*H. C. OF A. 1904.

THE COMMISSIONER OF RAILWAYS v. LEAHY.

O'Connor J.

is a very difficult matter to say what the jury would do under the circumstances; but before I can say that this case ought not to go to the jury in order to have that question determined, I must be satisfied myself that it would be impossible for a jury of reasonable men to come to the conclusion that this precaution under the circumstances ought not to have been taken, and, if taken that it could not have been effectual. In other words, if the case had gone to the jury, would the Court have been entitled to set aside a verdict for the plaintiff on that issue on the ground that it was one which reasonable men could not have arrived at. I find it impossible to come to the conclusion that the Court would have set aside such a verdict under those circumstances, and, that being so, it appears to me that the case, by reason of these facts appearing in the plaintiff's own case, ought not to have been withdrawn from the jury. For that reason the case ought to go down for a second trial.

*Mr. Smith.* I ask for costs.

GRIFFITH, C.J. We think the costs should abide the event

Solicitor for appellant, *W. F. Sayer.*
Solicitor for defendant, *C. Lyhane.*

H. E. M.

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[HIGH COURT OF AUSTRALIA.]

BRICKWOOD . . . . . APPELLANT;

AND

YOUNG AND OTHERS, AND THE MINISTER FOR PUBLIC WORKS OF NEW SOUTH WALES . . RESPONDENTS.

H. C. OF A. 1904.

SYDNEY, *Nov.* 28.

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

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*Practice—Time for setting down appeal for hearing—Delay—Appeal Rules, sec. III., r. 12, of 22nd August, 1904—Costs.*

Where an appellant has a substantial ground of appeal, and has shown his *bonâ fides* by promptly giving security and taking all other necessary steps in the prosecution of his appeal, the mere failure to set the appeal down for

hearing at the proper sittings of the Court, as prescribed by the Appeal Rules, is not in itself a sufficient ground for dismissing the appeal for want of prosecution.

An appellant filed and served notice of appeal on 7th September, 1904, and on the next day lodged security, £50, though, under the Appeal Rules, he need not have done so till three months later. By r. 12 of sec. III. of the Amended Appeal Rules of 22nd August, 1904, the appellant was bound, under these circumstances, to set down the appeal for hearing at the sittings of the High Court in November, 1904, whereas, if he had waited until the expiration of the three months allowed for the giving of security, he would not have been obliged to set the appeal down until the subsequent sittings. The appeal not having been set down within the time prescribed, certain of the respondents moved to have it dismissed for want of prosecution.

The motion was dismissed, upon the appellant undertaking to set the appeal down for hearing at the then present sittings, but the appellant was ordered to pay the costs of the motion.

The Court refused to make the payment of these costs by the appellant a condition precedent to the entertaining of the appeal.

MOTION to dismiss appeal for want of prosecution.

Notice of appeal was filed and served on 7th September, and on the next day £50 security was lodged by the appellant, but the appeal was not set down for the November sittings, which were the first sittings after the two months allowed by r. 12, sec. III., of the Appeal Rules of 22nd August, 1904. It appeared that the appellant's solicitor was under the impression that it was necessary to have the transcript prepared before setting the appeal down for hearing, and its preparation had been unavoidably delayed by the making of necessary copies of documents, and by certain other causes for which the respondents' solicitors were partly responsible.

*Rich*, for the applicants (respondents other than the Minister for Public Works). The appellant, by his delay, has disentitled himself to have his appeal heard. The security was lodged on 8th September, and therefore the appeal should have been set down for hearing at the present sittings: r. 12, sec. III. of Appeal Rules, 22nd August, 1904, which amended the Amended Rules of 12th October, 1903. There was no reasonable excuse for the delay. It was not necessary to have the transcript complete before setting down. The limitation of time is in the nature of a right

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BRICKWOOD v. YOUNG AND OTHERS.

given to the party who has obtained the decree, that he may know when finality has been reached, and the time will only be extended under very special circumstances, not merely because the appellant has made a mistake. [He cited *International Financial Society* v. *City of Moscow Gas Co.* (1)].

*Harvey*, for the appellant. The Court will not insist upon a rigid compliance with the rules when the appellant has a substantial ground of appeal, and the respondents have not been prejudiced. The appellant here has a substantial claim against the respondents, and has shown his *bonâ fides* by lodging £50 as security on the earliest possible day, and by going to the expense of preparing the transcript for the appeal. He was entitled to wait for three months before giving security, and, if he had done so, he need not have set the appeal down until after these sittings. The respondents, therefore, are in no worse position than they would have been if the appellant had taken all the time to which he was entitled for each step. The difficulty has been caused by his own expedition in giving security. The appellant is prepared to set down the appeal for the present sittings, if the respondents will waive the notice.

*Rich* in reply.

The judgment of the Court was delivered by

GRIFFITH C.J. This Court is not inclined to give effect to merely technical points in any case, and in the present case the appellant has shown his *bonâ fides* by giving security three months earlier than by the rules he was bound to do. He need not have given security until next month, December, and he could then have set the appeal down for hearing at the next sittings of the Court, held two months after that time, but, owing to his own expedition in giving security at the earliest possible moment instead of the latest, it became necessary, technically, to set it down for the present sittings, although the appellant seems not to have thought it necessary to do so. The appeal appears to have been brought *bonâ fide*, and security to have been given at the earliest possible

(1) 7 Ch. D., 241.

moment, and, if the appellant had done what he was strictly bound to do, he would have set the appeal down on 7th November. It would then have come into the list for these sittings after all the cases now on the paper, so that the respondents really lose nothing in substance, if we allow the appeal to be set down now. Mr. Harvey offered to set it down for these sittings, and there is no objection to that on the part of the respondents. Under these circumstances, following the practice of the Court of Chancery, and also, indeed, of the Courts of Common Law, which, in similar cases, were accustomed to allow the appellant to have time, requiring him to give an undertaking to "speed the cause," we think that the proper order to make in this case is that, the appellant undertaking to set the appeal down for these sittings, the application be dismissed, the appellant to pay the costs of the motion.

If we were very strict, and insisted on the rigid observance of the rules in these matters, it would probably result in a want of uniformity in the practice, as the expedition required in Sydney and Melbourne would be very much greater than in the capitals of the other States in which sittings are held. In some of these the Court sits only twice, and in some only once, in the year.

*Rich* asked to have the payment of the costs made a condition precedent to the entertaining of the appeal.

GRIFFITH C.J. It is not usual to make such an order, and there is no special reason for making it in this case.

*Application dismissed upon the appellant undertaking to set the appeal down for the present sittings. Appellant to pay the costs of the application.*

Solicitors for the applicant, *Perkins and Fosbery.*

Solicitors for respondent (appellant), *A. W. E. Weaver.*

C. A. W.