1893.

NEW ZEALAND.

G. W. ELL'S CASE

(LETTERS FROM MESSRS. LATTER AND HARGREAVES RELATIVE TO.)

Presented to both Houses of the General Assembly by Command of His Excellency.

No. 1.

Mr. E. C. LATTER to the Hon. the MINISTER OF JUSTICE.

SIR,— Christchurch, 1st August, 1893.

Referring to the report of the Commissioners on the Ell inquiry, I have the honour to ask your consideration of my remonstrance against the conclusions they have arrived at as far as they personally affect me.

Out of thirteen charges made by Mr. Ell, the Commissioners state that I was in error as to two, namely:—

1. That I was wrong in accepting Nathan's proof of debt. My reply is that the proof was based upon a document which was a promise to pay; and though its terms were unusual, its legality could only be upset by a decision of the Supreme Court, to which Mr. Ell might have appealed at any time.

2. That I did not ascertain the value of Ell's books. This is against the evidence, which shows that the books had been assigned to Nathan, and that I found that they were the records of a butcher's business, which had been closed over two years, during which Nathan had collected all that he was able, the result being only £24.

The charges lately made by Mr. Ell have previously (and on several occasions) been heard by their Honours Justices Johnston, Ward, and Denniston in the Supreme Court, and also by Mr. (now Mr. Justice) Conolly under Royal Commission; and the judgments having been invariably in my favour gives me, I respectfully submit, good grounds for remonstrance against the present conclusions of Messrs. Thompson and Turnbull, as no fresh evidence was submitted by Ell, and their decision has placed me in an unfair position. I was advised before the commencement of the inquiry that I could not be called upon to attend before the Commissioners except as a witness upon subpœna to answer such questions as I might be asked; but, knowing that this course would materially lengthen the proceedings, I attended gratuitously for twelve days, assisting to unravel the complications and to show the fallacy of Mr. Ell's claims. I am therefore disappointed and surprised to find that the Government propose to pay me only one-half of my counsel's fee of £50 for his attendance on the Commission for fourteen days, and for getting up the facts of the case.

I respectfully urge the reconsideration of this decision; as to impose this liability upon me would, I submit, be unjust, and I think I may refer with confidence to my services during the time that I had the honour to hold the position of Official Assignee, as deserving more generous treatment.

I have, &c.,

The Hon. the Minister of Justice, Wellington. E. C. LATTER.

No. 2.

Mr. W. H. HARGREAVES to the Hon. the MINISTER of JUSTICE.

SIR,— Christchurch, 1st August, 1893.

I have the honour to advise you that in giving my evidence before the Commissioners I quite inadvertently gave £5,619 9s. 11d. as the original amount of Messrs. Harper and Co.'s claim against Mr. Ell, whereas the proper amount should have been £1,003 2s. 11d.

The error arose by my referring to the last sheet of the copy of Harper and Co's. accounts, which consisted of memoranda of sundry surcharges and interest for and against the parties, the total being the first-named sum. I think it well to notify this error, as I understand the evidence is printed, and will form part of the records of the House. I would, therefore, respectfully urge that my letter as printed in the *Press* should also form part of the records attached to the evidence, and beg to enclose a printed copy of same.

I should mention that the error above named does not in any way affect the result arrived at by the Registrar and myself

I have, &c.,

The Hon. the Minister of Justice, Wellington. W. H. HARGREAVES.

Enclosure.

THE REPORT OF THE ELL COMMISSION.

To the Editor of the Press.

SIR,—As the accountant referred to in the above-named report, in conjunction with the Registrar of the Supreme Court, I shall be glad if you will permit me to reply as briefly as possible to the conclusions of the Commission affecting the decisions arrived at by us in taking the accounts under orders of the Court in the cases of Ell *v.* L. Harper, and Ell *v.* Harper and Hanmer. The Registrar, as a Government officer, is precluded from the right of defending himself through the medium of the Press; and, although I regarded myself as an officer of the Court appointed for a special purpose, my duties having been accomplished, I feel quite at liberty to take this course.

I would point out (1) that by an order of the Supreme Court, dated 27th June, 1884, we were authorised to take all accounts between the parties as from June, 1870; (2) that the sittings to take the accounts began on 11th July, 1884, and continued at intervals until finally closed in February, 1885; (3) that on 16th October, 1884, three months after first sitting, Mr. Ell's solicitor asked that a statement of accounts, agreed to by Mr. L. Harper in June, 1873, should be the starting-point for taking all stock accounts; (4) that the Registrar and Accountant decided they must take the accounts according to the order of the Court, as from June, 1870; (5) that on 17th October, 1884, Mr. Ell's solicitor applied to the Court for an order directing us to adopt June, 1873, as the starting-point in taking such stock accounts; this order was not granted; (6) that the Court granted an order on the 29th October, 1884, the purport and substance of which is quoted below.

The Commissioners state in their report: "1. That the Registrar and Accountant made a mistake as to the terms of the order of the Supreme Court of the 29th October, 1884, and should not have gone behind the settled account of June, 1873." To judge whether we made such a mistake I quote the essential part of this order of the Court, viz.: "If the Registrar and Accountant *are satisfied that there was a settled account,* or what was so intended, between the plaintiff of the one part and the defendant Leonard Harper and the late Philip Hanmer, deceased, or either of them, *covering all transactions between 1870 and 1873,* such settled accounts are not to be disturbed." The italics are mine.

In support of this settled account to June, 1873, the only documentary evidence placed before us was one item contained in what is known as a progress statement of accounts rendered by Harper and Co. to Ell, in April, 1875, and is stated as follows—viz.: "1873, September 1, Bill drawn in settlement, June, 1873, £147 13s." This bill was not paid by Ell. The evidence given by Mr. L. Harper was to the effect that this was intended as a settlement of stock account; whilst the evidence of Mr. Ell was that "he did not remember any settlement of account with Mr. L. Harper in June, 1873;" but during the taking of accounts from the 11th July to date of order of Court, the 29th October, 1884, Mr. Ell's solicitor *proved and claimed credit for items amounting to over £1,000, including items for stock, dating from November, 1871, to 30th June, 1873, the period covered by the so-called settled account, all of which we allowed in favour of Ell,* whilst rejecting the settlement as not complying with the terms of the Order of Court as "covering all transactions between 1870 and 1873." This, I submit, is self-evident.

The Commissioners also state: "2. That the Registrar and Accountant were in error, in not accepting the receipt indorsed on the deed of mortgage, as evidence that the £250 had been paid by Mr. Ell."

The facts presented to us were, that in Mr. Ell's original accounts against Mr. L. Harper the payment of this item is absent—the practice between the parties being that all cash received or paid passed to the debit or credit respectively. This mortgage was discharged for £250 by indorsement in the usual legal form on the 6th September, 1875, and on the next day, the 7th September, 1875, application was made by Mr. Ell, through Harper and Co., to bring this land under the Land Transfer Act, and was, together with other land under this Act, subsequently mortgaged by Mr. Ell, through Harper and Co., for £800, which sum was placed to Mr. Ell's credit.

The discharge of this mortgage was first noticed by the Registrar on the 11th September, 1884, when sundry deeds were produced in evidence, and Mr. Ell's solicitor then claimed credit for it for the first time; but until these deeds were produced neither Mr. Ell nor his solicitor knew of such a claim existing, in fact, it was a surprise to both. Until then, I am satisfied that Mr. Ell had no intention of claiming this £250. I questioned him particularly as to how and when he paid this sum, but he was quite unable to give any evidence that he had paid it either by cheque, cash, or in any form whatsoever. At the same time another discharged mortgage for £1,000, paid by Harper and Co., was produced; this Mr. Ell "did not know had been paid off, as he left all his affairs in Mr. Harper's hands." This amount (£1,000) was also claimed by Ell's solicitor, but was subsequently abandoned. I would ask, is it reasonable to suppose that a man in Mr. Ell's position at this time could fail to remember that he had carried £250 in his pocket to pay off this mortgage, and keep no record of its payment?

The decision we arrived at was that, whilst recognising the discharged mortgage for £250, there was no evidence that any money had passed between the parties, the object of the discharge being to enable Ell to bring the land under the Land Transfer Act, to be dealt with in conjunction with other unsold land (previously mortgaged for £1,000 and released as above stated), titles for portions already sold having been applied for by purchasers on the same date—7th September, 1875, the balance being finally mortgaged as already stated.

I submit that I was not dealing with matters of law, but of fact; and, while it is a fact that the mortgage was discharged, it is also a fact that we found no trace of payment, and hence its disallowance, leaving the parties to appeal to the Court if necessary.

With all deference to the Commissioners, I respectfully submit that—without exceeding the bounds of modesty—the Registrar and myself were probably in a better position to judge the facts

as presented to us, and able to give at least as sound a decision upon those facts as the Commisisoners; and I venture to affirm that no person having the intimate knowledge we had acquired of the two special points singled out in the report would have arrived at any other decision than we did.

I append a statment of the claims of the several parties and the amounts of our final award, including interest at 10 per cent. to date of award, and would draw attention to the fact that after the evidence was closed, I suggested that the parties should each render a *pro formâ* statement of account, in order that that we might ascertain the points of agreement between them, and the results are shown below:—

	£	s.	d.
1. Amount of G. W. Ell's original claim against L. Harper and Hanmer and Harper (*a*)	12,028	13	1
2. Amount of *pro formâ* statement sent in after evidence closed as above	3,174	15	4
Difference in Harper and Co.'s favour	8,853	17	9
3. Amount of L. Harper and Hanmer and Harper's original claim against G. W. Ell	1,003	2	11
4. Amount of *pro formâ* statement sent in after evidence closed as above	2,948	9	11
Increase against G. W. Ell	1,945	7	0
5. Amount awarded to L. Harper by the Registrar and Accountant against G. W. Ell	2,166	9	7
6. Amount awarded to G. W. Ell by the Registrar and Accountant against Harper and Hanmer	2,120	16	10
Balance due by G. W. Ell to Harper and Co. (*b*) ...	£45	12	9

NOTE.—(*a*) The £250 claimed as paid in discharge of mortgage is not found in this account. (*b*) It is significant that Mr. H. Slater, in his evidence before the Commissioners on the 30th May, 1893, states that when acting as Mr. Ell's solicitor in this case, in 1878, Mr. Ell remarked to him that there was not £50 difference between himself (Ell) and Mr. L. Harper.

These decisions were given by us in good faith, and to the best of our judgment, after careful consideration of all the evidence before us; and I think it is evident that if those decisions were wrong, then the proposal of the Commissioners to award Mr. Ell £200 is both illogical and inadequate.

I have no desire to prevent justice being done to Mr. Ell—although his idea of justice seems to be, getting everything he asks for—but as public money is proposed to be dealt with, and several hundreds have already been uselessly expended, I think it expedient that, as far as possible, all the information on both sides should be forthcoming. I therefore beg to refer to the "Report of the Public Petitions A to L Committee" on this case, as presented to Parliament on 7th October, 1892.

Attached to this report is one from the Public Petitions M to Z Committee, of 19th August, 1891; and amongst the many libellous and misleading statements Mr. Ell has so freely indulged in the Committee have accepted those stated in the following paragraphs, viz.: "5. That the Registrar, in disobedience to an order of the Supreme Court, went behind a settlement of accounts made between the contesting parties in 1873, and brought in a verdict for the Messrs. Harper against Ell for upwards of £2,000. 6. That thereupon Ell appealed against the said last judgment, and the judgment was set aside by the Court of Appeal, and referred back to the Registrar (and Accountant) at Christchurch *on the ground that he had no right to inquire into accounts prior to settlement between the parties in 1873.*" The case was at that time submitted by the Government to Sir Robert Stout, and in his report to the Premier, dated 19th November, 1891, he states *inter alia*, as follows, viz.:—

"It appears from the statement in the N.Z.L.R., C.A., vol. iv., p. 142, that G. W. Ell brought two actions for account, one against L. Harper and the other against L. Harper and P. Hanmer. Accounts were taken, and the Registrar and the Accountant appointed by the Court made their certificates. In the action against L. Harper the sum of £2,166 9s. 7d. was found due by the plaintiff to the defendant, and in the action against Harper and Hanmer the sum of £2,120 16s. 10d. was due by the defendants to the plaintiff. *There was an appeal against the finding of the Registrar and Accountant on the ground of mistake. When that matter was argued before the Court of Appeal the Court of Appeal set aside the Registrar's certificate, but not on the ground mentioned in paragraph 6 of the Committee's Report.* The ground of the decision was that the certificate signed by the Registrar and the Accountant did not set out, in accordance with the rules, sufficient material to explain the accounts, nor the evidence upon which the findings of the Registrar and Accountant were based. I think it proper to set out the full judgment of the Court of Appeal. It is as follows:—

"'In this case we think that the judgment should be set aside and the certificate reviewed by the Registrar and Accountant. The certificate, when looked at, shows us that the proceedings in Chambers were not taken as intended by the rules, and therefore not in a way which enables the Court to deal with the cause when it comes before it on a motion for a decree or further consideration. *It is quite clear that when accounts have to be taken the party accounting brings in his account and the Registrar takes evidence on the account. That was not done in this case, but an account was prepared by the Registrar and Accountant, and appended to the certificate.* There is nothing to show

what conclusions were arrived at. This is an account with interest added to it, but there is no indication as to what the items represent. There is nothing in the certificate as to the evidence the Registrar has acted on. This being so, no Judge could make a decree on such materials. That was the position the matter was in before Mr. Justice Johnston, and we think if this had been represented to him he certainly would not have made the decree.

"'It is the fault of the appellant that he has consistently made wrong applications. In this case, he was making application to review the certificate on the ground of mistake; and the *Judge decided rightly that there was no mistake, and he was right in refusing to review on the ground of mistake in the sense of that term in the rule.* But, as we find ourselves unable to make a decree upon this certificate, so he should have found himself unable to do so. Before concluding, I think I ought to say that the blame falls more on the representatives of the litigants than on the Registrar, in making his certificate and proceeding as he has done. The Registrars in the Supreme Court have not had the experience they have elsewhere, and it is incumbent on litigants to see that the proceedings are taken in the manner contemplated by the rules. The costs ought to fall on those who represent the litigants, but there is no complaint against the officer. We therefore think the judgment ought to be set aside, and the certificate reviewed. We have considered whether or not we can limit the items on which the review should take place; but, on the whole, we think in the interests of both parties it should be at large. Most of the items will, no doubt, be agreed to, and only a few of the matters gone into again, *and the evidence already taken can be admitted to be sufficient.* We think each party must pay his own costs of this appeal, as the appeal was limited to the certificate being void on the ground of mistake; but the case goes back on entirely different grounds—namely, that the Court itself, seeing the certificate, finds it so insufficient that no conclusion can be come to on it. The other two appeals, inasmuch as the appellant has not come within the right time, the orders appealed from being interlocutory orders and orders of refusal, must be dismissed with costs in each case on the lowest scale.'

"The judgment was that of the Chief Justice and Justices Richmond and Williams. The judgment negatives the 5th and 6th conclusions of the Committee."

It will be seen from the judgment that the Court of Appeal did not refer back the accounts on the grounds stated either by Mr. Ell or the Committee. We, however, proceeded with the review of the accounts from the 28th July to 11th August, 1886, and ceased on the latter date, in consequence of Mr. Ell's bankruptcy on the 6th August, 1886. During the last sitting Mr. Ell wished to proceed through his son, *to whom he had assigned his estate some two months' previously.* This we declined to do, and this is the point at which the case has remained until now.

It is not difficult to foresee the complications that may arise if the Commissioners' recommendations are carried out. In conclusion, I think Sir Robert Stout's closing remarks in his report to the Premier are very pertinent—namely: "If the Government or Parliament is to interfere in every case in which the litigant after patient hearing has lost his case in the Supreme and Appeal Courts, I am afraid the functions of Parliament will be very largely increased. I can see nothing from the documents presented to me warranting the interference of either Government or Parliament.

Yours, &c.,

Christchurch, 25th July, 1893. W. H. HARGREAVES.

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