H. C. OF A. 1908.

REIS v. CARLING.

O'CONNOR J.

appellants. In my opinion, therefore, the appeal must be allowed and all further proceedings on the judgment must be stayed.

Appeal allowed.

Solicitors, for the appellants, *Atthow & McGregor.*
Solicitors, for the respondents, *Flower & Hart.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

DWYER . . . . . APPELLANT;
PLAINTIFF,

AND

THE RAILWAY COMMISSIONERS OF NEW SOUTH WALES . . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908.

SYDNEY, *May* 5.

GRIFFITH C.J., BARTON and O'CONNOR JJ.

Practice—New Trial—Memorandum not signed by counsel who appeared at the trial—Plaintiff applying in person for rule nisi—Regulæ Generales of the Supreme Court (N.S.W.), rr. 150, 151.

Rule 150 of the Supreme Court of New South Wales provides that any party who intends to move for a new trial must within a certain time after the trial file a memorandum of such intention, which by Rule 151 must state, *inter alia*, the grounds of the application, and, where the party had counsel at the trial, must be signed by one of such counsel.

A plaintiff, who appeared at the trial by counsel, was nonsuited. Counsel's retainer being then withdrawn, the plaintiff, intending to apply for a new trial, filed a memorandum for a rule *nisi*, which was not signed by counsel, and appeared in person in support of his application. The Supreme Court refused to entertain the application on the ground that the memorandum did not comply with Rule 151.

Held, that as the right of a party to apply for a new trial existed at common law independently of the Rules of Court, and as Rule 151, which imposed a condition upon the exercise of that right, should be, and always had been construed by the Supreme Court, not as an absolute rule, but as a rule of convenience, to be relaxed on good cause being shown, the plaintiff should under the circumstances have been heard on his application for a rule *nisi*.

Decision of the Supreme Court on this point: *Dwyer* v. *Railway Commissioners*, 24 N.S.W. W.N., 72, reversed.

Motion for rule *nisi* refused on the merits.

APPEAL from a decision of the Supreme Court of New South Wales on an application for a rule *nisi* for a new trial.

The appellant, a solicitor, plaintiff in an action for damages against the respondents, was nonsuited. At the trial he was represented by counsel, but after the trial counsel's retainer was withdrawn, by consent. The plaintiff, desiring to apply for a new trial, filed a memorandum for a rule *nisi*, but, as he intended to move in person, did not obtain the signature of counsel as required by Rule 151 of the Rules of the Supreme Court. It appeared that he had shown the memorandum to counsel who had appeared for him, but had not obtained his signature to it. Plaintiff then appeared in person before the Full Court in support of his application, but the Court, on the ground that the memorandum was not in accordance with Rule 151, refused to entertain the application and ordered the appeal to be struck out: *Dwyer* v. *Railway Commissioners* (1).

From that decision the present appeal was brought to the High Court.

Appellant in person. Rule 151 has on several occasions been construed by the Supreme Court as one which may be relaxed, where the circumstances render it inequitable or oppressive to enforce it. If it is not an inflexible rule, the present case is one in which it should be relaxed. To enforce it would result in depriving the plaintiff of his right of appeal, for the retainer of counsel had been withdrawn and his signature could not be obtained. The Rule does not provide for signature by any other

(1) 24 N.S.W. W.N. 72.

H. C. OF A. 1908.

DWYER v. THE RAILWAY COMMISSIONERS OF NEW SOUTH WALES.

counsel. [He referred to *Quigley* v. *King* (1); *Wentworth* v. *Hill* (2).]

[GRIFFITH C.J.—I should like to know whether the right to move for a new trial is given by Statute, by common law, or by rule of Court.]

Garland, for the respondents. The right existed in the Queen's Bench at common law; and the Supreme Court has by the Charter of Justice, 9 Geo. IV. c. 83, the same powers in this respect as the Court of Queen's Bench in England. Undoubtedly Rule 151 is not inflexible, but it is very important in the interests of convenience that the Court should have the authority of counsel who appeared at the trial, for the correctness of the grounds taken, and the substantial nature of the point to be argued. If the Court is satisfied that the circumstances are such as to justify them in relaxing the Rule they will relax it, but that is a matter for their discretion. They were not so satisfied in the present case. According to the plaintiff's own statement, that he submitted the grounds of the memorandum to his counsel and did not obtain his approval, this is an instance of the very thing that the Rule was intended to prevent. The respondents, however, do not oppose the hearing of the plaintiff's appeal on its merits.

[GRIFFITH C.J.—We are asked to review the decision of the Supreme Court. We can scarcely do that by consent unless we think they were wrong in refusing to hear the application. We think that we should hear the appeal on its merits and give our reasons afterwards.]

The *Appellant* entered upon his argument as to the merits of the application, but as this turned wholly upon the particular facts of the case and involved no general principle, it is not necessary to report it in detail. The main grounds argued were that certain evidence tendered by the plaintiff in reply was rejected, and that the learned Judge who presided, in stating to the jury that a certain written statement given by one of the plaintiff's witnesses, which was contended by the plaintiff to be inconsistent with the evidence given by the witness at the trial, was really not incon-

(1) (1904) 4 S.R. (N.S.W.), 204. (2) 7 N.S.W. W.N., 4.

sistent with it, had in effect misdirected the jury. The appellant also asked for permission to file affidavits as to fresh evidence discovered by him since the trial.

Garland, for the respondents, was not called upon.

GRIFFITH C.J. The first point raised in this case is whether Rule 151 of the Rules of the Supreme Court is so far imperative that the Full Court were justified in the circumstances of the present case in refusing to entertain an application by the plaintiff for a rule *nisi* for a new trial. Now, so far as I understand, it has been the unvarying practice of the Supreme Court that a party, after a trial by a jury, has a right to apply for a new trial, on complying with certain conditions as to time, procedure, and so on. It has also always been the right of a party to appear in person or by counsel, or by his solicitor, when a solicitor is allowed to appear. If that were a privilege given by a rule of Court and not a right given by law, it might be hedged in by any conditions that the Court thought fit to impose, as, for instance, when a person is applying for leave to sue *in forma pauperis* the Court imposes as a condition in some cases that an opinion must be given by counsel, in order to show that it is a fit case for such leave. Rule 150, so far as is material, provides that when either party intends to move for a nonsuit, or for a new trial, he shall within a certain time after the trial file a memorandum of such intention; and by Rule 151 the memorandum is to state the day or days on which the cause was tried, the verdict or other termination of the trial, the motion intended to be made, and the grounds, and "where the party had counsel at the trial, shall be signed by one of such counsel." That is to say, in effect, that if a party employs counsel at the trial he shall not be afterwards allowed to exercise this right in person. If that were imperative it might give rise to serious questions as to whether the Court can by such a Rule of Court deprive a suitor of his right to be heard. But the Rule has always been construed by the Supreme Court itself as one which may be relaxed on occasion; not as an absolute rule, but as a rule of convenience. In the present case the ground of relaxation put forward on behalf of the appellant is that the retainer of the

H. C. OF A. 1908.

DWYER v. THE RAILWAY COMMISSIONERS OF NEW SOUTH WALES.

Griffith C.J.

counsel who appeared for him at the trial had come to an end, and he, therefore, had no counsel. He, therefore, was in this position, that he was under the necessity either of retaining new counsel or abandoning his right to apply for a new trial. Under these circumstances we thought that the rule, construed as the Supreme Court has always applied it, should have been relaxed, and the plaintiff should have been heard on his application for a rule *nisi*, and for these reasons we allowed him to be heard on the merits of the application.

As to the merits, it is clear that the plaintiff has none. There was a conflict of evidence and the jury found a verdict for the defendants. Two of the grounds of the plaintiff's application for a new trial are that the verdict was against evidence, and that it was against the weight of evidence. As to those grounds nothing is now said. The third ground was that the learned Judge who presided made some observations as to the effect of a certain document shown to a witness in cross-examination by counsel for the plaintiff. All that that amounted to was a comment by the learned Judge on the weight of the evidence, and that is not a ground for granting a new trial. The fourth ground was the wrongful rejection of evidence. But upon the issue presented to the jury that evidence was altogether irrelevant, and was therefore rightly rejected, if it was formally tendered, as to which there is some doubt.

It is suggested by the plaintiff that, when the memorandum was filed and before the case came before the Supreme Court, he discovered fresh evidence, and that he had affidavits on the point ready to be filed if he had been allowed to be heard, and that he would have then asked for leave to amend the memorandum, if necessary, and the Court might have granted him leave to do so. We asked him to state the reason of his not having discovered the evidence earlier and the nature of the evidence. For it is not enough to have discovered fresh evidence; it must also be shown to the satisfaction of the Court that the party could not by reasonable diligence have discovered it earlier. But it appears that whatever he may have discovered would have been quite irrelevant. In my opinion, therefore, if the application had been

heard by the Supreme Court, the rule *nisi* ought to have been refused.

H. C. OF A. 1908.

DWYER v. THE RAILWAY COMMISSIONERS OF NEW SOUTH WALES.

BARTON and O'CONNOR JJ. concurred.

Appeal dismissed.

Solicitor, for the respondents, *J. S. Cargill.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

PARKER . . . . . APPELLANT;
PETITIONER,

AND

PARKER . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908.

SYDNEY, *May* 5.

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

Husband and wife—Divorce—Domicil of origin—Change of domicil—Jurisdiction.

The respondent, whose domicil of origin was in Victoria, where he resided and carried on business, was married in that State, but never lived there openly with his wife. He had a branch office in Sydney; and a few years after his marriage he brought his wife and child from Melbourne to Sydney, and there made a home for them at which he lived with them for a few months and then deserted them. From that time, though in the course of his business he was frequently in New South Wales for considerable periods, he never had any fixed residence there.

In a suit brought by the wife in the Supreme Court of New South Wales for dissolution of marriage on the ground of desertion;

Held, on the evidence, that the respondent had not acquired a domicil in New South Wales, and therefore the Supreme Court had no jurisdiction to entertain the suit.