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CHAPLIN v. COMMISSIONER OF TAXES FOR SOUTH AUSTRALIA.

BARTON J. I concur.

O'CONNOR J. I concur.

Appeal dismissed with costs.

Solicitor, for the appellant, *H. K. Paine.*

Solicitor, for the respondent, *C. J. Dashwood,* Crown Solicitor for South Australia.

B. L.

[HIGH COURT OF AUSTRALIA.]

ARMSTRONG . . . . . APPEALLANT;
PLAINTIFF,

AND

THE GREAT SOUTHERN GOLD MINING COMPANY, NO LIABILITY . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Discd *Madden, Re* (1996) 131 FLR 430

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MELBOURNE, *June* 15, 16, 19.

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

Practice—County Court—New trial—Service of notice of application—Time—"Clear days"—Enlarging time—Appeal from exercise of discretion—Misdirection—No objection at trial—County Court Act 1890 (*Vict.*), (*No.* 1078), *sec.* 96—*County Court Rules* 1891 (*Vict.*), *Interpretation clause, rr.* 188, 424, 426.

The interpretation clause of the County Court Rules 1891 (Vict.) provides that "if not inconsistent with the context or subject matter . . . 'clear days' shall mean that in all cases in which any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusive both of the first and of the last day." R. 188 provides that "an application for a new trial . . . may be made either to the Court or a Judge . . . ; if application be not made at the trial notice in writing, setting out the grounds thereof, must be left with the Registrar . . . and a copy of such notice must be served upon the opposite party . . . within seven clear days after the day of trial."

Held, that the above definition of "clear days" does not apply to r. 188 and, therefore, that service of a copy of a notice of application for a new trial on the eighth day after the last day of the trial was out of time.

Assuming that the High Court and the Supreme Court of Victoria have jurisdiction to review the exercise by a County Court Judge of the discretion given him by r. 424 of the *County Court Rules* 1891 to enlarge the time for serving notice of an application for a new trial, and that a County Court Judge has jurisdiction under sec. 96 of the *County Court Act* 1890 to grant a new trial on the ground of misdirection in law where objection has not been taken at the trial to the misdirection (as to both of which questions, *quære*), the High Court will not grant a new trial where the County Court Judge has refused it and the party asking for it would, in the opinion of the Court, only have a problematical and infinitesimal hope of success if a new trial were had.

Holford v. *Melbourne Tramway and Omnibus Co. Ltd.* (1909) V.L.R., 497; 29 A.L.T., 112; and *Handley* v. *London, Edinburgh and Glasgow Assurance Co.* (1902) 1 K.B., 350, commented on.

Decision of the Supreme Court of Victoria: *Armstrong* v. *Great Southern Gold Mining Co., No Liability*, (1911) V.L.R., 1; 32 A.L.T., 102, affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the County Court of Victoria by John Armstrong, by his next friend, against the Great Southern Gold Mining Co., No Liability, to recover damages for injuries alleged to have been received by him while in the defendants' employment by reason of their negligence.

The action was tried before his Honor Judge *Eagleson* and a jury, who on 13th July 1910 gave a verdict for the defendants, and judgment was entered accordingly. On 20th July the plaintiff issued a summons for a new trial, and on 21st July he served this summons on the defendants. The summons came on for hearing on 26th July, when objection was taken on behalf of the defendants that the summons had not been served "within seven clear days after the day of trial" as required by r. 188 of the *County Court Rules* 1891. The plaintiff applied to the Judge to enlarge the time for service under r. 424. The Judge then heard the application on its merits and decided that there were no grounds for granting a new trial, that the summons was not served within the proper time, and, being of opinion that the plaintiff had had a fair trial, he refused to enlarge the time for service.

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From this decision the plaintiff appealed to the Supreme Court, who held that the service of the summons was out of time, and refused to interfere with the discretion exercised by the County Court Judge in refusing to enlarge the time. (*Armstrong* v. *Great Southern Gold Mining Co., No Liability* (1)).

From this decision the plaintiff now appealed to the High Court.

Other facts are stated in the judgments hereunder.

The arguments as to misdirection are not reported as the judgment went on other matters.

Macfarlan (with him *Connolly*), for the appellant. The service of the summons on the respondents for a new trial was not out of time. The definition of "clear days" in the interpretation clause of the *County Court Rules* 1891 as applied to r. 188 means that the interval between the day on which the verdict is given and the last day on which the notice is served must not be more than seven days, that is, it may be served on the eighth day after the day on which the verdict was given. The intention is that where "clear days" are mentioned one day more is given than when the days are not said to be "clear days." That is shown by r. 426. The language of the definition in the interpretation clause exactly applies to that in r. 188, and neither the context nor the subject matter of that rule is inconsistent with the meaning given by the definition. The day on which the verdict is given is excluded from the time: *Pellew* v. *Inhabitants of Wonford* (2). A Judge of the County Court has power to grant a new trial at any time: *Reg.* v. *Bindon*; *Ex parte Cairns* (3). Even if the service of the summons was out of time the Judge had power under r. 424 to extend it, and in refusing to extend it he exercised his discretion on a wrong ground. His decision is therefore appealable.

[GRIFFITH C.J.—It is very doubtful whether an appeal lies from a refusal by a Judge to extend the time for asking for a new trial: *Lane* v. *Esdaile* (4); *In re Housing of Working Classes Act* 1890; *Ex parte Stevenson* (5)].

(1) (1911) V.L.R., 1; 32 A.L.T., 102.
(2) 9 B. & C., 134.
(3) 5 V.L.R. (L.), 93.
(4) (1891) A.C., 210.
(5) (1892) 1 Q.B., 609.

In *Reg.* v. *Bindon*; *Ex parte Cairns* (1) it was assumed that an appeal would lie. On an application to a County Court Judge for a new trial on the ground of misdirection it is not necessary that objection should have been taken to the direction at the trial: *Handley* v. *London, Edinburgh and Glasgow Assurance Co.* (2). *Brown* v. *Dean* (3) does not qualify that proposition.

Bryant (with him *Arthur*), for the respondents. The meaning of r. 188 is clear in itself, and the definition of "clear days" in the interpretation clause is inapplicable. The rule would mean the same thing if the word "clear" were omitted. The words have a well known legal meaning: *Encyclopædia of the Laws of England*, 2nd ed., vol. III., p. 94. The definition in the interpretation clause only applies where it is intended that a certain number of days shall elapse between the happening of an event and the doing of an act. This Court will not interfere with the exercise of a Judge's discretion to enlarge time unless he has acted arbitrarily: *Ex parte Stevenson* (4). Objection should have been taken to the direction at the trial, and that not having been done, a new trial should have been refused: *Nevill* v. *Fine Art and General Insurance Co. Ltd.* (5); *Ritchie* v. *Victorian Railways Commissioner* (6); *Page* v. *Bowdler* (7); *Smith* v. *Baker & Sons* (8). In order to entitle the appellant to succeed he must under r. 192 show that some substantial wrong or miscarriage has been done, and he has not done so.

Macfarlan, in reply. If the misdirection complained of is a misdirection in law objection need not have been taken at the trial: *Holford* v. *Melbourne Tramway and Omnibus Co. Ltd.* (9). The rule laid down by the Courts in England that objection to a direction must be taken at the trial only applies to a non-direction and not to a misdirection.

[O'CONNOR J.—In *Mutual Life Insurance Co. of New York* v. *Moss* (10) this Court said that you cannot get a new trial for

(1) 5 V.L.R. (L.), 93.
(2) (1902) 1 K.B., 350.
(3) (1909) 2 K.B., 573; (1910) A.C., 373.
(4) (1892) 1 Q.B., 609, at p. 611.
(5) (1897) A.C., 68.
(6) 25 V.L.R., 272.
(7) 10 T.L.R., 423.
(8) (1891) A.C., 325, at p. 358.
(9) (1909) V.L.R., 497; 29 A.L.T., 112.
(10) 4 C.L.R., 311, at p. 322.

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misdirection unless the attention of the Judge was called to the misdirection at the time.]

That is *obiter*. This Court approved of *Handley* v. *London, Edinburgh and Glasgow Assurance Co.* (1) in *Brown* v. *Lizars* (2). [He also referred to *Stone's Justices' Manual* 1907, p. 7.]

GRIFFITH C.J. The appellant in this case brought an action in the County Court for damages for injuries alleged to have been received by him by reason of the negligence of the respondents, owners of the mine in which the appellant was employed. The respondents denied negligence, and set up the defences of contributory negligence and also that commonly expressed by the phrase *volenti non fit injuria*. At the trial the appellant did not content himself with the *primâ facie* evidence afforded by the rule laid down in sec. 129 of the *Mines Act* 1897, but offered evidence to show what was the real state of facts and what particular acts of negligence he complained of. The case he made was of the most shadowy character. He said that there was working with him a man named Higgins, an experienced miner, the appellant himself being under the age of 20 years. They were engaged in timbering an old drive, which is admittedly a dangerous work. The appellant's story is that Higgins tapped a stone in the roof of the drive and found it "drummy"—which I suppose indicates that there was a hollow space behind the stone—that he then sent the appellant away to get a prop to put under the stone, that while he was away Higgins went on tapping this dangerous stone and knocking pieces off it with a pick-axe, apparently standing under the stone while doing so, that when the appellant came back Higgins told him to measure what length of prop would be necessary and that while he was measuring the length, Higgins being close beside him, the stone fell and injured both of them. The appellant said that the negligence he complained of was that, when he came back with the prop, Higgins did not warn him not to go under the rock, Higgins himself being there. In cross-examination he said that the mistake Higgins made was in not sounding the rock again

(1) (1902) 1 K.B., 350.

(2) 2 C.L.R., 837, at p. 848.

after he had been tapping it to see whether it was safe, and that he came to that conclusion a month after the accident. Of course, a story of that sort bears on its face the impress of improbability. It is almost incredible to think that an experienced miner as Higgins was, having found that a rock was so dangerous as to need a prop being put under it, should proceed to hammer at it with a pickaxe. He would be almost certain to bring it down on his own head. That is the story put forward by the appellant. On the other hand, the evidence for the respondents is that the rock Higgins was tapping with a pickaxe was in a different place altogether. The probability of the appellant succeeding in this case was therefore extremely remote, to say the best of it, his story being almost incredible on its face. Other independent evidence was called by the defendants to show that the appellant's story could not be true, and that he was mistaken as to what happened. The learned Judge in summing up to the jury referred to the facts most fully, reading most of the material evidence, and gave the jury directions on the point of contributory negligence to which no exception can be taken in point of form. He also referred to the defence of *volenti non fit injuria* in a manner which was also unobjectionable in point of form. No objection was taken at the trial to the summing up. The jury gave a general verdict for the respondents. It is much to be regretted that they were not asked to answer specific questions. The appellant asked for a new trial on numerous grounds, but principally upon the ground of misdirection.

Rule 188 of the *County Court Rules* 1891 provides that "an application for a new trial . . . ; may be made either to the Court or a Judge . . .; if application be not made at the trial notice in writing, setting out the grounds thereof, must be left with the Registrar . . . and a copy of such notice must be served upon the opposite party . . . within seven clear days after the day of trial." The notice, as a matter of fact, took the form of a summons and was not served until the eighth day after the date of the verdict. Objection was taken on the summons coming on for hearing that the notice was out of time. It was contended for the appellant that it was not out of time because

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the interpretation clause of the Rules said that "'clear days' shall mean that in all cases in which any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusive both of the first and of the last day." That definition is, however, preceded by the introductory words "if not inconsistent with the context or subject matter." The term "clear days" may be regarded as a well known term in law with a well known interpretation which has existed for more than half a century. When reference is made to "clear days" in a rule for the protection of another party, it is a minimum. When the rule is for the advantage of the party who is to take action, it may be a maximum. In either case it denotes a limit. When it is a minimum, two days, one before and one after the period, are determined by it. But, when you talk of doing a thing within a period of a certain number of days, it is quite clear that the end of the last day is the furthest limit. It is impossible to say that a thing required to be done within seven days is done within seven days if done on the eighth day, and it is impossible to make any alteration of the limit by adding the word "clear." In such a context the interpretation clause cannot apply, and a notice served on the eighth day would be too late. So that the notice given here was out of time, and the learned Judge could not have proceeded with the hearing of the application unless the time was extended. He had, however, power under r 424 to enlarge the time. He was asked to do so and refused. He said that he was satisfied that the appellant had no substantial ground of complaint, and that he thought there had been no misdirection, and on the whole he refused to exercise his discretion under the rule. On appeal to the Full Court they were inclined to think that the summing up had not been altogether satisfactory with regard to the defence of *volenti non fit injuria*, but they declined to interfere with the discretion of the Judge of the County Court to refuse to enlarge the time. Now application is made to this Court, and we must first consider whether the time should be enlarged. It would be rather an extreme thing if, after the County Court and the Supreme Court had refused to enlarge the time, we were to review the discretion of both Courts. There is also the further point, that it is doubt-

ful whether the Supreme Court or this Court has any jurisdiction to interfere with the exercise by the County Court Judge of his discretion. The argument put by Lord *Esher* M.R., in *Ex parte Stevenson* (1), shows the extreme inconvenience of permitting an appeal in such a case, because it would amount to this, that the Court on the appeal, in order to determine whether the time should be enlarged, would have to ascertain whether if it were enlarged the plaintiff would be entitled to a new trial. So that the Court on every such appeal would have to inquire into the whole merits of the case. The result would be that the rule limiting the time would be a nullity. I express no concluded opinion upon the point, but I think it extremely doubtful whether we have jurisdiction.

Supposing that we have jurisdiction, I think there are good grounds why we should not extend the time. In the first place, I have very great doubt whether the learned Judge of the County Court had jurisdiction to entertain an application for a new trial on the ground of misdirection where objection was not taken to the direction at the time. It is said that the Court held that there was jurisdiction to do so in *Handley* v. *London, Edinburgh and Glasgow Assurance Co.* (2). I doubt whether it was so held, because, as I pointed out in *Brown* v. *Lizars* (3), the case was not so much one of misdirection as whether or not the defendant was entitled to a verdict. Attention was also called to the case of *Holford* v. *Melbourne Tramway and Omnibus Co. Ltd.*, (4) in which *Cussen* J. expressed an opinion entirely inconsistent with the practice of this Court, and, so far as I know, that of all the Australian and English Courts as to the necessity for taking an objection to a misdirection at the trial if a new trial is afterwards to be asked for. This is not an occasion on which it is necessary to go into the subject for the purpose of laying down the law on the point, but I doubt very much whether *Handley* v. *London, Edinburgh and Glasgow Assurance Co.* (2) is good law since *Brown* v. *Dean* (5), decided last year. As at present advised the two cases seem to me to be irreconcilable. Under these circum-

(1) (1892) 1 Q.B., 609, at p. 611.
(2) (1902) 1 K.B., 350.
(3) 2 C.L.R., 837, at p. 848.
(4) (1909) V.L.R., 497; 29 A.L.T., 112.
(5) (1910) A.C., 373.

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stances, supposing that we have jurisdiction to review the refusal of the County Court Judge to enlarge the time, I think we ought to have regard to the apparent facts of the case, and that, if the appellant would have only a problematical and infinitesimal hope of success in the event of a new trial, we ought in mercy to the parties to refuse to enlarge the time. For myself, I doubt whether a verdict for the appellant could have stood. I can see no ground, therefore, for reviewing the discretion of the Judge of the County Court, if we have power to do so. I think the appeal should be dismissed.

BARTON J. I concur.

O'CONNOR J. I am of the same opinion.

Appeal dismissed with costs.

Solicitors, for the appellant, *Murphy & Connolly.*
Solicitors, for the respondents, *Madden & Butler.*

B. L.

[HIGH COURT OF AUSTRALIA.]

O'SULLIVAN . . . . . APPELLANT;
PLAINTIFF,

AND

MORTON . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1911.

MELBOURNE, *June* 15.

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

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Appeal from Supreme Court of State—Appeal as to costs only—Special leave—Trial by jury—Action for several causes of action—Plaintiff succeeding on some and failing on others — Costs of issues —Rules of the Supreme Court of Victoria 1906, *Order LXV., r.* 1.