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duces tecum; but it has been decided by the Court of Appeal in *Elder* v. *Carter* (1), that wide as are the terms of Order XXXVII., rule 7, they were not intended to give litigants any new right to discovery against persons not parties to the proceedings. As against Mr. Pym, the solicitor, the appeal must be dismissed with costs." That judgment was concurred in by *Bowen* L.J., who sat with *Lindley* L.J. in *Elder* v. *Carter* (1), and it was agreed in also by *Kay* L.J.

That is the position of the authorities with regard to the rule which appears in the Rules of this Court as Order XXXIV., rule 2; and it will be quite apparent from what I have cited that the rule cannot possibly apply to a case like the present, in which discovery, or that which amounts to discovery, is sought against a person not a party to the suit. I think I ought to follow these decisions. This is not an application to secure the attendance of a person as a witness to produce documents. The petitioner is seeking an order to inspect, with leave to take extracts. This distinction was drawn in *Straker Bros.* v. *Reynolds* (2).

The result is that no section of the *Commonwealth Electoral Act*, nor any rule under that Act, has been discovered which can be held to give this Court of Disputed Returns the power to make such an order as is sought on behalf of the petitioner. It may be that such a power is highly necessary, and that the ends of justice are frustrated by its absence. It seems strange that in a proceeding which involves the question of the proper conduct of an election, when information is sought which exists only in the rolls and other documents in the custody of public officers, a petitioner is not entitled to the discovery that is here sought. But the remedy is in the hands of the legislature, not those of the Court.

I must therefore dismiss the application, and I think the sitting member is entitled to his costs of opposing it.

Application dismissed with costs.

Solicitors, for petitioner, *M. L. Moss & Dwyer*, Perth.

Solicitors, for respondent, *Hudson & Walker*, Perth.

N. McG.

(1) 25 Q.B.D., 194.

(2) 22 Q.B.D., 262.

[HIGH COURT OF AUSTRALIA.]

THE BROKEN HILL JUNCTION NORTH SILVER MINING CO., NO LIABILITY, AND OTHERS. . . . . Plaintiffs, } Appellants;

AND

THE BROKEN HILL JUNCTION LEAD MINING CO., NO LIABILITY . . Defendants, } Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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Melbourne, *Sept.* 25, 26, 29, 30; Oct. 1, 2, 3, 6, 7, 8, 9.

Barton A.C.J., Isaacs, Gavan Duffy and Powers JJ.

Practice—High Court—Abandonment of defences—Raising new defence—Agreement of parties—Remitter of case to Supreme Court—Order allowing further time—Interpretation.

The plaintiffs and the defendants were lessees from the Crown of adjoining mining leases in New South Wales, the mines on which communicated below the surface by means of certain adits. Through these adits air passed from the plaintiffs' mine into the defendants' mine. The plaintiffs brought a suit in the Supreme Court of New South Wales against the defendants, alleging that the defendants had threatened to close the adits, and seeking a declaration that the plaintiffs were entitled to the free passage of air from their mine through the adits to the mine of the defendants, and thence to the open air, and a consequent injunction. The defendants, by counterclaim, sought an injunction to restrain the plaintiffs from using fans or other artificial means so as to force humid or impure air into the defendants' mine and from interfering with the natural ventilation of the defendants' mine, and also sought an inquiry as to damages. A decree having been made dismissing the statement of claim and, as to the counterclaim, granting an injunction and ordering an inquiry, the plaintiffs appealed to the High Court against the whole decree. On the hearing of the appeal the parties made an agreement whereby

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the plaintiffs abandoned their appeal against the dismissal of the statement of claim, and all the defences taken by them to the counterclaim, and were to be entitled to raise a defence of justification under their lease from the Crown and the *Mining Act* 1874 and the regulations thereunder, and to adduce further evidence in support of that defence.

The Court thereupon ordered the counterclaim to be remitted to the Supreme Court in order that the agreement of the parties might be carried out.

The plaintiffs being in default in respect of printing and lodging copies of the transcript, the High Court had granted further time, but had ordered that the plaintiffs should, in the event of the appeal being unsuccessful, pay a fair and reasonable compensation to the defendants in respect of any damage caused by reason of the execution of the judgment of the Supreme Court continuing to be stayed.

Held, further, by *Barton* A.C.J., *Gavan Duffy* and *Powers* JJ. (*Isaacs J.* dissenting), that it should be declared that in the event of the defendants being finally held to be entitled to recover damages on the counterclaim as amended, the appeal should be taken to have failed within the meaning of the above order.

APPEAL from the Supreme Court of New South Wales.

The Broken Hill Junction North Silver Mining Co., No Liability (hereinafter called the "plaintiff old company") and the Broken Hill Junction Lead Mining Co., No Liability (hereinafter called the "defendant company") were the lessees from the Crown of adjoining mineral leases on which they carried on mining operations. The workings of the mines communicated by certain adits through which air passed from the mine of the plaintiff old company to that of the defendant company. A suit was brought in the Supreme Court in its equitable jurisdiction by the plaintiff old company and the Junction North Broken Hill Mine, No Liability, which was the assignee of the plaintiff old company, against the defendant company, alleging that the defendant company had threatened to close the adits between the mines, and claiming a declaration that the plaintiffs were entitled to a free and uninterrupted passage for air from the plaintiffs' mine through the adits to the mine of the defendant company and the workings thereof to the open air and a consequent injunction. By a counterclaim the defendant company alleged that the plaintiff old company had placed in their mine

certain fans worked by motors which forced through the mine of the defendant company greatly increased quantities of fumes and hot, humid and impure air whereby the natural ventilation was injuriously interfered with and the mine was rendered unhealthy and injurious to men working therein, and they claimed an injunction restraining the plaintiffs from using fans or machinery or other artificial means in such a manner as to force foul, hot, humid or impure air through or into the mine of the defendant company or from interfering with the natural ventilation of the defendants' mine. They also claimed an inquiry as to damages. The suit was heard before *Rich* J., then a Justice of the Supreme Court, who made a decree dismissing the suit, and on the counterclaim granting an injunction in the terms asked and ordering a reference to the Master in Equity for an inquiry as to damages.

The plaintiffs appealed to the High Court against the whole of the decree.

On 1st September 1913, at Sydney, the High Court, on the application of the respondents, ordered that the appeal should be heard in Melbourne on 22nd September subject to any part-heard case, that the appellants should be at liberty to print and lodge copies of the transcript record notwithstanding that the appellants were out of time in respect of printing, lodging and serving the same, and the order continued :—"And this Court doth further order that in the event of the said appeal being unsuccessful the said appellants do pay to the said respondents within 14 days of the determination hereinafter mentioned of the Honourable George Edward Rich a Justice of this Court such sum as the said Justice shall think fair and reasonable to compensate the respondents for and in respect of any damage which he may consider was sustained by the respondent from and after this day by reason of the execution of the said judgment of the Supreme Court continuing to be stayed."

The appeal now coming on for hearing, during the course of the arguments a certain agreement was arrived at between counsel for both parties upon which the Court made an order. The agreement and the order appear at the foot of this report.

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Barton A.C.J.

Irvine A.-G. for the Commonwealth and *R. K. Manning*, for the appellants.

Leverrier K.C. and *Innes*, for the respondents.

BARTON A.C.J. I take it we are proceeding upon this basis, that the Attorney-General, in asking that the case should be remitted to the Court below for an application for amendment to be entertained, has taken that course solely with the view of obtaining the amendment outlined as his answer to the counterclaim. The order of the Court, which I will read, is this : [His Honor read the order as set out at the foot hereof and continued :] The position, as it presents itself to me, is that the plaintiffs have felt themselves compelled to abandon, one by one, the positions they took up with regard to their claim itself, that the matter that remains is the counterclaim, and that as to the counterclaim the plaintiffs have also abandoned their position against it as it stands, and intend to rest their case upon the proposed amendment in the pleadings. That accounts for the main terms of the order. But I have a word to say about paragraph 3 of the order. [His Honor read it.] The order there referred to was this :—The parties came before this Court in Sydney on a motion made by the defendants. The plaintiffs were out of time in respect of their duty to print, lodge and serve the transcript. The position of the defendants was that they sought the dismissal of the appeal or a dissolution of the stay that the pendency of the appeal had imposed upon the injunction in their favour. The order made by this Court was : [His Honor read the order and continued :] So that which is referred to in paragraph 3 is that portion of the order of 1st September which relates to the plaintiffs' liability to pay compensation for the continuance of the stay, as stated in that order. Paragraph 3 of the present order of the Court is agreed in by a majority of the Court, my brother *Isaacs* not assenting to it. The position of the majority is that the order allowing further time for the appeal was a concession for a price, which the plaintiffs should now pay if the defendants insist. The plaintiffs were granted that portion of the order as a concession, and that concession involved a burden upon the

defendants, which they have now borne. We think, therefore, there is no reason why, the plaintiffs having received the concession, and the appeal having really failed, the price should not now be paid. As, however, the respondents have not insisted on their strict rights, they should not lose the entire benefit of that order if in the final result, which they are willing to make the criterion, the new defence to the counterclaim goes the way of the old ones.

ISAACS J. I would like to say first with regard to the matter which my learned brother *Barton* has stated is one upon which I dissent, that my reasons for doing so are these. A decree was made by which an injunction was on the counterclaim granted against the plaintiffs, restraining the plaintiffs from working their own mine as they claim to be entitled to work it. That order stood, and at the time was presumably right in law. The plaintiffs had an appeal pending in respect of the suit and the counterclaim, and they were ready to have that appeal heard. It was not their fault that it was not heard in Sydney, but the reason was the pressure of business in this Court. As the case could not be heard then, necessity required on the whole that the order of the primary Judge should stand in the meantime. Then the plaintiffs desired that the injunction should be stayed, and, having regard to the then existing presumption and the convenience of computation, they got that on the terms that they should pay not merely the damages that would be legally obtainable and allowed by strict law from their opponents in the event of the existing injunction being correctly ordered, but should pay what should be thought fair and reasonable. It was considered then that that would save technical objections. But the event upon which that special order was made was that *the appeal should fail*—meaning that, if on the appeal the injunction were sustained, that would show that it was rightly granted from the first. It is now swept away because the basis on which it was ordered is abandoned as incorrect, and it has yet to be decided whether the defendants are entitled to an injunction or not, but upon a different basis. If that were not so, there would be no necessity to remit the case. If then, as my learned brothers think, that promise was given for the mere concession of a *delay*, the plaintiffs should get

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these damages now whether they ultimately succeed or not, and should not be left to the contingency whether they have any rights or not. But, on the doctrine of fairness, the condition having failed, namely, the continuance of the injunction, and the presumption then existing now being removed, it seems to me that justice requires that the defendants, the plaintiffs on the counterclaim, being compelled to start anew to establish their right to an injunction, should get damages such as the law allows them if they succeed, and should not get money in respect of the injunction which is now swept away, and in respect of a formerly supposed right which does not exist. The consideration has failed, the plaintiffs object to pay the price, and that price should not be exacted. Those are my reasons for not assenting to that. The new obligation, if it exists, and not the old supposed obligation, will be the basis of the new injunction.

With regard to the main case, I think it is one of such a peculiar nature that it is desirable for me to state, in order to prevent future misapprehension, what is decided, and what is not. This appeal will be dismissed, as has been stated, in part, and the case in part remitted to the Supreme Court, and it is the agreement of the parties which enables us to do very much of what we are doing, and I wish to make a few observations so as to guard myself against being thought to have decided anything that I have not intended to decide. For instance, on the claim two questions arose, in the course of the argument, as to the liability of the defendants to the plaintiffs by reason of two propositions of law which the Attorney-General desired to argue. One was that, in relation to the New South Wales Mining Act, the issue of leases under regulations constitutes in law a scheme analogous to the building schemes with which we are familiar in English cases, by which the various purchasers are held to be reciprocally bound according to their covenants and agreements in relation to the land. That particular argument the Court considered—I think as to that I express the decision of the whole Court—that it was necessary to raise facts and issues that were not raised before the Judge below, and that we as an appellate tribunal could not entertain that. That is in accordance with previous decisions of this Court and of the Privy Council.

In *Dhanukdhari Singh* v. *Mahbir Pershad Singh* (1), on appeal from the Calcutta High Court, Lord *Robertson*, speaking for the Privy Council, said that the question attempted to be raised was not submitted for the consideration of the High Court of Calcutta, and he added :—"It is out of their Lordships' power to entertain the ground of appeal, it being one of fact which has not been subject to the consideration of the Court below." Acting on that, we thought that the Attorney-General's position was not maintainable in this Court at this stage. So that the merits of the matter were not decided.

Then the Attorney-General had another objection, which is the ordinary objection of a restrictive covenant on the principle of *Tulk* v. *Moxhay* (2). With that he has not persevered for reasons which appeared to him to be wise, because had he succeeded on that he would not have been in any better position than that in which he now is, having regard to the fact that the inspector has ordered the adits to be reopened. All he could have gained on that argument would have been to have those adits open. I will make one further observation about that. It has been agreed that his clients shall assist to get the inspector's assent to the closing of those adits so that no damage will be done in the meantime to the defendants. That seemed to me to be reasonable. I should think too, it may be done without closing those adits so securely as to prevent them being used if necessary as escape drives, which is one of the purposes of the Act of 1901 (No. 75), for the safety of miners. They can, no doubt, be closed so as to prevent forced ventilation affecting the defendants' mine and yet so as to be a means of safety for the miners below. That explains why there is no decision upon the question of the restrictive covenant. So that this case cannot in my view be regarded as any authority with respect to the liability of a person in the position of a defendant to a person in the position of a plaintiff in respect of such clauses as the second clause in the defendants' lease from the Crown.

Now, with regard to the counterclaim, everything has been withdrawn by way of defence except the circumstances set up in the proposed amended pleading and, as I understand, the amount

(1) 17 Madras L.J. Rep., 354. (2) 2 Ph., 774.

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of damage which may be proved on inquiry against the plaintiffs. In other words, the defendants to the counterclaim have assumed the onus of justifying the acts complained of in the counterclaim, so that we do not decide upon the onus of proof, and to my mind that is a very important matter. In any case, it may come to be decided whether the onus in such a case does not rest upon the person making such a complaint as the defendants, that is, the plaintiffs to the counterclaim, here make. I would refer in that regard to two cases which I merely say will afford matter for serious consideration should that question ever arise and be fought. One is of great authority—*West Cumberland Iron and Steel Co.* v. *Kenyon* (1). The passage I specially refer to is in the judgment of *Brett* L.J., and is as follows :—" This action is brought on the ground of an alleged breach of the maxim *Sic utere tuo ut alienum non lædas.* The cases have decided that where that maxim is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land. If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner, he cannot succeed. So he must fail if he only proves that the defendant has used his land otherwise than in the natural way, but does not prove damage to himself. Both points are here in issue. For a long time both parties contended about one of these points, and not about the other. The plaintiffs proved that the defendants used their property otherwise than in the natural manner necessary to give them the due enjoyment of their rights of ownership, and otherwise than in the regular course of mining ; but they failed to prove that any greater burden was thrown upon their land than it would have had to bear if the defendants had done nothing, and Mr. Justice *Fry* seems to have been of that opinion."

The term " natural user of land " is a very ambiguous term which was first used, I believe, by Lord *Cairns* in *Rylands* v. *Fletcher* (2), and has since been frequently considered, and the latest case in which it has been considered is by the Privy Council in *Rickards*

(1) 11 Ch. D., 782, at p. 787. (2) L.R. 3 H.L., 330.

v. *Lothian* (1). Lord *Moulton*, referring to *Rylands* v. *Fletcher* (2) and the maxim *Sic utere tuo ut alienum non lædas*, speaks of the supply of water to a house, and says (3):—"The provision of a proper supply of water to the various parts of a house is not only reasonable, but has become, in accordance with modern sanitary views, an almost necessary feature of town life. It is recognized as being so desirable in the interests of the community that in some form or other it is usually made obligatory in civilized countries. Such a supply cannot be installed without causing some concurrent danger of leakage or overflow. It would be unreasonable for the law to regard those who instal or maintain such a system of supply as doing so at their own peril, with an absolute liability for any damage resulting from its presence even when there has been no negligence." Now those are matters which would have led me to consider the question of onus on these pleadings very earnestly, had the point been pressed upon the attention of the Court. Therefore I wish to guard myself against being thought in this case to decide that the onus does lie on the plaintiffs in this case to justify the acts complained of in the counterclaim as framed. However, the plaintiffs have, perhaps wisely, undertaken that onus, and the matter will rest upon that. That has been made clear this morning.

With these observations, and with the one matter of dissent, I agree in the order proposed.

GAVAN DUFFY J. I wish to say a word as to paragraph 3 of the order which has just been read. On 1st September the respondents applied to this Court to dismiss the appeal on various grounds. On the hearing of that motion, and for the purpose of preserving the appeal, the appellants undertook that if their appeal failed they would consent to an inquiry as to damages before *Rich* J. The question then is: Has the appeal failed? In my opinion it has. The effect of our decision on the agreement of the parties is that, as to the issues which were before my brother *Rich* in his capacity as a Judge of the Supreme Court of New South Wales, he was per-

(1) (1913) A.C., 263; 16 C.L.R., 387.
(2) L.R. 1 Ex., 265; L.R. 3 H.L., 330.
(3) (1913) A.C., 263, at pp. 281-282; 16 C.L.R., 387, at p. 402.

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fectly right. It is said that if we hold that the appellants have failed in their appeal, the logical consequence is that the order for the assessment of damages should be made now, and I am inclined to agree with what my brother *Isaacs* said on that subject. But Mr. *Leverrier* for the respondents did not insist on having all he was entitled to; he asked that a modified order should be made, and we have accordingly made such an order.

POWERS J. I agree with the other members of the Court as to that part of the order as to which there is no dissent. As to that part of it as to which my brother *Isaacs* has dissented, I agree in it for the reasons given by my brothers *Barton* and *Gavan Duffy*.

The plaintiffs by their counsel undertaking to join with the defendants in applying to the Inspector of Mines for leave to the defendants to close, and in the event of such leave being obtained, agreeing to the defendants closing during a period of four months from the date of such leave, and as long thereafter as a Judge of the Supreme Court of New South Wales shall think just and reasonable, the adits between the respective mines of the plaintiffs and defendants, and the plaintiffs by their counsel admitting that the defendants are entitled to an inquiry as to damages in the event of the plaintiffs failing to establish the defence to the counterclaim raised by the amendments hereinafter mentioned but not otherwise, and the plaintiffs further undertaking not to make any claim against the defendants for damage by reason of loss that the plaintiffs may sustain in respect of the closing of any of the said adits pursuant to the first-mentioned undertaking, it is agreed as follows :—

1. *That the plaintiffs will with the consent of the defendants within seven days from the date of pronouncing the order herein apply to the said Supreme Court for an order that the defence to the counterclaim be amended by striking out all defences to the counterclaim*

already pleaded thereto and by inserting in lieu thereof the following paragraphs :—

"6A. *In further answer to the counterclaim the plaintiffs say that the mine of the plaintiffs was held by them under Mineral Lease No.* 3224 *and renewal thereof in the statement of claim mentioned and that the said lease and renewal thereof were made under and by virtue of the Mining Act* 1874 *and the Acts amending or consolidating the same and the regulations thereunder and that under and by virtue of the said lease, renewal, Acts and regulations, the plaintiffs were bound to make, construct and work the said mine in the best and most effectual manner and to the best advantage, and the plaintiffs say that the acts complained of were acts done by the plaintiffs under and by virtue of and in pursuance of the powers and authorities conferred upon them by and directions contained in the said lease and renewal thereof and the said Acts and regulations.*

"6B. *In further answer to the said counterclaim the plaintiffs say that the acts complained of were done by the plaintiffs to produce an adequate amount of ventilation in the said mine so that the shafts, winzes, levels and working places of such mine and the travelling roads to and from each working place should be in a fit state for working and passing therein and were done under and by virtue of and in pursuance of the powers and authorities conferred upon them by and directions contained in the Mines Inspection Act* 1901."

2. *That in addition to the defence raised by the said amendments the plaintiffs shall be taken to have denied all allegations of fact contained in the said counterclaim except so far as the same have been found and ascertained by the Honourable Mr. Justice Rich on the original hearing of this suit and the counterclaim.*

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3. *That the defendants shall reply to the said amendments within* 14 *days from the date of the service thereof and the plaintiffs shall file and serve their rejoinder, if any, within seven days of the service of the said reply.*

4. *That upon the hearing of the said counterclaim the evidence already given on the original hearing of this suit and counterclaim so far as relevant be deemed to be in evidence and that the plaintiffs and defendants respectively be at liberty to adduce such further evidence as they may be advised and that they be estopped from disputing any of the findings of fact of the Honourable Mr. Justice Rich on the said original hearing except certain specified findings.*

5. *That the plaintiffs and the defendants shall use their best endeavours to expedite the trial of the said counterclaim and shall on or before* 17*th October instant make a joint application to the said Supreme Court to fix the date of the trial of the said counterclaim for the first Monday in December next or so soon thereafter as the course of business of the said Supreme Court shall permit.*

6. *That the decree of the said Supreme Court dated the* 20*th March* 1913 *be varied by omitting therefrom* (*a*) *the portion of it granting an injunction and ordering a reference to the Master in Equity as to damages and* (*b*) *all reference in the said decree to costs, and that save as aforesaid the said decree be affirmed.*

The parties having agreed as above set forth,

Order:—

(1) *That the decree of the Supreme Court appealed from be varied by omitting therefrom* (*a*) *the portion of it granting an injunction and ordering a reference to the Master in Equity as to damages and* (*b*) *all reference in the said decree to costs, and that save as aforesaid the said decree of the Supreme Court be affirmed.*

(2) *That the counterclaim be remitted to the said Supreme Court in its equitable jurisdiction to admit of the plaintiffs applying for an order that the defence to the counter-*