the Act. The most the appellants can establish is the right to counterclaim for unliquidated damages. The *Taupo Totara Timber Co.* case is an authority in favour of the respondents: Section 32 in itself gives no right to a charge: it merely creates a fund available for the charge. Sections 31 and 32 define the quantum of the fund. Either under s. 31 or s. 32 the moneys must be payable by the employer to the contractor, so that the question for this Court is whether there are any moneys payable.

*Stephenson for Wellington Joinery Co.:*

I adopt Mr. Cresswell's argument. As to the effect of abandonment or repudiation of a contract, see *Salmond and Williams on Contract* (2nd ed. 564). There was in this case a rescission for breach. The material date is the date of rescission: see *Dominion Coal Co. v. Dominion Iron and Coal Co. Ltd.* (1909, A.C. 293). *Taylor v. Laird* (156 E.R. 1203). *Salmond and Williams* (2nd ed. 566). *Boston Deep Sea Fishing Co. v. Ansell* (39 Ch.D. 339). The contractor was entitled on October 31 to institute a claim for £300. That sum was payable to him at common law under the contract. The *Taupo Totara Timber Co.* case is distinguishable: see clauses 15 and 17 (p. 241). Even if the architect in that case had certified for a progress payment it would not have become payable to the builder until he had complied with cl. 15. In this case a number of certificates were given, presumably in the same form as the present, and were acted upon by the parties as sufficient for the purpose. The sufficiency of the certificate is raised for the first time in this Court. As to the question whether by reason of the fact that the contract was an entire contract which was not completely performed there were any moneys payable by the employer—I understand it to be admitted that the company has a right to sue on a *quantum meruit* for

work done and materials supplied. Such a sum is money payable under a contract in terms of the Act. Although under the old rule of pleading it would be an action on the case and would not arise strictly *ex contractu*, nevertheless for the purposes of this action, it is an action arising *quasi ex contractu*. The words in the section are not "moneys arising exclusively", but "moneys payable, or to become payable". I rely on the extract and the cases quoted by Christie J. By the definition of "work" in s. 20, the company is entitled to claim for the work done and the material supplied. The judgment of Christie J. is correct, and the company is entitled to a charge on the sum of £337 10s.

*Harding in reply:*

The £337 10s. is payable to the appellants. *Michael v. Hart* (1902, 1 K.B. 482). *Mersey Steel and Iron Co. v. Naylor* (9 A.C. 434). When the notice was given there was nothing to which a charge could attach. *Gathercole v. Smith* (*supra*) is not in point: the word "transfer" is not in the Act. The Wellington Joinery Company were not "workers" but "contractors": the definition of "work" is subject to the context. Even supposing I am wrong in submitting that the repudiation put an end to the appellant's liability, it is still wrong to say that the money was payable by reason of s. 32.

*Cur. adv. vult.*

**O'LEARY C.J., NORTHCROFT and STANTON JJ.** (per STANTON J.):—This is an appeal by special leave from the judgment of the Supreme Court on an appeal from the Magistrates' Court.

The respondents sued the appellants and one J. Watt under the provisions of the Wages Protection and Contractors' Liens Act 1939, claiming a charge upon certain moneys which were alleged to be payable by the appellants to Watt. The Magistrate held that they were entitled to the charge claimed and on appeal from that judgment, Mr. Justice Christie upheld the Magistrate's contention.

The facts out of which the claim arose may be shortly stated as follows. The appellants entered into a contract with Watt whereby the latter undertook to erect a house for a total price of £2,200, and Watt entered into sub-contracts with the respondents. The work was begun and payments amounting to £1,050 were made to Watt under the contract. On October 31, 1947, Watt abandoned the contract and on November 18 notice of its intention to claim a charge was given by the first-named respondents and similar notices by the other respondents later. The value of the work done by Watt up to the time of abandonment was estimated to be £1,350 and the claim of the respondents was that they were entitled between them to recover from the appellants a sum of £337 10s. being 25% of £1,350. It was said that the appellants either had or should have this sum in hand and that it was payable to Watt in terms of the head contract.

It seemed to be common ground between the parties that the respondents could only maintain their claim and hold the judgments given in their favour if the sum of £337 10s. was shown to be payable by the

appellants to Watt and we think this assumption was well founded. In a long line of cases of which *Taupo Totara Timber Co. v. Smith and Egden* (13 G.L.R. 240; 30 N.Z.L.R. 77) is probably the most important, it has been consistently held that the Liens Acts were intended merely to divert to workers and sub-contractors moneys which would otherwise be payable by the employer to the head contractor, and this purpose was made more effective by provisions requiring the employer to hold back from the head contractor certain moneys, and preventing the head contractor from assigning moneys coming to him, and further ancillary provisions not here material. The present Act was passed after these cases had been decided and it contains no provisions altering this principle.

In the present case it is said that the amount claimed did actually become payable to Watt in terms of the contract and it is necessary, therefore, to examine this contract. It is a very short and somewhat crude document and is said to contain intrinsic evidence of having been drawn by laymen. After providing that the contractor is to erect the house in accordance with plans and specifications referred to and to the satisfaction of an architect, it contains the following clause:—

“4. Progress payments on account of the contract price to be made to the Contractor from time to time on the certificate of the Architect and for the amount specified in such certificate.”

Presumably, in pursuance of the provisions of that clause, the architect on October 30, 1947, gave a certificate in the following form:—

“*Re Residence J. Stern Esq., Rodrigo Road, Wellington.*

I hereby certify that a further advance may be made to Mr. J. Watt, Builder, 19 Hankey St. Wellington in part payment for the above works.

Estimate value of Contract work to date £1,350.

This certificate relates solely to the work done on and materials supplied to the job and it is issued without reference to any claims by the owner against the contractor or any other person against either of them.

F. Ost.”

Prior to the giving of that certificate, a sum of £1,050 had been paid to the contractor and the respondents' contentions are:—

(1) That on October 30, consequent on the issue of the architect's certificate, the sum of £300 became payable to Watt.

(2) That under s. 32 of the Act, this sum should be increased to £337 10s. payable to Watt on this date.

(3) That neither the subsequent abandonment of the contract by Watt nor any other event affected the status of this sum of money and it must, therefore, be now available for charge by, and ultimate payment to, the subcontractors.

As to (1), the basis of this contention is that the sum of £300 was immediately payable as a “progress payment” provided for in the contract, and reliance is placed on that part of the judgment in the *Taupo Totara Timber case* in which it is said that, if a contract provides for progress payments, the employer becomes liable to the contractor therefor. The difference however between that case and the present is that the progress payments mentioned in the *Taupo Totara Timber case* were payments over and above the 25% retention moneys, whereas here the so-called

progress payment is a portion of those moneys, and the question, therefore, arises as to whether such moneys did become immediately payable to the contractor, assuming, of course, that by the joint effect of the terms of the contract and the certificate they were agreed to be paid. The contention of the respondents gives no effect to s. 32 of the Act, which, as amended by s. 59 of the Statutes Amendment Act 1940, requires every employer to retain until the expiration of thirty-one days after the completion of the work “one-fourth of so much of the contract price as has for the time being become immediately payable”. We think there can be no doubt that, if Watt had sued the appellants for £300 on October 30, this section would have been a complete answer to his claim and he could not have succeeded, and that he could only succeed in compelling payment of this money at the expiration of thirty-one days after the completion of the work. This must mean completion by the contractor, and if he never completes the work, he can never compel payment of the 25% of the contract price which the employer was bound to retain, whatever the terms of the actual contract. In other words, the position is exactly the same as if the appellants had out of each progress payment retained 25% of the value of the work done up to date, except that in such case they would now have in hand £337 10s. instead of £300. If that is so, the case comes exactly within the decision in the *Taupo Totara case*, the essence of which is contained in the following extract from the judgment of Edwards J. at p. 243:—

“The important question to determine is whether or not the plaintiffs can maintain their claim to the moneys retained in hand by the defendant Smith under section 59 of the statute. In my opinion it is clear that they cannot . . . The charges thus created are merely upon the moneys payable by the person sought to be charged not upon the contract-price or any part of the contract-price as such. The subsequent clauses are machinery clauses, but they all show that no more was intended by the Legislature than is expressed in sections 51 and 52. The moneys required to be retained by section 59 subsection 2, are to be retained in hand until thirty-one days after the completion of the work. Within thirty days after completion, all persons who intend to claim a lien upon those moneys must give notice of that claim under section 56. If the work is never completed these provisions clearly can have no application.”

The reason for this conclusion is also stated in the judgment in terms which seem to be accepted by all parties as settled law:—

“A contract for the execution of a whole work for a lump sum is an entire contract, and the moneys payable under it cannot be recovered unless the work is performed in its entirety.”

The fallacy underlying the argument for the respondents and the judgments appealed from is that it has not been realised that s. 32 as now amended applies in terms to the class of contracts to which this is said to belong—namely, contracts which without referring to the Act make progress payments to the full value of the work immediately payable, and it says in effect that out of those “immediately payable” amounts the employer must retain one-fourth of the respective amounts until thirty-one days after the completion of the work.

It may be said that this result is unfair to workers and subcontractors on two grounds—first that it

makes use of a provision inserted in the Act for the protection of workmen and subcontractors in order to defeat in certain cases their claims; and secondly that it allows employers to obtain the benefit of 25% of the value of the work done and materials supplied by the head contractor, of which portion has been provided by unpaid workers and sub-contractors without having to pay for it. All that can be said in reply to these suggestions is that Parliament has not thought fit to impose on building owners any liability to workers or subcontractors additional to or beyond the liability that they have to the head contractor and, consequently, workers and subcontractors must still incur the risk of recovering nothing if the head contractor fails to complete his contract and so never becomes entitled to receive the 25% retention moneys that the law requires the owner to retain.

A contrary view is suggested by the judgment of Edwards J. in *Waters v. Gunn* (12 G.L.R. 669; 29 N.Z.L.R. 468), a case which was not cited in the argument before us and, presumably, not in the Courts below. The effect of that judgment seems to be that an employer may validly contract to pay to his contractor the whole of the contract moneys without providing for the retention of the statutory 25% and that, if he does so, the contractor can enforce payment of such moneys irrespective of the prohibitory terms of the Act. Such a conclusion seems to be in conflict both with ordinary principles of interpretation and with the views expressed by the same learned Judge in *McAndrew v. Tudehope* (7 G.L.R. 556) and in the *Taupo Totara* case, and we think that as a general proposition it can hardly have been intended by the learned Judge. Whatever force there might have been in the view expressed in *Waters v. Gunn* when that case was decided, it seems to us impossible to apply it to our statute in view of the amendment to s. 32 enacted in 1940. The statutory duty is now to retain one-fourth of so much of the contract price as has for the time being become immediately payable, or as would be so payable, but for a provision inserted in the contract to secure its retention *in conformity with the Act*.

We think, therefore, that *Waters v. Gunn* cannot be considered as an authority against the conclusion at which we have arrived.

The second contention of counsel for the respondents is really inconsistent with the first. If the position is that the rights of the parties to the contract are to be determined by the terms of that contract alone without reference to the provisions of the statute, then by no possible construction of the documents could it be said that more than £300 was on October 30 payable to the contractor. If on the other hand these rights are to be ascertained by considering the joint effect of the contract and the statute—as we think is the true position—then, as already indicated, the result is that no moneys were or are payable to the contractor by the employers. The penalty for failing to retain in hand the specified 25% is that, if and when the work is completed and charges by workers or subcontractors exceed the amount actually in hand, then the employer must personally provide and pay the amount required up to a maximum of

25%. See *Allomes and Tarrant v. Goldsbury* (16 G.L.R. 607). The fact that the appellants have in the past in breach of s. 32 failed to retain the required 25% does not prevent them from repairing that breach by subsequently retaining sufficient moneys to comply with s. 32.

As to the respondent's third contention: there are two things to be said—first that this is not an attempt to set off a claim for damages against moneys otherwise payable, but an inquiry as to whether or not any moneys were or are payable, the answer to which is in the negative.

The second answer is that even if the sum of £300 or some smaller sum had become payable as a progress payment, the employer would have a right of action for damages against the contractor for breach of contract and the measure of the damages would be the difference between the contract price and the cost of making the building conform to the contract, with the addition of the amount of profits or beneficial use lost by the breach. These damages need not now be recovered in a separate action, as was once the case, but could be recovered by set-off or counterclaim in the contractor's action, and *Baskett v. Gibbs Gold Dredging Co.* (*supra*) is to that extent no longer good law: see *Hudson on Building Contracts* (1946, pp. 342-3). If the contractor could not enforce payment of a progress payment without deduction of damages claimable by the employer, neither can the lienors. This consideration also seems to us to answer the suggestion that the lienors might waive compliance with s. 32 and so enable themselves to claim payment of the retention moneys. This might be so if the contractor were not in default, but we do not think it can be invoked to secure for lienors what the contractor himself could not in the circumstances here present have obtained.

In the result we think it must be held that there are no moneys payable by the appellants to Watt and, consequently, the subcontractors are not entitled to recover any amount from them.

There was a further question argued as to the special position of the Wellington Joinery Co. Ltd., but, in view of the conclusion to which we have come on the major and crucial questions it is unnecessary to deal with this subsidiary one. We think the appeal should be allowed with one set of costs on the middle scale, each of the respondent lienors to pay a proportion based on the amount of its claim. The appellants must have their costs in the respective actions in the Courts below. If any question arises in settling the amount of costs payable by or to any party it should be settled and the appropriate amount ascertained by the Registrar.

**KENNEDY J.**—This is an appeal by special leave from a judgment of Mr. Justice Christie which was delivered on an appeal from a Magistrate. An objection was taken, which was admittedly never raised in the Courts below, and I think not, now, in these proceedings, open, and I make no further reference to the objection as to progress certificates, but proceed to consider the main objections taken.

The first contention was that there were no moneys payable by the owner to the contractor and therefore

no moneys in respect of which there could be a charge. This submission was based upon the view that the contract was a lump sum contract and, as the contractor had failed to complete his contract, no moneys were payable by the owner. The contract itself, however, provided for progress payments and upon payment being certified, the owner became liable to pay the amount of such progress payments and the builder's subsequent default in completing his contract or indeed repudiation, in no way affected that liability to pay or cancelled out that indebtedness. I am not, of course, by that statement excluding the possibility of set-off or deduction from the sum otherwise payable. Formal contracts usually contain express provision for that. I record that although there was mention at one stage of an adjournment to prove damages no question of set-off or deduction from the progress payment would appear to arise. The law is correctly stated, so I think, in *Salmond and Williams on Contracts* (2nd ed., p. 565) where it is stated:—

"It may be concluded accordingly that the rescission of a contract (unless it otherwise provides) is not retrospective rescission *ab initio*, and is not retrospective rescission as from the date when the contract became voidable for breach, but amounts exclusively to the prospective determination of the contract as from the date of rescission, putting an end to the contract so far as it still remains executory on either side at that date, but leaving the contract unaffected in respect of its operation up to that date.

From this conclusion it follows that on the rescission of a contract for breach neither party (unless the contract otherwise provides) possesses any such general right of *restitutio in integrum* as exists in the case of rescission for fraud . . . But in rescission for breach the contract remains operative as to the past, and therefore precludes any such claim for restitution in respect of acts of performance prior to rescission. Money which has been paid or property which has been transferred by either party to the other prior to such rescission must in general stay where it is and cannot be recovered.

On the same principle every obligation which has accrued due between the parties before the rescission of the contract, and which so creates a then existing cause of action, remains unaffected by the rescission and can still be enforced."

Reference should also be made to *Dominion Coal Co. Ltd. v. Dominion Iron and Steel Co. Ltd.* (1909, A.C. 293).

It was, however, submitted that the sum of £300 being the difference between the £1,350 the value of the work, and the sum paid, £1050, or the sum of £337 10s. was to be retained until the completion of the contract and the work was not completed and never would be completed. This sum was accordingly never available as money immediately payable. If s. 31 imposed an absolute obligation on the owner, irrespective of any contract and in all circumstances superseding any arrangement to the contrary, then the submission is correct. Section 31 does not constitute the owner a trustee of moneys, nor does it provide for a separate trust fund but it merely imposes a duty as part of the scheme for working out responsibility by the owner if he should pay in breach of the duty. Discussing a corresponding section, Edwards J., in *Waters v. Gunn* (12 G.L.R. 671; 29 N.Z.L.R. p. 470), said:—

"The enactment simply directs the employer to abstain from paying the full amount of his debt to the contractor

in order that the rights of claimants under the statute may be preserved for the prescribed time. The words used are 'shall retain in his hands', but they can mean no more than this. If the employer were directed to set aside a certain part of his debt in such manner that it would form a fund to meet claims under the Act, independently of the employer's solvency, it would be a different matter. It is plain, however, that the value of this enactment to those interested must in all cases depend upon the employer's solvency. If the employer chooses to pay his debt in full, he cannot set that up as an answer to a claim which comes within the statute; but that is the only effect of subsection 2 of section 59. There is no penalty attached to the payment of the debt in full without regard to the provisions of the statute. It would be idle to suggest that such a payment would involve the employer in any penal consequences, or that as between the employer and the contractor it would not be an effectual discharge of the debt. If, therefore, the employer chooses to take the risk to which he exposes himself by disregarding this statutory provision, he can, in my opinion, lawfully do so. If he can lawfully do so, I see no reason why he cannot lawfully contract to do so."

I have not quoted the opinion of Mr. Justice Edwards as to s. 59 (2) being what he termed directory and not mandatory, and I do not rely upon his judgment for this.

If, however, it be said that s. 31 prevented the owner from depriving himself of his ability to pay by directing the retention of part of the moneys which were payable and that this rendered unenforceable that provision of the contract which provided for the immediate payment I may say it may well be that in a straight out conflict between the statutory duty and the contractual duty, there being no question of waiver or consent, the statutory duty must prevail. But those entitled to the benefit of the statutory provision might waive their rights to its benefit. Not only might they waive their rights but they might expressly contract not to insist on them and a contract with those for whom such duties were laid not to lay claim to their performance would be valid: *Griffiths v. Earl of Dudley* (1882, 9 Q.B.D. 357); and a contract might be inferred even from acquiescence: *Davis v. Bryan* (1827, 6 B. & C. 651) and *Bond v. Rosling* (1861, 1 B. & S. 371). But it was said that all rights in respect of the moneys retained have been lost because the owner is retaining them and must retain them pursuant to s. 31. I do not think in the circumstances this submission can have effect. There were before the Court as claimants all who might possibly claim a charge or lien and in making claim to the moneys paid into Court they waived or renounced the benefit of s. 31 and their rights must be determined as if that section did not apply and, as if the moneys were immediately payable. The contrary conclusion is that the owner must retain certain moneys for the benefit of sub-contractors and workers and retaining them for ever, must effectually deprive them of any benefit.

The sum apparently payable is £300 and neither £337 10s. nor £350. The contract provides for 5 per cent retention moneys and the proper course was, although the contract is in general terms, to treat the 5 per cent as accruing and deductible as the work proceeded which would make the deductible sum £67 10s. This leaves a distributable balance of £237 10s. The right of the parties should be adjusted with reference to that sum.

As to the claim of the Wellington Joinery Company Ltd. it may be said that by the default of the contractor there became substituted for the obligation to pay only on the completion of the work, an obligation to pay a fair price for the work actually done and this, having regard to the event must be deemed the contract. The objection raised to the claim of the Wellington Joinery Company Ltd. could not, however, in view of the sum found to be payable in any way assist the appellant, and, if sound, would merely affect the other parties *inter se* and no objection had been taken by any of them. From the above observations the rights of the various parties can be readily calculated. The case should, in my view, be formally remitted to the Magistrates' Court to work out the rights of the individual parties in accordance with this judgment.

**CORNISH J.**—I concur in the judgment just delivered by Mr. Justice Kennedy.

Solicitors: for appellants: *Tuckwell & Roache*, Wellington; for respondent J. A. Redpath and Sons Ltd.: *O'Donnell, Cresswell & Cudby*, Wellington; for respondent Wellington Joinery Co. Ltd.: *Stephenson & Anyon*, Wellington; for respondent Residential Construction Co. Ltd.: *Chapman, Tripp, Watson, James & Co.*, Wellington.

#### HARRIS V. THE GENERAL MANAGER OF N.Z. RAILWAYS AND ANOTHER.

1950, June 19, July 14. Court of Appeal, Wellington. Sir Humphrey O'Leary C.J., Callan and Stanton JJ.

*Public Service—Transfer without promotion—Right of appeal against—Jurisdiction of New Zealand Railways Appeal Board to hear and determine—Findings not examinable in Supreme Court—Government Railways Amendment Act 1927, ss. 5, 6, 7 and 11—Amendment Act 1928, s. 4.*

Every appointment made under s. 5 of the Government Railways Amendment Act 1927, which includes the transfer of a member of the Department to a position from any other position in accordance with subs. (1), is subject to a right of appeal by any member who, if appointed, would thereby obtain promotion.

As to whether the appellant was or was not qualified for appointment to the position in question and therefore could not in any event be appointed to it, the proper determination of this question was a matter for the Appeal Board whose finding thereon was not examinable in the Supreme Court. *Cooke v. Charles A. Vogeler Co.* (1901, A.C. 102) and *Van de Water v. Bailey and Russell* (1921, G.L.R. 83; 1921, N.Z.L.R. 122) followed. *Rockland v. Auckland Electric Tramway Co. Ltd.* (1918, G.L.R. 636; 1918, N.Z.L.R. 824) referred to.

This was an appeal from the decision of Hay J. (reported 1949, G.L.R. 613) and was allowed.

*Page for appellant.*

*Evans K.C.*, Solicitor-General, for first respondent.

*Blundell* for second respondent.

*Evans, K.C.*, for first respondent:

The Appeal Board has not been made a party. If joined it would submit to the judgment of the Court.

*Page for appellant:*

The first question is whether the Appeal Board had jurisdiction to entertain the appeal—Does any member of the Department for whom an appointment would have meant promotion have a right of appeal against an appointment which has been made by transfer? The answer lies in the interpretation of the Government Railways Act 1926 and its amendments and the regulations made thereunder. The question involves a close examination of ss. 5, 6, 7 and 11 of the Amendment Act of 1927. The position was created in October, 1948, and the law then in force is the law to which regard must be had. The statutory provisions involved are of considerable complexity. Section 5 (1) of the Government Railways Act 1927 was amended by s. 12 of the Act of 1936. Before examining the sections I invoke the rule that if one construction will do an injustice and another will avoid that injustice, it is the bounden duty of the Court to adopt the latter construction. *Craies on Statute Law* (4th ed. 91). To deprive the appellant of his right of appeal and the consequences which follow from the exercise of it, without any compensation, is to take from him a substantial yearly payment which he has earned and enjoyed for nearly four years. That has been done by the creation of this new position the duties of which the appellant has been carrying out to the satisfaction of the Department. There is no suggestion of increased efficiency, and it is common ground that Mouton has received no material advancement. The General Manager had authority to transfer any member of the Department to the new position provided he did so in accordance with the provisions of s. 5. Subsection (2) provides for notification "whenever practicable". In this case the vacancy arose in a position which carries an annual salary not exceeding £765, and the filling of that position by transfer would result in the member's promotion. The position was created and was notified by official circular. It would seem to follow that the General Manager at that stage was not of opinion that the appointment should be made forthwith, so that subs. (3) has no application in this case. It was mandatory on the General Manager to notify the vacancy, because there were officers in the Service to whom the appointment would have meant promotion. Subsections (4), (5) and (6) state the principles upon which appointments shall be made. Preference must be given to the member who in the opinion of the General Manager is the most efficient and suitable to be appointed. There would seem to be four possible classes of appointments: (1) By notification followed by transfer of the appointee involving promotion, (2) By notification followed by transfer not involving promotion, (3) Without notification, by transfer of the appointee involving promotion, and (4) Without notification, by transfer of the appointee not involving promotion. Section 7, subject to the provisions of s. 11, gives a right of appeal in each of the four classes referred to. Here the vacancy was notified, and we say that it had to be notified. Had Harris been appointed it would have involved promotion, and his right of appeal is clearly laid down in subs. (7). That view seems to be sup-



ported by the Trial Judge. Section 6 applies to cases (1) and (3), i.e., cases in which the member transferred has obtained promotion, whether or not the vacancy has been notified. Section 7 gives the General Manager power to cancel a provisional appointment. In considering the effect of ss. 6 and 7 regard must be had not only to s. 5, but also to subss. (b) and (c) of s. 11. The paragraphs are framed in very general language. The Trial Judge refers to s. 11 (1) (b) and the judgment shows that he is of opinion that, in view of ss. 6 and 7, para. (b) should, as subs. (7) of s. 5, be confined to cases which involve promotion for the appointee. His Honour does not specifically refer to para. (c) of s. 11 (1), which it would seem, if the Judge is correct, should also be construed as confined to cases in which the appointment involves promotion for the appointee. But subs. (7) of s. 5 and paras. (b) and (c) of s. 11 (1), when looked at alone, confer on a member whose appointment would have involved promotion a right of appeal not only in classes (1) and (3) but also in (2) and (4). The crucial question seems to be whether ss. 6 and 7, or either of them, are sufficient in themselves to show that such a right of appeal is to be confined to cases of transfers involving promotion. The Judge has found that it is impossible to read s. 6 in any other sense than as providing that an appointment by way of transfer under s. 5 which does not involve promotion is not subject to appeal. If he is correct, then that construction gives rise to three serious objections: (1) Such a construction has the effect of deciding that not only subs. (7) of s. 5 but also paras. (b) and (c) of s. 11 are to be construed in a manner that places an important qualification on the meaning of the plain and unqualified language that is contained in them. To confine the right of appeal to those cases in which the appointee has obtained promotion is to ignore to a great extent the clear wording "Every appointment made under s. 5 and any member for whom appointment would have meant promotion". Similarly with regard to s. 11. In this case applications were called, and Harris applied for the position and the consequent promotion. To decide in the face of that that the right of appeal can be taken away by a simple transfer without promotion is to deny any effect to paras. (b) and (c). (2) The second objection is that if that construction is correct then it would appear from the provisions of subs. (2) of s. 6 of the Act of 1927 that the later provisions in subs. (1) of s. 4 of the Act of 1928 are wholly redundant. Under subs. (2) of s. 6 the appointing authority is bound to appoint a successful appellant and to cancel any provisional appointment that may have been made. If the Judge is correct then the necessary powers of appointment and cancellation are contained in s. 6 (2) and the rights of a successful appellant are fully protected, and s. 4 of the Act of 1928 becomes wholly redundant. Section 6 is limited to transfers involving promotion, and subs. (2) refers to appeals against any such appointment, i.e., appeals involving promotion. If the right of appeal is not so limited, then the Amendment Act was necessary because without it a successful appellant has no provision under which his declared right of appointment can be enforced. (3) A third objection is that if the

Judge is correct, then the Appeal Board cannot in its consideration have regard to subs. (2) of s. 4 of the Amendment Act of 1928. Under s. 5 (4), when a vacancy is notified the appointing authority can consider only applicants for the position. If the applicants include persons in the position of Mouton, for whom appointment does not mean promotion, and the vacancy could be filled by simple transfer, nevertheless the appointing authority is enjoined and must have regard to the rules laid down in subss. (4), (5) and (6). Preference must be given to that member who appears to be the most suitable and efficient, and if two members are equally suitable then the senior must be appointed. If the construction placed on the Act by His Honour is correct then the Appeal Board cannot observe the rules laid down in subs. (2) of s. 4 because, according to that construction, it has no jurisdiction to entertain the appeal. If s. 6 is not to be construed as limiting ss. 5 and 11 as the judgment has found, then the question arises as to why it was enacted. The answer is that if a person is appointed under s. 6 he is automatically entitled to the increased grading, salary, and privileges which the position carries: see Regn. 52. If the section had not been enacted an appointee by way of transfer would obtain no increase in status, salary, or privileges; and as such appointee he has a vested right to such increase in salary and status. He could be reduced only under s. 77 of the Act of 1926. If s. 6 had not been enacted there would be no power to make provisional appointments. Finally as to s. 7. The words that create the greatest difficulty are the words "The appointing authority may at any time cancel a provisional appointment if in its opinion the office can be suitably filled by transfer without promotion of any other member". We say that the General Manager can fill the position only under s. 5. To take the words as showing that the Legislature meant that there should be no right of appeal against a transfer without promotion is to negate the clear words in s. 5 (7), paras. (b) and (c) of s. 11 (1), and to make redundant s. 4 (1) of the Act of 1928. The statute must be interpreted as a whole, and if so interpreted there is clearly a right of appeal vested in the appellant. It has been suggested by the Judge that to grant the appeal would hamper the administration of the Department. Paragraph (2) of Mr. Reid's third affidavit is an answer to that suggestion.

*Evans, K.C.*, for first respondent:

The Department only wishes to put forward the view on which it has acted in practically all the cases since 1927 and which it has assumed to be correct, though in some cases it has acquiesced in an appeal and acted upon the result where no question has been raised. The legislation is undoubtedly difficult of construction. Section 4 of the Act of 1927 recognises that appointments may be made of persons outside the Service, whereas ss. 5, 6 and 7 all relate to appointments by transfer. Applicants for the position would have a right of appeal against an outsider who has been appointed: see subs. (1) of s. 4 of the Act of 1928. It would seem that this legislation must have been the result of discussions between the Government and the representatives of the officers of the



Department and that more attention was paid to endeavouring to arrive at agreement than to close and unhurried study of the language in which to express it. Both the Government Railways Act 1927 and the Public Service Act 1927 were passed at the end of the Session. With regard to s. 5, if the First Division of this Court upholds the decision of Northcroft J. in *Deynzer v. Campbell and Others* (1949, G.L.R. 444) it will recognise that there is an inherent right on the part of the Crown to transfer an officer at any time from one position to another. In subs. (2) of s. 5 the word "shall" has been altered to "may" by s. 31 of the Finance Act (No. 2) 1948, passed on December 3, 1948. In this case the notice was published on October 28, 1948, and Mouton's transfer was announced on February 15, 1949. The words "If the filling . . . promotion" are capable of two meanings. They may mean (i) That if the General Manager proposes to transfer any member with promotion he must notify the vacancy, but if he proposes to transfer a particular member without promotion he can do so without notifying the vacancy; or (ii) That if there is then in the Department any qualified member to whom the appointment would mean promotion if he applied for it, the vacancy must be notified even if the General Manager has formed the intention of transferring a particular member without promotion. I feel constrained to agree that the latter interpretation applies to this case. Although this was a new position it was a vacancy. The question is, What is a qualified member? Is it one whom the General Manager thinks to be qualified, or does "qualified" refer to the qualifications required by the regulations? Refers to s. 89 (1) (e) and (g) of the Act of 1926. I submit that "qualified member" has reference to the regulations prescribing the qualifications for particular positions. Refers to Public Service Amendment Act 1927, s. 8. I pass to subs. (3) of s. 5, having conceded that subs. (2) throws a position open to competition by members who are enterprising enough to seek promotion as against those who do not. That permits the appointment either of a member to whom it involves promotion or of a member to whom it does not mean promotion. Section 7 suggests that there is a right of appeal in both cases. Subsection (4) refers to "members being applicants". Subsection (5) is consequential on subs. (4) and must refer to "members being applicants", and so in subs. (6). It is definitely ascertained as a fact, though not shown in the printed case, that Mouton was an applicant for the position. In subs. (7) it may be that the words "Any member, subject to the provisions of s. 11, may appeal therefrom" refer to the procedure, time, and other matters that are mentioned in subss. (2), (3), (4) and (5) of s. 11 prescribing the procedure for appeals. That may mean that the appointment may be made (a) after advertisement under subs. (2); (b) Without advertisement under subs. (3); (c) Without advertisement because the case does not fall within the words of subs. (2) but is within the general power of transfer to which I have already referred, and whether the case falls within subss. (2) or (3), a member may be appointed without promotion. It may be deduced that subs. (7) gives a right of appeal

even where the appointee is appointed without promotion. Subsection (3) supports that view. However, ss. 6 and 7 give the clearest possible indication that there is no right of appeal where the transfer is made without promotion. With regard to s. 6, the sole purpose of making a transfer provisional when it involves promotion is to afford time for the lodging and disposal of appeals. There is nothing in it to make provisional an appointment without promotion. There can be no appeal against such an appointment. That view is further confirmed by s. 7 which gives power to cancel a provisional appointment made with promotion in order to make an appointment without promotion. Against the latter there is no provision for appeal. If it were possible to have an appeal in such a case, there might be a never ending series of appeals. It is unreasonable to suppose that the Legislature intended to make such a final appointment possible after (a) a provisional appointment, and perhaps also (b) an unsuccessful appeal, if it was not also intended to make such a final appointment possible in the first instance. One of the consequences of the appellant's submissions would be that a junior member has a right of appeal against the transfer of his senior without promotion, while the senior member admittedly has no right of appeal against the transfer of his junior without promotion. There remains for consideration s. 11 (1) (b) and (c). This case is not (c). That applies where there has been no notification. Paragraph (f) may pick up subs. (7) of s. 5 if the word "determination" includes appointment. But s. 5 (7), equally with s. 11 (1) (b), is restricted by ss. 6 and 7. I concede that my submissions require the Court to refuse to interpret s. 5 (7) and s. 11 (1) (b) according to the literal words used and to write qualifications into those sections. The whole matter crystallizes itself at that point. The provisions of ss. 6 and 7 are so emphatic as to require that s. 11 shall leave room for both sections to have as much operation as possible. Looking at s. 5 as a whole, there are expressions which are ambiguous and would appear to be oversights due to hasty drafting. Sections 6 and 7 deal with a particular case, namely the appointment of a member without promotion; and the general provision later in s. 11 must yield to the particular provision. *Halsbury's Laws of England* (2nd ed., vol. 31, p. 484, paras. 484, 604). *Pretty v. Solly* (26 Beav. 606, 610; 53 E.R. 1032). *Craies on Statutes* (4th ed. 198, 200). *Moss v. Elphick* (1910, 1 K.B. 465, 468, 846). The corresponding sections in New Zealand to those considered in *Moss v. Elphick* are sections 29 (1) and 35 of the Partnership Act 1908. Statutes giving a right of appeal must be expressed in clear and unambiguous language: *Halsbury's Laws of England* (2nd ed., vol. 31, p. 504, para. 645). The reason for the enactment of s. 4 of the Amendment Act of 1908, which at first sight appears only to repeat the effect of s. 6 (2) of the Act of 1927, is that s. 6 (2) relates only to transfers within the Service, and there existed in 1927 no provision touching the case of an appointment made from outside the Service. In 1928 the amendment was intended to supply that deficiency. Subsection (2) of s. 4 was designed to bind the Appeal Board to the same considerations as already

bound the General Manager under s. 5, subss. (4), (5) and (6) of the Act of 1927.

*Blundell* for second respondent:

I. (1) I respectfully adopt the submissions of the Solicitor-General and the reasoning of the Trial Judge that there is no right of appeal where a transfer is without promotion. The difficulty of reconciling ss. 5 and 11 with ss. 6 and 7 of the Act of 1927 disappears if s. 7 is interpreted in the restricted sense referred to by the Solicitor-General. All that can happen under s. 5 is a provisional appointment, see s. 6. If the stage of a provisional appointment is reached, s. 7 permits the appointment to become inoperative if the General Manager decides that it is unnecessary to fill the position. In effect, there would then be no "determination" to bring s. 11 (1) (b) into operation. Section 7 permits the same result where there is a transfer without promotion. Here the appellant was not given the provisional appointment, but under s. 7 the same result is reached for the unsuccessful as for the successful applicant. (2) The inherent right of the General Manager to transfer employees is confirmed by Regulation 40 of the 1922 Regulations. Those regulations have been inferentially approved by the Legislature: see the Amendment Act of 1944, s. 43 (5). (3) The scheme of the legislation shows a virtually unrestricted right of appeal prior to 1927 but definite restrictions since then. Cf. s. 60 of the Act of 1908, repeated in s. 81 of the Act of 1926, with s. 5 of the Act of 1927. II. The second respondent raises the further defence that as the appellant has never been classified as a shunter he is prohibited by Regn. 58 (2), (4) and (5) of the 1922 Regulations from being appointed to the position of Wharf Storeman and accordingly the Appeal Board had no jurisdiction to purport to appoint him to that position. He is not a "qualified member" under s. 5 (2) of the Act of 1927. The point involves consideration of Regns. 49 (a) and 58 as to which is to prevail. The Trial Judge left the matter open but indicated that his opinion was adverse to this submission. Affidavits show that the Department has not observed Regn. 58 strictly, and hence this defence is scarcely available to it. I concede that the appellant is a "specially qualified" person under Regn. 49 (a) and that this submission fails unless that regulation is subordinate to Regn. 58. The judgment suggests three reasons why this proposition should not be accepted. Each is incorrect. As to the authority to make regulations, see s. 68 of the Act of 1908. That is repeated in s. 89 of the Act of 1926. The Act of 1944 gives statutory authority to existing regulations. Prior to 1922 there was no provision in the regulations corresponding to Regn. 58. The first regulations applicable to railways were made in 1900: see *New Zealand Gazette* (1900, p. 1,669). Regulation 21 of those regulations contains provisions similar to the existing Regulation 49 (a). The next consolidation of the regulations was in 1913: see *New Zealand Gazette* 1913 (p. 3617). Regulation 34 was similar to R. 49 (a). The next and existing regulations appeared in 1922: see *New Zealand Gazette* 1922 (p. 1583). Regulation 58, being a particular and later provision, must be con-

strued strictly against the earlier and general provision of Regn. 49 (a). Refers to *R. v. Cunningham* (1919, G.L.R. 337). Section 58 is in mandatory terms and restricts the right of promotion of the person it affects to certain positions unless the requirements regarding shunting have been complied with. As to the suggestion that the regulation may be *ultra vires* of s. 88 of the Act of 1926, Regn. 58 does not offend against s. 88 because it does not prevent a person from attaining some other position but merely attaches conditions which have to be fulfilled before he can be promoted. The regulation in that sense is similar to Regns. 43, 44 and 45 prescribing conditions with regard to engineers and others. Regulation 58 must be construed strictly, and the mere fact that Wharf Foreman is a position created subsequently to 1922 does not affect the restricted positions open to the appellant. He may go to Goods Foreman and "to no other position": Regn. 58 (4) and (5). Regulation 58 (4) refers to "Traffic Storeman in Grade 1". The present qualification of the appellant is "Storeman in Class 1—Traffic" and this is equivalent to "Traffic Storeman in Grade 1": see second affidavit of Reid. The reference by the appellant in his affidavit to his position being that of Wharf Storeman is not correct. The appellant has not been classified as nor has he served as a shunter. Although it would appear that the work involved in the positions of Shed Foreman and Wharf Foreman has marked similarities, the fact remains that Wharf Foreman is a different position, and Regn. 58 (4) makes it clear that the appellant can be promoted to the position of Shed Foreman in charge of Goods and to no other position. As a matter of fact his lack of eligibility disentitles him under Regn. 58 (2), but that is of no practical importance because the same result is achieved under Regn. 58 (4) and (5). If Regn. 58 does apply and overrides Regn. 49 (a) the appellant is not entitled to be appointed to the position of Wharf Foreman. As to whether that is a matter for the Appeal Board or for this Court: The right of appeal is given by ss. 5 and 11. Any rights of appeal that the appellant may have to the Appeal Board, and any jurisdiction which the Appeal Board may have, necessarily require the appellant to be a qualified member. Qualification must be bound up with the regulations, and if on the undisputed facts the appellant is not qualified by virtue of Regn. 58, then he is not entitled to be appointed Wharf Foreman. [Callan J. refers to s. 32 of the Finance Act (No. 2) 1948.] That section has no application in this case. The appellant was not in the First Division, and therefore in any event the provisions of the Act of 1949 could not apply.

*Page in reply:*

Regulation 58 is inconsistent with the clear provision of s. 88 of the Amendment Act of 1926. Regulation 58 (4) is a general provision: Regn. 49 (a) a specific provision. The specific provision should prevail. Section 6 of the Act of 1927 was enacted to ensure that an appointment involving promotion should be provisional. It is possible to give the words of s. 7 some meaning without doing the harm that is

done if one is forced to the interpretation contended for by the Solicitor-General and by Mr. Blundell.

*Cur. adv. vult.*

**O'LEARY C.J.**—These proceedings were initiated by a motion for the issue of a Writ of Mandamus commanding the first defendant to appoint the plaintiff to the position of Wharf Foreman, Grade 4-3, at Wellington, upon the grounds that the plaintiff is entitled to be appointed to the position and the first defendant, as the appointing authority, has failed and wrongfully refused to perform a duty incumbent upon him to appoint the plaintiff. The second defendant being the person actually appointed to the position claimed by plaintiff was subsequently joined as a defendant.

The undisputed facts on which the proceedings are based are fully set out in the judgment appealed from and it is convenient to repeat them, which I do by citing the precise words of the judgment of Hay J. (1949, G.L.R. 613):

"The facts are that by circular memorandum dated the 28th October, 1948, a vacancy was notified in the newly created position of Wharf Foreman, Wellington Goods (Grade 4-3, Division 1—maximum £560) in respect of which applications were to close on the 9th November, 1948. Plaintiff, whose position was 'Storeman in Class 1—Traffic' made application for the new position, and it is acknowledged that had he been appointed, it would have represented promotion for him for the purposes of the Government Railways Act 1926 and its Amendments. By official circular memorandum of the 15th February, 1949, it was announced that the second defendant had been transferred to the said position of Wharf Foreman of exactly the same grading and maximum salary, the transfer being therefore one without promotion. The plaintiff claims it was the duty of the first defendant to appoint him to the position. The plaintiff wrote to the first defendant on the 21st April, 1949, to know when the decision of the Appeal Board was to be put into effect and on the 25th May, 1949, received a reply stating that in view of legal advice received on the matter it was not proposed to take any action on the decision, or purported decision, of the Appeal Board. On the 7th July, 1949, the plaintiff's solicitor wrote to the first defendant requesting the plaintiff should be appointed to the position within one week, but the letter was not acknowledged. The statement of defence filed by the first defendant alleges that the Appeal Board had no jurisdiction to entertain the appeal, and that the purported allowance of the appeal had no legal effect. It is therefore denied that the plaintiff was entitled to be appointed to the position, or that the failure and refusal so to appoint him have been wrongful. The second defendant pleads the same defence as that relied on by the first defendant, and for a further defence says that if it be proved that the Appeal Board did have jurisdiction to entertain the plaintiff's appeal, then by reason of clause 58 of the regulations (N.Z. Gazette, 15th June, 1922, Vol. 46, p. 1583) the Appeal Board had no jurisdiction to appoint the plaintiff to the said position."

To complete the narration one fact should be added and that is that the second defendant was himself an applicant for the position.

The main question to be decided is whether the Appeal Board had jurisdiction to entertain the plaintiff's appeal. The answer depends on the construction and application of sections 5, 6, 7 and 11 of the Government Railways Act 1927. The judge of first instance, after an examination and consideration of these provisions concluded that there was no right of appeal in the present circumstances and denied

the writ. After considering the arguments submitted against the finding and also those in support at first I was not convinced that Hay J.'s interpretation was wrong but on further consideration I feel that the judgment about to be delivered by Stanton J. correctly states the legal position and I concur in his views.

Before discussing the relevant provisions there are some general observations which I desire to make. The Railway Service is a branch of the Public Service, the employer being the Crown, though at various times the administration is delegated to a Board or individuals, the present controller being the General Manager of Railways. I think it is established beyond question that a Public Servant is liable to dismissal at any time subject to any limitation which may be imposed by statute, statutory provision being the appropriate means of limitation. With the implied right to dismiss there must, I think be a corresponding right to transfer within a Department or from Department to Department and from one position or post to another. Again this must be subject to any limitation imposed by statute which may affect the servant transferred or may give rights to any other servant affected by the transfer. This right to transfer which I have in mind is the same as "the inherent administrative power of the Department to transfer a member to a position equivalent to that already held by him" referred to by Hay J. in his judgment. See also the judgment of Reed J. in *Barnes v. The King* (1933, G.L.R. 596; 1933, N.Z.L.R. s. 117).

This power is necessary for efficient administration and control and should not, in my opinion, be held to be restricted without clear and express provision to that effect.

The main question to be decided is whether there is in the statutory provisions clear and express provision limiting the right of transfer.

I think there is such limitation in subsec. (7) of section 5 and subsec. (1) (b) of section 11 of the Government Railways Act.

Subsection (7) is as follows:—

"Every appointment made under this section shall be duly notified by the General Manager by official circular, and subject to the provisions of section eleven hereof any member for whom such appointment would have involved promotion may appeal therefrom."

Subsection (1) (b) is as follows:—

"11. (1) Every member shall have a right of appeal in accordance with this section against—

(1b) Any determination in respect of an application made by such member for promotion by means of appointment to any office or position for which applications have been called."

Read literally these sections give a right of appeal to an appellant in the present case, for the appellant was an applicant for promotion and had he received the appointment such would have involved promotion although the successful appointee received no promotion.

I was reluctant to accept that position as it occurred to me that giving a right of appeal where the Department merely says to A who is doing AB work that he is to do XY work without any alteration of grade or salary might well hamper the administration and

control. It was, I have little doubt, such a consideration which prompted Hay J. to search amongst other sections of the Act for some restriction of the wide right of appeal which was contended for and he considered this was found in sections 6 and 7. I myself was impressed by his findings of these sections but after considering appellant's argument in this Court and the judgment of Stanton J. I am satisfied that there are constructions of and reasons for sections 6 and 7 which in no way affect the plain meaning of secs. 5 (7) and 11 (1) (b).

It was pointed out that section 6 was necessary to meet No. 52 of the Regulations under the Government Railways Act 1908 which gave to a promoted member the immediate benefit (including salary) of his promotion. As his position would be uncertain until any appeal was heard or the time for appealing was past it was expedient from the Department's point of view to have it made clear that until final determination the successful applicant was not entitled to the increased benefits. Such provision is not required where there is an appointment without promotion—there are no additional benefits which could enter into the matter. This, I think, is the explanation of and for section 6 and, if it is, it disposes of any contention that the section implies that there is no right of appeal where a transfer does not involve promotion for the successful appointee.

I think too that section 7 is a necessary provision to enable the Department, even after an appointment involving promotion is made, to cancel that appointment for departmental reasons such as a belated opinion that there is a more suitable member for the position. The section, in my opinion, does not assist in placing a limitation on the clear and definite words of the sections giving the right of appeal.

On this branch of the case I am therefore constrained to differ with great respect from the views of Hay J.

The contention that in any event the plaintiff could not be appointed because of his not fulfilling the conditions of Regulation 58 was fully argued by Mr. Blundell for the second defendant.

Hay J. found for the plaintiff on this issue for the reasons stated in his judgment and I see no reason to differ from him on the question.

Stanton J. in his judgment, while agreeing with the Trial Judge's conclusion on this issue, gives different reasons for rejecting respondent's contention. In short, he is of opinion that such questions as the applicant having qualified for a position by length of service or experience in particular work is a matter for the determination of the Appeal Board and is not examinable in the Supreme Court. This view was put to counsel for respondent: it was not met and it is difficult to see how it could be in view of such authorities as *Van de Water v. Bailey and Russell* (1921, G.L.R. 83; 1921, N.Z.L.R. 122) cited by Stanton J., the principles of which were accepted and approved by Smith J. in *Bethune v. Bydder* (1937, G.L.R. at 676), and by Fair J. and Sir Michael Myers C.J. in *Akel v. Clark* (1940, G.L.R. 93; 1940, N.Z.L.R. 147), and which I myself have followed in *Scanlon v. Salmon and Another* (1948, G.L.R. 465; 1948, N.Z.L.R. 1185).

There was no erroneous assumption of jurisdiction by the Appeal Board and the matter must rest there. I therefore agree that the second defendant's contention should be rejected and the appeal must be allowed.

**CALLAN J.**—I have read the judgment prepared by Mr. Justice Stanton. I agree with him on both branches of the case, namely—(1) that the appellant had a right of appeal to the Appeal Board; and (2) that it was for the Appeal Board alone, and not for the Supreme Court or this Court to determine whether the appellant was a member qualified, under the Regulations, for appointment to the position.

The first question has occasioned difference of judicial opinion; it is, obviously, of general importance, and I have carefully considered all that has been said or written in support of the view opposed to that which, in the result, I accept. In the result, with the greatest respect to the learned Judge in the Court below, I am unable to accept his view, but am of opinion that the appellant had a statutory right to appeal to the Appeal Board. Such a right is given to him twice by the Statute, namely by s. 5 (7) and by s. 11 (1) (b). In each case the language is clear, and he comes exactly within it, as being a member who applied unsuccessfully for the position, and for whom appointment would have meant promotion.

In this situation, the Solicitor-General felt himself compelled to ask the Court to write into the clear words of s. 5 (7) and s. 11 (1) (b) words of limitation or qualification which are not there, because Parliament has not added them. He argues that this *must* be done because, so he submits, these sections cannot possibly be reconciled with secs. 6 and 7. These latter sections are, he says, special provisions and he invokes the maxim—“*generalia specialibus non derogant*”. Before this invitation can be accepted, it must be clear that the sections said to be incapable of reconciliation are irreconcilable. Satisfaction as to that is an essential step in the process of reasoning which the Solicitor-General invites the Court to accept. The matter should be approached in the first instance on the assumption that Parliament meant what it said in *all* that it said. Even if this does not, at first, appear to be the position, a Court should assume that Parliament has understood the topic as to which it legislated, and has used its language advisedly, and that its various expressions of intention will, on full and sufficient consideration, appear not to be in conflict with each other. If then it should, at first sight appear that secs. 5 (7) and 11 (1) (b) conflict with secs. 6 and 7, the immediate task is to consider secs. 6 and 7 very carefully. If it can be shown that they can have a sensible meaning and effect without convicting Parliament of saying in secs. 5 (7) and 11 (1) (b) what it did not mean, then reconciliation of the various sections becomes possible, and effect should be given to everything Parliament has said, without taking liberties with its language.

This is where I find Mr. Page's argument decisively helpful. As he pointed out, where appointment carries promotion and an increase of salary, it is desirable that it be merely provisional until all danger of a

successful appeal is removed; but there is not the same need to safeguard the Department where the appointee is not to get an increase of salary as the result of his appointment. This sufficiently explains s. 6 and its limitation to cases where appointment involves promotion.

As to s. 7, and the inclusion therein of the words—"or can be suitably filled by the transfer without promotion of any other member", the following suggestion seems sufficient. After a provisional appointment which would involve promotion of the appointee has been made, it may for the first time come to the notice of the General Manager that there is a suitable member whose appointment would not involve promotion. Why should not Parliament have thought it wise, in such a case, to give power to cancel the provisional appointment so that the General Manager might appoint the other member? It by no means follows that this second appointment would not be subject to appeal. But the existence of such a power would preserve as long as is convenient the opportunity to the General Manager to select the most suitable member he can find, and that tends towards efficiency in the service.

The Solicitor-General contended that in certain cases, the interpretation which he resisted would give a right of appeal to juniors, while denying it to seniors who might be applicants for the same appointment. But on the interpretation which the Solicitor-General resisted, no applicant member, be he senior or junior, is denied an appeal when, for him, appointment would have meant promotion. I see nothing unreasonable in saying that he who has lost promotion and increase of pay may appeal, while he who has merely lost transfer to other work may not—or, at any rate, nothing so unreasonable as to justify taking great liberties with plain language of the legislature in order to avoid that result.

My opinion, then, on the first question, is that the appellant has a statutory right of appeal to the Appeal Board.

As to the second question, namely that raised by counsel for the second respondent, I am in entire agreement with Mr. Justice Stanton's conclusion and with his reasons, and see no need to write a separately expressed opinion.

In my view, the appeal should succeed; the appellant should have his writ of mandamus if that is necessary. The Solicitor-General was understood to intimate that this would not be necessary.

**STANTON J.**—This is an appeal from the judgment of Hay J., refusing an application by the appellant for a writ of mandamus commanding the first respondent (herein referred to as the General Manager) to appoint the appellant to the position of wharf foreman at Wellington.

The facts are admirably summarised in the judgment appealed from and it is only necessary to say that the appellant the second respondent and others were applicants for the position mentioned and the second respondent was appointed, he being a member of the Department for whom the appointment did not involve promotion. The appointment of the appellant would have involved promotion for him

and he appealed to the Appeal Board against the appointment. The Appeal Board sustained his appeal but the General-Manager refused to appoint him, contending that the appellant had in the circumstances no right of appeal. This contention was upheld by the learned Judge and the question on this appeal is whether or not that conclusion was justified.

It was admitted that the appointment was made under s. 5 of the Government Railways Amendment Act 1927 and consequently came within subs. (7) of that section, which is as follows:—

"Every appointment made under this section shall be duly notified by the General Manager by official circular, and subject to the provisions of section eleven hereof any member for whom such appointment would have involved promotion may appeal therefrom."

Read literally, this subsection provides that *every* appointment under the section, which includes the transfer of a member of the Department to a position from any other position in accordance with subs. (1), is subject to a right of appeal by any member who, if appointed, would thereby obtain promotion. It is not limited in terms to appointments where the appointee thereby obtains promotion. It is, however, suggested that by virtue of the provisions of ss. 6 and 7 of the same Act it must be read as though it were so limited and should accordingly be read as if there were inserted therein some words which excluded from the right of appeal, and possibly the requirement of notification, all appointments where the appointee being a member of the Department did not obtain promotion. This would involve a serious restriction on the right of appeal so widely and clearly expressed and would seem inconsistent in spirit with the concluding words of subs. (7) which indicate that the governing factor is the position of the member who has failed to secure a promotion to which he considered himself entitled. Nothing but a very clear indication that the suggested limitation must have been intended by Parliament would justify such a departure from the express terms of the subsection.

It is contended by the respondents that such an indication is to be found in ss. 6 and 7 of the Act because it is said that these provisions show with reasonable certainty that a member may be transferred to any position where this does not involve his promotion and that in such a case there is no right of appeal on the part of any other member. These sections are as follows:—

"6. *Appointment by transfer to be provisional.* (1) Every appointment made by way of transfer under the last preceding section and involving the promotion of the member transferred shall be provisional, and shall not be confirmed unless and until all appeals therefrom have been duly determined and have been disallowed, or, if no appeals are made, until the time allowed for the making of such appeals has expired. (2) If any appeal against any such appointment is allowed, the appropriate appointing authority shall forthwith appoint the successful appellant to the position, and shall cancel the provisional appointment.

7. *Provisional appointment may be at any time cancelled.* Notwithstanding anything in the foregoing provisions, the appointing authority may at any time cancel a provisional appointment, whether or not an appeal against such appointment has been made, if in its opinion the office is not required, or can be suitably filled by the transfer without promotion of any other member, or that further notification of the position is desirable, or for other sufficient reason."

Mr. Page suggests that all that s. 6 (1) does is to ensure that where the appointee is a member for whom the appointment involves a rise in salary and a consequent change in status, these advantages shall not be definitely his until the possibility of a successful appeal has been disposed of. He says that if the section had not been passed the appointee could, under Reg. 52 of the 1922 Regulations, claim an immediate and definite appointment. He points out that there is a difference in this respect between appointees whose appointment involves promotion and those whose appointment does not involve promotion because in the latter case there is no change in salary or status. On careful consideration I think this may well be an adequate explanation of the whole effect of this subsection and I do not think a positive deduction can be drawn from it that a transfer without promotion is a permanent appointment which is final and without appeal.

Nor does subs. (2) materially assist respondent's contentions. It is in any case unnecessary because s. 11 (4) provides that the decision of the Appeal Board shall be final and on the principles enunciated in *Shackland v. Auckland Electric Tramways* (1918, G.L.R. 636; 1918, N.Z.L.R. 824) a successful appellant would necessarily have to be appointed to the position which was in issue. Any doubt on the matter is now entirely removed by s. 4 of the Government Railways Amendment Act 1928 which expressly provides that in such a case a successful appellant is entitled to be appointed to the position to which his appeal related.

Section 7 gives to the General Manager the right to cancel a provisional appointment for various reasons, one of which is that the position can be suitably filled by the transfer without promotion of any other member. It does not, however, say that if it is so filled no other member can appeal. If a provisional appointment is cancelled, then one of two courses must be taken, either the position is not filled at all, in which case no question of appeal can arise, or it must be filled in terms of s. 5, which gives a definite right of appeal. I do not think it follows from the provisions of s. 7 that if the appellant had been appointed to the disputed position his appointment could have been cancelled and the second respondent appointed and thereupon no right of appeal would arise. It may be said that this construction has the effect of requiring the General Manager to make only a provisional appointment when promotion is involved but compels him to make a permanent appointment where no promotion is involved with no right of cancellation as in the case of a provisional appointment, so that for instance in the present case Harris's appointment could have been cancelled but Mouton's could not. I suggest that there may be two sufficient answers to this contention. In the first place, it may well be that an officer who has been merely transferred to other duties without increase of salary or change in status could be required to return to his former duties without the enactment of special statutory permission, no other officer is affected and the allocation of an officer's duties is an ordinary incident of an employer's rights. Secondly, even if this were not so, no great harm would be done. The power of cancel-

lation under s. 7 is a very limited one and to bring under it officers transferred without promotion might well have the effect of limiting rather than of extending the General Manager's powers in relation to such officers.

It is suggested in the judgment appealed from that to allow a right of appeal where a transfer is made without promotion would seriously hamper the administration of the Department and extend the right of appeal far beyond what was necessary for the protection of members of the Department, and the Solicitor-General pointed to cases where it would give a right of appeal to junior members which senior members would not enjoy. I cannot help feeling that these matters are outside the scope of our consideration; there is admittedly a certain right of appeal given and a Court can do no more than ascertain as best it can from the language used what cases are within that enabling provision and what are without it. As Stout C.J., said in *N.Z. Public Service Association v. Robertson* (16 G.L.R. 604; 33 N.Z.L.R. 1514), quoting the high authority of the Earl of Halsbury L.C., in *Cooke v. Vogeler* (1901, A.C. 102):

"a Court of law has no jurisdiction to disregard what the Legislature has enacted. It cannot balance one inconvenience against another inconvenience or choose between alternatives."

It was admitted in the argument before this Court that it is hopeless to expect perfection in the wording of statutes and the existence of apparent anomalies is not a sufficient reason for declining to give effect to clear words. This argument also pays perhaps insufficient regard to the consideration emphasised both in s. 5 (7) and s. 11 (1) (b) and (c) of the Act of 1927 that the right of appeal is expressly given for the benefit of officers who would obtain promotion if appointed to the offices they seek and who may, therefore, claim that they have been denied the promotion to which they were entitled.

I find myself forced to the conclusion that there cannot be extracted from the provisions of ss. 6 and 7 such a clear indication that on a transfer without promotion there is no right of appeal as to justify a Court in writing into subs. (7) a large limitation on the right of appeal thereby conferred, and it is not suggested that there is any other provision which could do so.

Counsel for the appellant was not prepared to contend that the General Manager was estopped from now raising the question of the right of appeal but, in the view that I take on the main question, this aspect is not of importance.

The second respondent raised a further question—namely, that Harris was not a member qualified for appointment to the position in question and, therefore, could not in any event be appointed to it. This contention was based on certain provisions in the 1922 Regulations which, it was said, required the holder of this office to be a person qualified as a shunter. While I see no reason for differing from the conclusion to which the learned Judge in the Court below came on this question, I think it is clear that its proper determination is for the Appeal Board and that the latter's finding thereon is not examinable in the Supreme Court. It is not a fact preliminary



or essential to the appellant's right to appeal, or to the Board's jurisdiction to entertain that appeal. Applications were called for and the appellant was an applicant and he also was a member of the Department for whom the appointment would have involved promotion. He had, therefore, a right of appeal both under s. 5 (7) and s. 11 (1) (b), and was entitled to have his appeal heard. At such hearing it was the duty of the Appeal Board to consider any objection to the qualification of the applicant for the position but it was the only body which could determine any such question and its decision is final and without appeal. In *Van de Water v. Bailey and Russell* (1921, G.L.R. 83) Salmond J. said at p. 84:—

“Prohibition is the appropriate remedy for the disregard by an inferior Court of the limits of its jurisdiction; but it is not the remedy for an erroneous exercise by such a Court of the jurisdiction committed to it. The remedy for an error of law or fact in the exercise of a Court's jurisdiction is appeal or rehearing, if any statutory provision has been made for that purpose; and if there is no such provision for appeal or rehearing there is no remedy at all. In the present case the error of the Magistrate, if such an error existed, was in my opinion an erroneous decision in the exercise of his jurisdiction, and not an erroneous assumption of jurisdiction which he did not possess.”

As the Board allowed the appeal, we must assume that it found the appellant qualified to take the position. It was stated by the Solicitor-General that the Appeal Board would, if necessary, take any action required by the decision of this Court.

I think, therefore, that the appeal should be allowed.

Solicitors: for appellant: *J. R. Marshall*, Wellington; for first respondent: *Crown Law Office*, Wellington; for second respondent: *Bell, Gully & Co.*, Wellington.