[HIGH COURT OF AUSTRALIA.]

HALL . . . . . APPELLANT;

AND

COSTELLO AND THE MINISTER FOR LANDS (N.S.W.) . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1909.

SYDNEY, *May* 27, 28.

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

Appeal from Supreme Court—Special leave—Acquiescence in decision of Supreme Court—Delay—Rescission of special leave.

Under the Crown Lands Acts competing applications for Crown lands are dealt with by the local Land Board, whose decision is subject to appeal to the Land Appeal Court. From the latter Court there is an appeal by special case to the Supreme Court, which decides the points of law submitted and remits the case to the Land Appeal Court, and that Court again remits it to the Land Board for final determination in accordance with the decision of the Supreme Court.

On the hearing of an appeal by special leave from a decision of the Supreme Court on a case stated by the Land Appeal Court, it appeared that according to a decision of the High Court in another case, pronounced after the decision of the Supreme Court, the point argued in the Supreme Court had been rightly decided, but that the appellant should have succeeded on another ground which had not been argued before the Supreme Court owing to its having been decided against the appellant by that Court at an earlier stage of the same litigation. By the last decision of the Supreme Court the case was remitted to the Land Appeal Court and by that Court to the Land Board. From the determination of the Land Board the appellant again appealed to the Land Appeal Court, which dismissed the appeal, and, the appellant having failed to appeal from that decision, the Land Board made a final determination in favour of the respondent. The respondent thereupon went into possession of the land which had been the subject matter of the litigation, and expended considerable sums in improvements. The first

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decision of the Supreme Court was pronounced in October 1905, and the second in May 1907, and special leave to appeal from the latter decision was granted in November 1908, more than six months after the respondent had gone into possession.

The High Court rescinded the special leave, and refused to grant special leave to appeal from the decision of the Supreme Court pronounced in 1905 on the ground that the decision of the Land Appeal Court in 1908, which had been acquiesced in by the appellant, had finally determined the rights of the parties, and could not be affected by any opinion that the High Court might express, and also on the ground that the appellant had by undue delay and apparent acquiescence allowed the respondent to alter his position by entering into possession and expending money on the land.

Special leave to appeal from the decision of the Supreme Court: *Hall* v. *Costello*, 24 N.S.W. W.N., 66, rescinded, and special leave to appeal from the decision of that Court: *Hall* v. *Costello*, (1905) 5 S.R. (N.S.W.), 573, refused.

APPEAL from the decision of the Supreme Court of New South Wales on a special case stated by the Land Appeal Court.

The appellant, Elizabeth Hall, in August 1888 became the holder as devisee under the will of her deceased husband of an original conditional purchase, taken up in 1865, and resided continuously on the holding up to the date of this appeal. In August 1904 she applied for a conditional lease under the Crown Lands Acts by virtue of her original holding. An application for an additional conditional purchase of the land so applied for by the appellant was made simultaneously by the respondent, John Costello. At the time of making her application Mrs. Hall had married again, and was living with her husband. On 23rd December 1904 she applied to the Minister for his consent to her application, as required by sec. 17 of the *Crown Lands Amendment Act* 1903, and the Minister gave his consent subject to the confirmation of the appellant's application by the local Land Board. The Board confirmed the application, and the respondent Costello appealed to the Land Appeal Court, and that Court stated a case for the opinion of the Supreme Court on the question whether the present appellant, being a married woman not living apart from her husband under an order for judicial separation, was precluded by sec. 17 of the Act of 1903 from making the application in question. The Supreme Court answered the question in the affirmative: *Hall* v. *Costello* (1), and remitted the case

(1) (1905) 5 S.R. (N.S.W.), 573.

to the Land Appeal Court, which in its turn remitted it to the local Land Board for final determination in accordance with the opinion of the Supreme Court. On 26th April 1906 the local Land Board allotted part of the land to the appellant and the balance to the respondent, Costello. Costello appealed from the determination of the Board to the Land Appeal Court, and that Court stated a case for the opinion of the Supreme Court on the question whether the appellant, being the holder for her sole and separate use of an original conditional purchase devised to her by her husband and having resided thereon continuously for the prescribed period, was entitled under the Crown Lands Acts to make the application in question. The Supreme Court on 1st May 1907, following a previous decision of their own: *Phillips* v. *Lynch* (1), held that the appellant was not entitled, but confined their attention to the effect of sec. 3 of the *Crown Lands Amendment Act* 1903, which was the only section relied upon before the Land Board and the Land Appeal Court. (See *Hall* v. *Costello* (2). The appellant appears to have taken some steps towards appealing to the High Court from that decision and to have abandoned the appeal, after obtaining special leave. The case was, therefore, remitted to the Land Board through the Land Appeal Court, and finally the land in question was awarded to the respondent under his application for an additional conditional purchase. In the interval the High Court on appeal from the Supreme Court had held in *Phillips* v. *Lynch* (3) that the interpretation placed by the Supreme Court on sec. 3 of the Act of 1903 was right, but that, as regards the effect of sec. 17, they had been in error, the result of that decision being that the appellant should have been allowed to apply for the land under the latter section. The Land Appeal Court and the Land Board had felt themselves bound to follow the direction of the Supreme Court in the case before them rather than the decision of the High Court in *Phillips* v. *Lynch* (3).

On 27th November 1908 the appellant, on the motion of *L. Armstrong*, was granted special leave to appeal from the decision

(1) (1906) 6 S.R. (N.S.W.), 645. (2) 24 N.S.W. W.N., 66.
(3) 5 C.L.R., 12.

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of the Supreme Court in 1907, on affidavits which explained the delay in making the application.

On the appeal coming on for hearing affidavits were read on behalf of the respondent in support of a motion to rescind the special leave, and it appeared from these that the respondent, after the granting of his application by the Land Board, had gone into possession of the land in April 1908, and had expended considerable sums of money in making improvements on the land before he received notice of the present appeal.

L. Armstrong, for the appellant. Both sec. 3 and sec. 17 of the Act of 1903 are involved in the decision of the Supreme Court in 1907. The question there was put in a general way, not limited to either section. Even if that decision is restricted to sec. 3, and is therefore taken to be correct on the authority of *Phillips* v. *Lynch* (1), the appellant is not in the same position as the married woman in that case. The appellant became a holder under a devise before the Act of 1889, sec. 47 of which imposed the disability relied upon in the Supreme Court. Even if an appeal cannot be entertained as to the decision of 1907, special leave should be granted to appeal from the decision in 1905, for if that case had been rightly decided the appellant would now be in possession of the whole of the land. [He referred to *Crown Lands Amendment Act* 1903, secs. 3, 17; *Crown Lands Amendment Act* 1889, 53 Vict. No. 21, sec. 47.] There is nothing in the fact that the Minister's consent under sec. 17 of the Act of 1903 was obtained after the application was put in.

Pike, for the respondent. Special leave should be rescinded on the ground of delay and acquiescence. The respondent went into possession and made improvements, relying upon the final determination in his favour by the Land Appeal Court in 1908, in obedience to which the Land Board had awarded him the land. No appeal from the decision of the Land Appeal Court in 1908 is now possible, as the statutory period was allowed to elapse without the prescribed steps for appeal having been taken by the

(1) 5 C.L.R., 12.

appellant. Moreover, the decision of the Supreme Court in 1907 was right: *Phillips* v. *Lynch* (1). The only point dealt with was that arising under sec. 3 of the Act of 1903. The delay of the appellant, since 1907, is not satisfactorily explained, and it would be a great hardship on the respondent to grant special leave now to appeal from the decision in 1905. The respondent has lost his chance of applying for other land adjoining his own. There is no question of general public interest involved. The law has been declared by the High Court in *Phillips* v. *Lynch* (1), and this case only involves the question which of these two parties should have the land. [He referred to *Dalgarno* v. *Hannah* (2).] The Land Appeal Court and Land Board were bound to act in accordance with the opinion of the Supreme Court: 53 Vict. No. 21, sec. 8 (4). They have finally disposed of the matter. [He referred to *Walker* v. *Walker* (3); *Commissioners of Taxation for N.S.W.* v. *Baxter* (4).] The appellant began an appeal in 1907 and finally abandoned it.

Even under sec. 17 the appellant must fail, as the consent of the Minister should have been obtained before the application. It is from the date of the application that title begins: 53 Vict. No. 21, sec. 12.

Armstrong in reply, referrred to *Craig* v. *Phillips* (5); Appeal Rules, sec. 3.]

May 28.

GRIFFITH C.J. This is in some respects a singular case. The appeal is incidental to a long continued litigation between the appellant and the respondent, who were rival applicants for Crown land. Under the provisions of the New South Wales Crown Lands Acts, when there are competing applications for land the local Land Board is the tribunal appointed to decide between the competing parties. From the Land Board there is an appeal to the Land Appeal Court, and to no other Court; from the Land Appeal Court there is a limited right of appeal to the Supreme Court by way of special case, and to no other Court. The Supreme Court decides the points of law sub-

(1) 5 C.L.R., 12.
(2) 1 C.L.R., 1.
(3) (1903) A.C., 170.
(4) 77 L.J.P.C., 67.
(5) 7 Ch. D., 249.

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mitted to it and remits the case to the Land Appeal Court to be dealt with according to its decision, and that Court again remits it to the Land Board which gives its decision, subject to further appeals through the same channel. As I have said, the appellant and the respondent were rival applicants. It now appears that, under the law as it has been declared by this Court, the appellant and not the respondent was entitled to the land. The application was made in 1904. In 1905 the Supreme Court on appeal from the Land Appeal Court decided that the appellant was not entitled to make application for the land under the provisions of sec. 17 of the *Crown Lands Amendment Act* 1903. Then the matter was further litigated before the Land Board and the Land Appeal Court, and in May 1907 the Supreme Court on appeal from that Court decided that the appellant was not entitled to apply for the land under sec. 3 of the Act of 1903. Shortly after that this Court in the case of *Phillips* v. *Lynch* (1) overruled the decision of the Supreme Court pronounced in 1905, from which it followed that the appellant was originally entitled to make the application. After the decision of the Supreme Court in 1907 the matter went back to the Land Appeal Court, and they sent it back to the Land Board which took up the matter in February 1908, and decided in favour of the respondent, obeying, as they were bound to do, the decision of the Supreme Court. The appellant again appealed to the Land Appeal Court which dismissed the appeal in April 1908. No appeal lay from that decision except to the Supreme Court, and no such appeal was brought. The decision therefore stands as a final judgment from which no appeal now lies to any Court. Under these circumstances it would be idle for us to entertain an appeal from the decision of the Supreme Court pronounced in 1907 for the purpose of discussing the propriety of the previous decision of the Supreme Court, which was only an incident in a litigation terminated by the final judgment of the Land Appeal Court in April 1908. This Court has held that one of the decisions of the Supreme Court was wrong and the other right. Whatever opinion this Court might express in this case would be merely a reiteration of the opinion it has already expressed; it would not

(1) 5 C.L.R., 12.

affect the judgment of the Land Appeal Court which stands for all time between the parties. That in itself is sufficient reason for refusing to entertain the appeal. With regard to the decision of the Supreme Court pronounced in 1905, which is the decision really objected to, the long delay that has taken place, followed by the entry of the respondent upon the land in reliance upon the unappealed from, and now unappealable, judgment of the Land Appeal Court, is sufficient to justify this Court in refusing to entertain an appeal after such a lapse of time, though mere lapse of time is not of itself conclusive ground for refusing special leave to appeal.

For these reasons I think that the special leave to appeal should be rescinded.

O'CONNOR J. I agree on all the grounds put forward by Mr. *Pike* that special leave should be rescinded. The most important ground, I think, is that last alluded to by my learned brother the Chief Justice, that in April 1908 the Land Board made an order allotting this land to the respondent. There was an appeal to the Land Appeal Court in the same month and they decided that the Land Board was right. The respondent waited 28 days, which is the prescribed time for appealing to the Supreme Court; no action was taken by the appellant to upset the decision, and the respondent thereupon, as he was entitled to do, went into possession of the land, put an outside fence round it, erected certain improvements on it, and used it in the course of a butchering business which he established, and spent a considerable amount of money upon it. All that has taken place under the final order of the Land Court, which put the respondent in possession of the land. I agree with my learned brother that that order is not before us, that it is impossible that it can ever be brought before us, and that no order that we could make could ever affect its validity. Now, whatever view we may entertain of the law laid down by the earlier decisions in 1905, we cannot give back to the appellant the land which the order of 7th April 1908 has vested in the respondent. Under these circumstances to grant leave to argue the question raised by Mr. *Armstrong* would be to give leave to argue a question that is merely

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abstract and academic, and in regard to which the Court would have no power to give effect to its decision. That seems to me a complete answer to the application for special leave. But in addition to that there is, to my mind, no justification for the long delay in making application for special leave, particularly as the party now in possession, who was entitled to take possession, has expended a substantial amount upon the land, in reliance upon the final order of the Land Appeal Court. No doubt, if that were the only matter to be considered there is a good deal to be said in favour of the view that by putting the appellant on terms the position might be adjusted, so as not to prejudice the respondent. But the present position of the parties, taken in connection with the appellant's failure to account for the delay in applying to this Court constitute, to my mind, a reason conclusive against allowing the leave granted *ex parte* to stand. I need not go into the question whether the other points are open or not. It is sufficient to say that for these reasons I think that the special leave should be rescinded.

HIGGINS J. I concur cordially in the order rescinding special leave to appeal. But I must confess to entertaining some doubt as to the main ground upon which it is proposed to rescind the leave. The special leave obtained was for an appeal from the order of the Supreme Court in May 1907, as to sec. 3 of the Act of 1903—not from the decision of the Land Appeal Court in April 1908. I think that the leave should be rescinded upon the merits, that there is no important point of law and no matter of further importance or interest involved, to say nothing of the extraordinary delay since the decision of the Supreme Court in 1907. There is no ground for special leave of the kind stated in *Dalgarno* v. *Hannah* (1). As for the order of 1905 which is not the subject of this appeal, but which Mr. *Armstrong* asked leave to appeal from, I think that the fact that the law has been laid down differently since that decision is not a ground for granting special leave to appeal after the time fixed by the Act.

(1) 1 C.L.R., 1.

Special leave to appeal rescinded. Respondent to pay the costs of the appeal and of the motion. One set of costs only.

Solicitors, for the appellant, *Percy D. Cox* by *H. C. Ellison Rich.*

Solicitors, for the respondent Costello, *Kennedy & White* by *Sullivan Brothers.*

Solicitors, for the respondent Minister, *J. V. Tillett,* Crown Solicitor for New South Wales.

C. A. W.

[HIGH COURT OF AUSTRALIA.]

JAMES F. McKENZIE & Co. . . . . APPELLANTS; APPLICANTS,

AND

E. A. LESLIE AND J. R. LESLIE . . . RESPONDENTS. OPPONENTS,

ON APPEAL FROM THE REGISTRAR OF TRADE MARKS.

Trade Mark—Registration—Trade Marks not identical—Likelihood of deception—Honest concurrent user in one State—Conditions as to mode of user—Trade Marks Act 1905 (*No.* 20 *of* 1905), *secs.* 6, 28, 44, 114—*Trade Marks Act* 1865 (*N.S.W.*) (*No.* 9 *of* 1865), *secs.* 2, 4, 7.

A. had for over 20 years used two trade marks, one consisting of the word "Excelsior" and the other a device containing that word, in respect of baking powder, in New South Wales, but chiefly in one district thereof. B. had during the same period used a trade mark, consisting of a device containing the word "Excelsior," also in respect of baking powder, in New South Wales,