REPORTS OF CASES

DETERMINED BY THE

HIGH COURT OF AUSTRALIA

DURING THE YEAR 1903.

[HIGH COURT OF AUSTRALIA.]

DALGARNO . . . . . APPELLANT;
DEFENDANT,

AND

HANNAH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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Nov. 6, 10, 11.

Griffith, C.J., Barton and O'Connor, JJ.

Special leave to appeal—Rule upon which the Court will act in granting leave—Jurisdiction of Court to entertain appeals from judgments pronounced before its establishment—Appeal from judgment of the Supreme Court of New South Wales exercising federal jurisdiction pronounced before passing of Judiciary Act 1903 (*No.* 6 *of* 1903), *secs.* 35, 39—*Right of appeal by virtue of the Constitution of the Commonwealth, secs.* 71, 73—*Claims against the Commonwealth Act* 1902 (*No.* 21 *of* 1902), *secs.* 3, 6, 7.

Whether an appeal will lie to the High Court from a judgment of a Court exercising federal jurisdiction pronounced before the passing of the Judiciary Act: *Quære.*

The jurisdiction of the High Court is conferred by the Constitution and not by the *Judiciary Act.*

The Constitution (sec. 73) imposes no restriction as to amount upon appeals from judgments of the Supreme Courts of the States in the exercise of federal jurisdiction.

The rule laid down by the Judicial Committee in *Prince* v. *Gagnon* (8 A.C., 103, at page 105), as to granting special leave to appeal in cases below the appealable amount adopted.

The plaintiff had obtained a verdict for £200 damages in an action for negligence against the defendant, sued as nominal defendant on behalf of the

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Commonwealth. The defendant appealed to the Full Court of New South Wales, and on 20th August, 1903, that Court, in the exercise of the federal jurisdiction conferred upon it by the *Claims against the Commonwealth Act* 1902, discharged the defendant's Rule Nisi for a New Trial, with costs. On 25th August in the same year the *Judiciary Act* 1903 was passed, and on 15th October following, the High Court granted to the defendant special leave to appeal from the decision of the Supreme Court of New South Wales. The plaintiff moved to rescind the order granting leave on the grounds (1) that the Court had no jurisdiction to entertain the appeal inasmuch as the judgment appealed from was pronounced before the passing of the *Judiciary Act*, and the case did not fall within those enumerated in sec. 35 of that Act as cases in which appeals might be brought from such judgments; and (2) that the case was not of such a nature as to justify the Court in granting special leave to appeal even if it had jurisdiction. It was not clear whether the judgment appealed from had proceeded upon a supposed general rule of law or upon the special facts of the case.

The motion for leave to appeal was rescinded.

MOTION to rescind order granting special leave to appeal.

The plaintiff in this case was a cabman who had received injuries and suffered pecuniary damage owing to the fall of a telephone wire which was part of the telephone system of the Commonwealth Government. He brought an action for negligence against the defendant, sued as nominal defendant on behalf of the Government. The action was tried in the Supreme Court of New South Wales in its federal jurisdiction, under the *Claims against the Commonwealth Act* 1902 (No. 21 of 1902). At the trial the Judge refused to nonsuit, on the ground that, though there was little or no independent evidence of negligence, the case came within the principle laid down in *Scott* v. *London and St. Katharine Docks Co.* (3 H. & C. 596), and that from the nature of the accident itself the jury might infer negligence. The plaintiff obtained a verdict for £200 damages. The defendant moved the Full Court of New South Wales that the verdict should be set aside and a nonsuit or verdict for the defendant be entered or a new trial granted on the ground that there was no evidence of negligence. A Rule Nisi was granted, and on 20th August the Full Court (consisting of *Owen*, *Simpson*, and *Pring*, *JJ.*) by a majority, (*Pring*, *J.*, dissenting), discharged the rule with costs [reported (1903) 3 N.S.W. State Reports, 494]. It did not clearly appear whether the judgment of the Court was based upon the maxim *res ipsa loquitur*, or, if so, whether there was or was not additional evi-

dence of negligence. On 25th August the *Judiciary Act* 1903 (No. 6 of 1903), received the Royal assent, and, on 15th October, the High Court made an order granting to the defendant special leave to appeal from the decision of the Supreme Court.

The plaintiff now moved the High Court to rescind this order.

Dr. Sly (with him *Ferguson* and *Clines*), for the plaintiff in support of the motion. The defendant is not entitled to have leave to appeal on two grounds, (1) that the Court has no jurisdiction to grant leave in this particular case, because the judgment appealed from was pronounced before the passing of the *Judiciary Act* 1903; and (2) that the judgment did not decide a matter or question of great public importance. As to the first point, the right of the defendant, if any, rests upon the *Judiciary Act*, which was passed on 25th August of this year, whereas the judgment of the Supreme Court was pronounced on the 20th of that month. Before the Act came into force the plaintiff had obtained a judgment which could not be reversed by any Court except the Privy Council. This Court, therefore cannot grant leave, or even entertain an appeal, unless the Act is to be construed retrospectively. There are in the Act no clear and unambiguous words showing that the Act is to be so construed. [Refers to *Beale*, on *Legal Interpretation of Statutes*, 1896 ed., p. 193, where the judgment in *Reid* v. *Reid* (1886), L.R. 31 Ch. D. 402, at pp. 408, 409, is cited.] That rule applies to cases of procedure. This is a case of vested rights. At the time of the passing of the Act the plaintiff had a vested right, and that cannot be taken away except by clear and unambiguous words; *Adams* v. *Young*, 18 N.S.W.R. 73, 19 N.S.W.R. 37; *Hughes* v. *Lumley*, 24 L.J.Q.B. 29; *Vansittart* v. *Taylor*, 24 L.J.Q.B. 198.

He was stopped on this point.

Wise, K.C., A.G. for N.S.W. (with him *Pilcher*, K.C., and *Garland*) for the defendant. The cases referred to on behalf of the plaintiff do not apply because the right in question here is a matter of procedure. The right to make application for leave to appeal is a step in an action. *Hughes* v. *Lumley*, and *Vansittart* v. *Taylor*, which follows it, are distinguishable. They deal with the *Common Law Procedure Act*, and in both cases it was held that,

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before error could be brought under that Act, either party must have had an opportunity of refusing to consent to the appeal. In both cases there was a necessity for consent of parties. They are therefore exceptional cases. The true rule is laid down in *Warne* v. *Beresford*, 2 M. & W. 848, and *Wright* v. *Hale*, 6 H. & N. 227, at p. 231; (1866) 30 L.J. Ex. 40; [refers also to *Boodle* v. *Davis*, 8 Ex. 351; 22 L.J. Ex. 69; and *Republic of Costa Rica* v. *Erlanger*, L.R. 3 Ch. D. 62.] Moreover the defendant, apart from the *Judiciary Act* has a constitutional right to appeal by virtue of sec. 73 of the Constitution. By sec. 71 of the same Act, the judicial power of the Commonwealth is vested not only in federal Courts but also in such Courts of the States as the Parliament invests with federal jurisdiction. The *Claims against the Commonwealth Act* (No. 21 of 1902, sec. 6) gave the Supreme Court of New South Wales jurisdiction to try this case in the first instance. The papers are entitled "In the Supreme Court of New South Wales, Federal jurisdiction." There was, therefore, a right of appeal to this Court, but there was no Court to appeal to.

[GRIFFITH, C.J.—You say the High Court was potentially in existence all the time.]

That is so. The *Judiciary Act* does not constitute the Court, it only determines the number of judges. The Court existed potentially from the date of the establishment of the Constitution. Therefore, sec. 35 of the *Judiciary Act* does not affect the position. The word "including" in that section is a word of extension, not of limitation, the following sub-section being inserted for more abundant caution.

[GRIFFITH, C.J.—From that point of view the question is, does sec. 35 of the *Judiciary Act* deprive this Court of a jurisdiction given by sec. 73 of the Constitution?]

A right is conferred upon the defendant by the Constitution and, therefore, the burden is on the other side seeking to show that there is an intention in the later Act to take away that right.

Dr. Sly in reply. On the question whether the application for leave to appeal is a matter of procedure, I refer to *Wright* v. *Hale* (*supra*), and *Beale* on *Legal Interpretation of Statutes*, p. 195, citing *Kimbray* v. *Draper*, 3 Q.B., 160. As to the defendant's

contention that his right has not been taken away, I contend that notwithstanding sec. 73 of the Constitution there was no right of appeal to the High Court, because there was no such Court in existence. The words "High Court" at the beginning of the section mean "High Court when constituted." The plaintiff's right, when he had obtained his judgment was absolute. But, if the argument on behalf of the defendant is correct, that right, after having continued absolute until the establishment of the High Court, which might have been after a lapse of, say ten years, would then have been subject to an appeal.

[BARTON, J.—Would the passing of an Act saying that "three judges" should constitute the High Court have given a right of appeal to the defendant ?]

No, there is no appeal until Parliament creates the Court.

[GRIFFITH, C.J.—If the Court had been constituted the defendant would clearly have been entitled to appeal. You must show that sec. 35 of the *Judiciary Act* takes away that right.]

If at the time of the Supreme Court judgment there was no right of appeal in the defendant, I must succeed. The Court was still the Supreme Court of New South Wales, though exercising federal jurisdiction. Under sec. 73 there is therefore no appeal, because that section does not give a general right of appeal to the High Court until Parliament "otherwise prescribes"; until that happens the conditions and restrictions imposed by the Queen in Council apply. Although the Legislature invested the Supreme Court with federal jurisdiction it did not intend to create it a federal Court. The words in the last paragraph of sec. 73, "Supreme Courts of the several States," include Courts exercising federal jurisdiction, and therefore they include the Supreme Court of New South Wales in this particular case, and there is no appeal. Section 6 of the *Claims against the Commonwealth Act* does not make the Supreme Court a federal Court.

[O'CONNOR, J.—The Attorney-General would contend that by virtue of the *Interpretation Act* 1901 the Supreme Court dealt with this case as a federal Court.]

The Constitution draws a distinction between created federal Courts, and Courts exercising federal jurisdiction, or with federal

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jurisdiction conferred upon them. The Orders in Council cover every case, and consequently if a plaintiff obtains a verdict for £500 and there is no *Judiciary Act*, the defendant has an appeal to the Privy Council as of right. When the Supreme Court of New South Wales was invested with federal jurisdiction by the *Claims against the Commonwealth Act*, the pre-existing conditions as to appeals to the Queen in Council applied to the extended jurisdiction in the same manner as in the case of the Divorce jurisdiction that was conferred upon that Court by the Divorce Acts. The judgments pronounced by that Court in its Divorce jurisdiction were subject to appeal without express provision. There is no distinction in principle whether the Court is exercising a new or an extended jurisdiction. Sec. 39 of the *Judiciary Act* does not take away this right, because the right exists by virtue of the limitations contained in the Constitution. The very wording of sec. 35 shows that it cannot apply to a verdict under £500.

[GRIFFITH, C.J.—"No others" are words of limitation. Cannot the words "including respectively, &c." be read distributively as applying to Courts not exercising federal jurisdiction?]

No, that would be a forced construction.

[GRIFFITH, C.J.—If the Attorney-General is correct, those words are immaterial.]

All Supreme Courts, whether exercising federal jurisdiction or not, are put on the same footing. In the Constitution, the Legislature, though distinguishing them in terms, makes no distinction between them in regard to the right of appeal. Sec. 35 was intended to comprehend the whole area of the right of appeal, and, with the exception of the words following "including respectively," its operation is clearly intended to be prospective only.

Cur. adv. vult.

Dr. Sly, called upon as to the second ground. The Court will exercise its jurisdiction in granting special leave to appeal in the same way as the Privy Council [states the facts of the case]. The question at the trial was simply, was there negligence or not, and the Judge told the jury that if there was no evidence given by

the plaintiff, beyond that the wire had fallen for some unexplained reason, the defendant should have a verdict. But there was further evidence of negligence. The principle *res ipsa loquitur* applies. There is no great principle involved; *Prince* v. *Gagnon*, 8 A.C., 103; *Canada Central Railway Co.* v. *Murray*, 8 A.C., 574; *Johnston* v. *Minister and Trustees of St. Andrew's Church, Montreal*, 3 A.C., 159. It is not a matter of great importance, it is a mere matter of law; *Scott* v. *Scott*, 33 L.J., Mat. Cas. 1, cited in *Cross* v. *Goode*, 8 N.S.W.R. 263.

Wise, K.C. In the case *Sun Fire Office* v. *Hart*, 14 A.C. 98, the Privy Council granted special leave to appeal because the question involved was of great importance to insurance offices in general. Here there is involved a matter of great and general importance to the Government. The Court below decided that the doctrine *res ipsa loquitur* applied. [Refers to judgment of *Simpson*, J., and the affidavit of defendant in support of the motion for special leave to appeal.]

Garland followed. The point in issue at the trial was whether an explanation had been given by the defendant sufficient to counterbalance the *primâ facie* evidence of negligence supplied by the actual falling of the wire. There was no *primâ facie* evidence of negligence; *McMillan* v. *Grand Trunk Railway Co. of Canada*, Wheeler's P.C. Law 982, a case where special leave to appeal was granted 17th May, 1889.

Dr. Sly in reply.

Cur. adv. vult.

On 11th November the judgment of the Court was delivered by

GRIFFITH, C.J. This is an action against the Commonwealth for a wrong alleged to have been done to the plaintiff by persons for whose actions the Commonwealth is responsible. It was brought in the Supreme Court of New South Wales against the defendant as nominal defendant, under the provisions of the *Claims against the Commonwealth Act* 1902 (No. 21 of 1902), by which (sec. 6) the Supreme Court of each State is invested with federal jurisdiction for the purpose of hearing and determining actions brought under the Act. The section proceeds to declare that the Court "shall have that jurisdiction as a Court invested

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with federal jurisdiction and not otherwise." Apart from this Act, the Supreme Court of New South Wales had no jurisdiction to entertain an action against the Commonwealth, unless the Commonwealth had voluntarily submitted to its jurisdiction, which is not suggested. It follows that in entertaining the action the Court was not exercising any jurisdiction which it had under the laws of New South Wales, but was exercising a new jurisdiction conferred upon it by the laws of the Commonwealth. At the trial the plaintiff obtained a verdict for £200 damages. A Rule Nisi for a New Trial was granted by the Full Court, which, after argument, was discharged on 20th August, five days before the *Judiciary Act* received the Royal assent. On 15th October this Court, on the *ex parte* application of the defendant, granted special leave to appeal. Motion is now made by the plaintiff to rescind the order for leave on the grounds: (1) that the Court has no jurisdiction to entertain the appeal, the judgment having been given before the passing of the *Judiciary Act*, and the case not falling within any of the cases enumerated in the first paragraph of sec. 35 of that Act as cases in which appeals may be brought from judgments given before the passing of the Act; and (2) that the nature of the case is not such as to justify the grant of special leave, even if the Court has jurisdiction to entertain the matter.

With regard to the second ground, we think that the rule to be applied by the High Court in dealing with applications for special leave to appeal in cases below the appealable amount should be substantially that laid down by the Judicial Committee of the Privy Council in the case of *Prince* v. *Gagnon* (8 A.C. 103, at p. 105). "Their Lordships are not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save where the case is of gravity involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."

The argument in support of the first ground was based on the assumption that the right of appeal by leave of the Court, in cases involving less than the amount made appealable by the Orders in Council, was created by sec. 35 of the *Judiciary Act*. On that

assumption it was contended that at the time when the judgment sought to be appealed from was pronounced, no right of appeal to any tribunal existed, that the plaintiff had, therefore, a vested right to retain his judgment (subject only to the prerogative of the King to grant leave to appeal), and that the *Judiciary Act* did not operate retrospectively to impair that right. For this contention, if the right of appeal by leave from judgments involving less than the appealable amount is created by the *Judiciary Act*, the cases of *Hughes* v. *Lumley* (24 L.J.Q.B. 29), and *Vansittart* v. *Taylor* (*ib.*, 198), afford abundant authority, if authority were needed. In answer to the motion it was contended that the right of appeal asserted was not created by the *Judiciary Act*, but by the Constitution, and extends to all judgments falling within the provisions of sec. 73, whether pronounced before or after the passing of the *Judiciary Act*, and that that Act does not take it away. Sec 71 of the Constitution provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal Courts as the Parliament creates, and in such other Courts as it invests with federal jurisdiction. We pause to repeat that in the present case, as already pointed out, the Supreme Court of New South Wales was exercising the judicial power of the Commonwealth as a Court invested with federal jurisdiction. The section goes on to say that the High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes. Section 73 provides that the High Court shall have jurisdiction, "with such exceptions and subject to such regulations as the Parliament prescribes," to hear and determine appeals from all judgments, decrees, orders, and sentences of "any federal Court, or Court exercising federal jurisdiction, or of the Supreme Court of a State." Then follow two paragraphs, the first of which limits the power of the Parliament to prescribe exceptions and regulations with respect to appeals from the Supreme Courts of the States, and provides in effect that the appealable amount shall not be increased beyond that fixed by the Orders in Council, while the second provides that, as to such appeals, the existing restrictions and conditions shall continue until altered by the Parliament within the ambit of its authority as controlled by the previous

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paragraph. These paragraphs, however, do not apply to appeals from federal Courts or Courts exercising federal jurisdiction, unless, indeed, the Supreme Court of a State exercising a new federal jurisdiction, which it had not under the laws of its own State, is to be considered nevertheless, for the purposes of this section, as a Supreme Court acting as such, and not as "a Court exercising federal jurisdiction." A distinction is, however, plainly drawn by the section itself between the two capacities in which the Supreme Court may act; and the words of sec. 6 of the Act No. 21 of 1902, already quoted, seem to refer to this distinction. A distinction between the several capacities in which a Supreme Court may act is, no doubt, unfamiliar. But such a distinction between the several capacities in which a single Judge or an inferior Court may exercise jurisdiction, so that an appeal from a decision in one capacity may lie to one Court, and from a decision in another capacity to another Court, is not unusual. A familiar instance is that of the Chief Justice of New South Wales acting as such, and as a Judge of the Vice-Admiralty Court. This distinction is most explicitly taken in sec. 39 of the *Judiciary Act*. In this view the restrictions of the Orders in Council do not apply to appeals from judgments of the Supreme Courts in the exercise of federal jurisdiction. That jurisdiction was, however, to be subject to such exceptions and regulations as the Parliament might prescribe. It is important to remember that the powers of the Parliament, so far as regards the appellate jurisdiction of the Court, are limited to prescribing "exceptions" from the otherwise unrestricted jurisdiction conferred by the Constitution, to prescribing regulations as to the exercise of the right of appeal, *i.e.*, as to time, security, procedure, and similar matters, and to modifying the restrictions and conditions prescribed by the Orders in Council as to appeals from the Supreme Courts exercising State jurisdiction. But it has no authority to create any additional appellate jurisdiction. The authority, therefore, if any, of this Court to hear the case now before us is to be sought not in the *Judiciary Act* but in the Constitution itself, and sec. 35 of that Act is to be regarded, not as a provision for creating rights of appeal, but as a provision making exceptions from the jurisdiction conferred by the Con-

stitution and prescribing regulations as to its exercise. Had then the High Court jurisdiction to entertain appeals from judgments pronounced before the passing of the *Judiciary Act*? The Court, as the embodiment of the judicial power inherent in every Sovereign State, is an essential part of the structure of the Commonwealth. Sec. 73 of the Constitution has been in force from the establishment of the Commonwealth, although the power of the High Court could not, of course, be exercised until the Court was actually constituted by the Parliament. With regard to judgments pronounced by the Supreme Court, in the exercise of their State jurisdiction before the passing of the *Judiciary Act*, the right of appeal to the High Court was to be subject to the same conditions and restrictions as appeals to His Majesty in Council until those conditions and restrictions were altered by the Parliament. In the meantime, if the matter were not of the appealable amount, or the prescribed time had elapsed before the actual establishment of the High Court, without an assertion by the unsuccessful party of his right of appeal to His Majesty, his right was gone. But as to appeals from federal Courts or Courts exercising federal jurisdiction other considerations arise. There is much force in the contention that the jurisdiction of those Courts was, from the first, intended to be subject to the right of appeal to the High Court, and that that right, being a right conferred by the Constitution itself upon suitors, could not be lost or taken away by mere inaction of the Parliament, or in any other way except by actual legislation prescribing exceptions. The temporary inability to exercise a statutory right by reason of a delay which, from the nature of the case, was inevitable, in the passing of an Act to determine the number of Judges of the High Court, could not, in this view, operate as a destruction or diminution of the right itself. The provisions of sec. 7 of the *Claims against the Commonwealth Act* 1902, which empower the Attorney-General to require the postponement of an appeal from a judgment given under the Act until a time when—it may be suggested—the High Court would probably have been established, seem also to suggest the assumption on the part of the Parliament that the Court when established would have jurisdiction to deal with judgments which had been already pronounced.

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On the other hand it may be said that the words of sections 71 and 73 of the Constitution are words of futurity, that a right of appeal to a non-existent Court is illusory, and that a right of appeal involves an incidental right to take proceedings for giving effect to it, which cannot be taken until the Court of appeal itself exists. It may be said also that, as pointed out by the Judicial Committee in the recent case of *Walker* v. *Critchett* (13th February, 1903) on an application for leave to appeal from the Supreme Court of New South Wales, a successful litigant is entitled to know when he can regard the litigation as at an end. It may, therefore, be argued that his right should not be held to be in suspense unless such suspension is enacted in plain and unambiguous language. Further, it is suggested that the provisions of sec. 35 of the *Judiciary Act* may be read as containing an indication of an opinion on the part of the Parliament that only a specified class of past judgments should be subject to appeal. It may be that that opinion was erroneous, and that they were all so subject unless excepted, or that none of them were subject to appeal. The question is one of difficulty and importance. It is, however, a matter for our discretion to say whether so important a question should be decided in the present case. And considering the nature of the case, which is, we think, on the border line, and that there is at least ground for serious argument that the case is not one in which, if we have jurisdiction to give leave to appeal, we ought, applying the rule already enunciated, to do so, and further that if an erroneous rule as to the liability of the Commonwealth has been laid down by the Supreme Court (as to which we express no opinion), the error can be corrected if it is ever again sought to apply the same rule, we think that our discretion would be most fitly exercised by refusing leave to appeal.

The order for leave will therefore be rescinded. The appellant must pay the respondent's costs of the motion, and such costs as have been incurred by the respondent in respect of the appeal.

Attorney for plaintiff, respondent, *J. B. Frawley.*

Attorneys for defendant, appellant, *Macnamara & Smith.*

C. A. W.