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that promptitude which is so important a feature when a man is asserting an equitable right to interests in a speculative enterprise.

For the reasons I have given I agree that this appeal should be allowed.

Appeal allowed. Judgment appealed from discharged. Suit dismissed, against Zobel with costs, against Gander with costs subsequent to the statement of defence. Respondent, Murray, to pay the costs of the appeal and in the Supreme Court.

Solicitors, for the appellants, *McLachlan & Murray.*
Solicitors, for the respondent, *Robson & Cowlishaw.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MANN . . . . . APPELLANT;
COMPLAINANT,

AND

DOO WEE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA EXERCISING FEDERAL JURISDICTION.

H. C. OF A. 1907.

PERTH, *Nov.* 5.

Griffith C.J., Barton and Isaacs JJ.

Justices Act 1902 (*W.A.*), (2 *Edw. VII. No.* 11), *secs.* 135, 137, 191—*Criminal Code* 1903 (*W.A.*), (1 & 2 *Edw. VII. No.* 14), *secs.* 553, 614—*Appeal from justices—Order for rehearing—Abandonment of appeal—Proof of charge de novo—Absence of accused.*

Where an appeal from a summary conviction is heard by way of rehearing, the fact that the appellant at the outset abandons his appeal and absents himself from the Court is no ground for allowing the appeal and quashing the conviction.

An order that an appeal shall be heard by way of rehearing does not operate to quash the conviction appealed against.

AN appeal from the order of *Rooth* J. exercising federal jurisdiction in a matter under the *Immigration Restriction Acts* 1901-05. The respondent was arrested and charged before a Police Magistrate at Perth with being a prohibited immigrant, and after due hearing was convicted and sentenced to imprisonment for two months. He lodged an appeal to the Supreme Court of Western Australia on the ground that he could bring evidence, which he did not previously know was necessary on his part, to prove that he had been resident in the Commonwealth more than a year.

On the respondent's application *Parker* C.J. made an order that the appeal should be by way of rehearing, in pursuance of sec. 191 of the *Justices Act* 1902. The appeal came on for rehearing before *Rooth* J., and counsel for respondent (the then appellant) thereupon informed the Court that he desired to withdraw the appeal. This was not allowed, His Honor ruling that, as an order for rehearing had been made, this was equivalent to a quashing of the conviction, and the prosecution must proceed to prove the charge *de novo*. After protest, counsel for the prosecution opened the case and proceeded to call witnesses ; but, it being pointed out that the accused person was absent, *Rooth* J. ruled that the procedure was governed by the *Criminal Code* (1 & 2 Edw. VII. No. 14), sec. 614, and the charge could not be proved in the absence of the accused. His Honor refused to issue a bench warrant to compel the attendance of the accused, and made an order allowing the appeal and quashing the conviction. The complainant appealed to the High Court.

Thomas, for the appellant. The offence of being a prohibited immigrant is a summary, not an indictable, offence ; the procedure therefore was governed by the *Justices Act* 1902, and not by the *Criminal Code* 1903, sec. 553. That being so, the absence of the accused person was immaterial ; the accused was represented by his counsel, and therefore present before the Court : *Justices Act* 1902, sec. 137 ; and under sec. 135 the Judge could have proceeded *ex parte*.

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But in any event the order that the appeal should be by way of rehearing did not require the proof of the whole case over again; that order was only a step in the procedure of hearing the appeal, to allow the appellant to adduce fresh evidence in support of his appeal. The conviction stands until it is properly reversed; and the accused having expressly abandoned his appeal, there was nothing to do but affirm the conviction.

No appearance for the respondent.

GRIFFITH C.J. I think that where the learned Judge fell into error was in treating the order of the Chief Justice that the appeal should be by way of rehearing as a substantive order disposing of the appeal *pro tanto*, instead of, as it really was, a mere step in the hearing of the appeal itself. The application to the Chief Justice for that order, the order itself, and the subsequent hearing of the appeal before *Rooth* J. were all parts of a single proceeding, that is, the appeal. The case came properly before the Court of Appeal, and thereupon the appellant asked to withdraw his appeal and declined to proceed with it. At that time the conviction stood. The learned Judge, instead of dismissing the appeal when the appellant abandoned it, entered upon the hearing, and then allowed the appeal on the ground that no evidence could be given in the absence of the appellant. In the first place, I am of opinion that he ought to have dismissed the appeal as soon as the appellant abandoned it. In the second place, I have no doubt that the appellant was present in contemplation of law all through the proceedings, since he was there when they began. It was quite immaterial that he went out of Court while they were going on. If it had been necessary under the circumstances to hear evidence, I have no doubt that it was competent for the Court to do so; but, if it had then been necessary, I think it would now be necessary to remit the case for rehearing. But in the actual circumstances it was not necessary. A conviction stands until it is quashed. If an appellant when the appeal comes on abandons it, there is an end of the appeal, and the conviction remains in force. For these reasons I think that the learned Judge was wrong and that this appeal should be allowed.

BARTON J. Sec. 614 of the Criminal Code appears to relate only to the trial of indictable offences, and I do not think there can be any application of it in this case. The appellant, being present by his counsel at the calling on of the appeal, and having through his counsel abandoned the appeal, made the most cogent admission of the propriety of the original conviction which could be made in a Court of Justice, and therefore this appeal should be sustained.

ISAACS J. I am of the same opinion. The respondent was summarily convicted, and sec. 183 of the *Justices Act* gave him an absolute right to appeal on complying with certain conditions. Those conditions were complied with, and he therefore was an appellant. Sec. 187, in prescribing the security for his appearance, directs that he should enter into a recognizance to appear before the Court to which the appeal is made, and to submit to the judgment of the Court. He cannot, in my opinion, by breaking the requirements of the Statute, put himself in a better position than if he complied with them. Then the Act goes on to provide for the hearing of the appeal, and sec. 191 provides that there may be a rehearing in either of two cases: If the parties agree, or if the Court to which the appeal is made so orders. But that is only, as has already been put by the Chief Justice, a matter of procedure; it is not the main order in the case; and if the appellant chooses to abandon his whole appeal he abandons it altogether, including any agreement for rehearing or any incidental order for rehearing which may have happened to be made. I think, therefore, that the view taken by his Honor Mr. Justice *Rooth*, that the order for a rehearing was the main order, was not correct; and that is shown very distinctly by this, that secs. 192 and 193 provide for cases where a decision is not affirmed by the appellate Court, and where the decision of the justice is affirmed by the appellate Court. If the decision is affirmed, then the order made by the justice, embodied in that decision, has to be carried out; the conviction stands, in other words, until it is set aside. It never was set aside, and although the appellant was enabled to take steps to challenge it, and did take steps to challenge it, he abandoned his right to do so; and the only consequence

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is that, having formally abandoned it, the original conviction stands. I agree therefore that the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Conviction restored.

Solicitor, for appellant, *Barker* (Crown Solicitor).

N. G. P.

[HIGH COURT OF AUSTRALIA.]

MAURICE MYERSON . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908.

SYDNEY, *April* 22.

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

Criminal Law—Verdict—Recommendation to mercy—Ambiguous expression in rider—Meaning of jury's finding.

Where the jury in a criminal trial add to a verdict of guilty, and objection is taken to the conviction on the ground that the rider is a rider finding special facts which are alleged to be inconsistent with guilt, the Court must look at the whole finding including the rider, and if it then appears reasonably doubtful whether the jury have found the facts necessary to establish the offence charged, the accused is entitled to the benefit of the doubt and the conviction should be quashed ; but the effect of a clear finding of guilty is not cut down by a rider stating facts which, considered in the light of the circumstances of the case and the nature of the offence charged, are consistent with guilt.