would have been liable as the owner of the goods. It was not argued, and it was unnecessary to argue it, and there should be no costs on either side in the second action.

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ISAACS J. I agree.

GAVAN DUFFY J. I agree.

First question answered in affirmative.
Second question not answered.

Solicitor, for the plaintiff, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the defendants, *Priddle & Gosling.*

B. L.

Foll *R v Owens & Farrington; Ex parte Seaton* (1933) 49 CLR 20

[HIGH COURT OF AUSTRALIA.]

DELPH SINGH . . . . . PLAINTIFF;

AND

KARBOWSKY . . . . . DEFENDANT.

H. C. OF A. 1914. SYDNEY, *May* 11, 13.

Practice—High Court—Appeal from Supreme Court of a State—Security for costs—Extension of time for giving—Jurisdiction—Special leave—Security not given through default of solicitor—Rules of the High Court 1911, *Part I., Order LIII., r.* 6; *Part II., Sec. III., r.* 12; *Sec. V., r.* 1—*Judiciary Act* 1903-1910 (*No.* 6 *of* 1903—*No.* 34 *of* 1910), *sec.* 35—*High Court Procedure Act* 1903 (*No.* 7 *of* 1903), *secs.* 35, 37.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Compliance with the provisions of the rules in Section III. of Part II. of the *Rules of the High Court* 1911 as to giving security on instituting an appeal from the Supreme Court of a State is a condition precedent to the coming into existence of a cause in the appellate jurisdiction of the High Court.

The words "procedure of the Court in its Appellate Jurisdiction" in rule 1 of Section V. of Part II., relate only to interlocutory proceedings in an appeal

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which has been duly instituted ; and therefore rule 6 of Order LIII. of Part I., which authorizes the Court or a Justice to enlarge or abridge the time for doing any act or taking any proceeding limited by the Rules, and provides that the enlargement may be made even after the expiration of the time originally allowed or limited, does not apply to the time limited by rule 12 of Section III. of Part II. for giving security for the costs of an appeal.

Held, therefore, by *Griffith* C.J., *Barton* and *Gavan Duffy* JJ. (*Isaacs* and *Rich* JJ. dissenting), that there is no jurisdiction in the High Court or a Justice thereof to extend the time prescribed by rule 12 of Section III. of Part II. for giving security for the costs of an appeal from the Supreme Court of a State.

E. Ryan & Sons Ltd. v. *Rounsevell*, 10 C.L.R., 176, approved.

By the fault of the solicitor of a party desiring to appeal to the High Court from the decision of the Supreme Court of a State, security for the costs of the appeal was not given within the prescribed time although sufficient money for that purpose had been supplied by the party to his solicitor within that time.

Held, by *Griffith* C.J., *Barton* and *Gavan Duffy* JJ. (*Isaacs* and *Rich* JJ. dissenting), that under the special circumstances of the case special leave to appeal should be granted.

REFERENCE.

A suit in equity was brought in the Supreme Court of New South Wales by Delph Singh against Victor Karbowsky and James Alexander Smith in which the plaintiff claimed that, under an agreement between him and the defendant Karbowsky, he was entitled to a half share in the world's rights to a certain invention patented by the defendant Karbowsky. The action was heard before *A. H. Simpson* C.J. in Equity, who found that no such agreement as was alleged had been made, and accordingly gave judgment for the defendants with costs.

On 18th December 1913 the plaintiff gave notice of appeal to the High Court from the judgment so far as it related to the defendant Karbowsky. The time within which under rule 12 of Section III. of Part II. of the *Rules of the High Court* 1911 the security for the costs of the appeal should have been given expired on 18th March 1914. On 16th February 1914 the solicitor for the plaintiff received in a letter from the plaintiff a cheque for £50 "for fees on notice of appeal." The solicitor applied this cheque as on account of his costs against the plaintiff, and consequently the security was not given within the time

limited. The plaintiff then moved for an extension of the time for giving the security. The motion came on for hearing before *Rich* J., who referred it to the Full Court.

Wise K.C. (with him *Jordan*), for the plaintiff. As soon as the notice of appeal has been given there is an appeal or at any rate an inherent right of appeal before this Court upon which this Court can make an order. The words "shall be deemed to be abandoned" in Part II., Section III., r. 12, do not mean that the appeal is at an end, but merely shift the presumption. Sec. 35 (2) of the *High Court Procedure Act* 1903 assumes that for certain purposes there is an appeal before the security is given.

[RICH J. In *In re Taylor*; *Ex parte Bolton* (1) the time for appealing was extended after the time limited had expired, but there was no rule providing that the appeal should be deemed to be abandoned as there is here.

GAVAN DUFFY J. Nor was there a rule stating that the appeal should not be instituted until after security was given.]

In *Hunter* v. *Steamship "Hesketh"* (2) the Privy Council dispensed with the giving of security required to be given by rule 15 of *Privy Council Rules* of 1865: See *Safford and Wheeler's Privy Council Practice*, p. 933. Rule 1 of Section V. of Part II. has the effect of making rule 6 of Order LIII. of Part I. applicable to appeals, and therefore the time for giving security may be extended whether that time has or has not expired. If there is no jurisdiction to extend the time the plaintiff should have special leave to appeal. He is entitled to appeal as of right, and he should not be deprived of that right by reason of the mistake of his solicitor. The crucial question of fact has never been decided. The learned Judge must have forgotten some of the evidence given by witnesses who he says were truthful.

Ferguson, for the defendant. Until the security is given there is nothing before this Court in respect of which it can make an order: *E. Ryan & Sons Ltd.* v. *Rounsevell* (3); *Lever Bros. Ltd.* v. *G. Mowling & Son* (4); *Miller* v. *Major* (5). Rule 6 of Section

(1) (1909) 1 K.B., 103.
(2) (1891) A.C., 628.
(3) 10 C.L.R., 176.
(4) 5 C.L.R., 510.
(5) 4 C.L.R., 219.

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V. of Part II. only applies to appeals which have been duly instituted. Where power is intended to be given to the High Court to deal with an appeal which has not been duly instituted express words are used, as in rule 2 of Section V. of Part II. The defendant has a vested right in his judgment which will not be taken away except by clear words.

[ISAACS J. referred to *Carter* v. *Stubbs* (1).]

Assuming that there is jurisdiction to extend the time, the mistake of the plaintiff's solicitor is not a sufficient ground for doing so: *International Financial Society* v. *City of Moscow Gas Co.* (2); *In re Coles and Ravenshear* (3); nor is that mistake a ground for granting special leave to appeal. There is no important question of law in contest, but the only question is one of fact depending upon the credibility of witnesses.

Wise K.C., in reply.

Cur. adv. vult.

May 13.

The judgment of GRIFFITH C.J. and BARTON and GAVAN DUFFY JJ. was read by

GRIFFITH C.J. This is a motion to extend the time for giving security for the costs of an appeal from the Supreme Court of New South Wales, notice of which was given on 18th December last. Rule 12 of Section III. of the Appeal Rules requires the appellant to give security within three months after service of the notice of appeal, and declares that if it is not so given the appeal shall be deemed to be abandoned, and that, as soon as it is given, the appeal shall be deemed to be duly instituted. Until, therefore, the security is given the intending appellant's right is inchoate only, and there is no cause pending in this Court. Upon failure to give the security the inchoate right is *ipso facto* at an end.

The application is made under rule 6 of Order LIII., which provides that the Court or a Justice may enlarge or abridge the time for doing any act or taking any proceeding limited by the Rules, and that the enlargement may be made even after the

(1) 6 Q.B.D., 116. (2) 7 Ch. D., 241.
(3) (1907) 1 K.B., 1.

expiration of the time originally allowed or limited. It is contended that this rule is, by rule 1 of Section V. of the Appeal Rules, made applicable to proceedings for the purpose of instituting an appeal to the High Court.

That rule provides that the Rules of Court relating to the procedure of the Court in its original jurisdiction shall, as far as applicable to appeals, apply to the procedure of the Court in its appellate jurisdiction.

In our opinion this rule has no application to the present case. Sec. 37 of the *High Court Procedure Act* directs that appeals to the High Court shall be instituted within such time and in such manner as is prescribed by Rules of Court. The time and manner have been so prescribed by rule 12 of Section III. already mentioned. We think that compliance with the rules as to the time of instituting an appeal is a condition precedent to the coming into existence of a cause in the appellate jurisdiction.

We think also that the words in rule 1 of Section V. "procedure of the Court in its Appellate Jurisdiction" relate only to interlocutory proceedings in an appeal which has been duly instituted. The provisions of rule 2 immediately following, which empower the Court in certain cases to expedite the hearing of an inchoate appeal which has not been completely instituted, would be quite unnecessary if the construction contended for were adopted. On that construction a single Justice might not only enlarge but abridge the time for appealing, a result which, we think, is inconsistent with the intention of Parliament as expressed in sec. 37 of the *High Court Procedure Act.*

Our conclusion is in accord with that of *O'Connor* J. in the case of *E. Ryan & Sons Ltd.* v. *Rounsevell* (1), which we think was rightly decided.

An alternative application was made for special leave to appeal, which it is clearly within the discretion of the Court to grant. Under the circumstances of the case, which are very special, we think this discretion may properly be exercised in favour of the appellant.

The judgment of ISAACS and RICH JJ. was read by

ISAACS J. The applicant had a statutory right of appeal under

(1) 10 C.L.R., 176.

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the Constitution as modified by sec. 35 of the *Judiciary Act* because the civil right exceeded £300 in value. That was an absolute vested right.

Then as a matter of procedure—but procedure only—directions are given by Parliament in sec. 35 of the *High Court Procedure Act* that security shall be given "in such manner as shall be prescribed by Rules of Court for the prosecution of the appeal without delay." But that Act does not give the appeal: it adds the requirement of security as procedure in connection with it, when given by the Constitution as qualified by the *Judiciary Act*.

The *High Court Procedure Act* says nothing whatever as to the consequence of not giving security, except as to any additional security which may be ordered. But it allows the Court or a Justice to reduce the security prescribed—it may be to a shilling; or to increase it—it may be to £1000. That is discretion dependent on circumstances, and when an order is made altering the security the security so ordered is the "prescribed security" within the meaning of rule 12 of Section III. of the Appeal Rules.

Then sec. 37, under the special head of "Procedure" relative to appeals to this Court, says:—"Appeals . . . . shall be instituted within such time and in such manner as is prescribed by Rules of Court." That is affirmative only, and enacts no consequence of failure to comply with any rule. That is left to the Rules themselves. Now we turn to the Rules.

Section III., rule 12, prescribes the *time* for giving security. It divides appeals into two classes: (1) appeals without leave—three months; (2) appeals by leave—three months or any other time mentioned in the order. If nothing is said on the point, the prescribed time is three months; if the order varies that, the varied time is the prescribed time. See, for instance, *In re Oliver and Scott's Arbitration* (1). As to both classes it says of the security: "As soon as it is given, the appeal shall be deemed to be *duly* instituted."

Now it is material to inquire what the rule assumes has already taken place. The notice of appeal has been given, which

(1) 43 Ch. D., 310.

is one step (Section III., rule 1); affidavits are headed "In the High Court of Australia" (rule 6), the cause being pending in the lower Court until leave is granted (*ib.*); but after that the parties are called "appellant" and "respondent" respectively (rule 7), and a copy of the notice of appeal is filed in the High Court (rule 8). Also, by rule 2 of Section V., an order may be made by this Court expediting the hearing of the appeal, and ordering "the appeal" to be set down, and may abridge the time within which security is to be given, &c. Nothing is said there about enlarging time, but the very fact that abridgment, as a consequential act expediting the hearing, is possible shows the contemplation of jurisdiction over the matter, just as is connoted by sec. 36 of the *High Court Procedure Act.* But it no more connotes the absence of the power elsewhere, than the mention in rule 6 of Order LIII. of the power to alter the time fixed by a curial order connotes the absence of such a power otherwise. All these considerations indicate to us that the giving of security within the time is mere procedure, auxiliary to the main fact of the existing constitutional appeal already vested. Not giving the security involves this, that the "appeal" is deemed to be "abandoned." Therefore there is an "appeal" which can be "abandoned." In *Lever Bros. Ltd.* v. *G. Mowling & Son* (1) the learned Chief Justice thought there was no jurisdiction to make an order extending the time for giving security, but did not find it necessary to decide it. As the rules stood in 1907 we think that opinion was well founded, because, as in England formerly, the original jurisdiction rules did not apply to appeals. But since then, viz. in 1908, Section V., rule 1, expressly applies them. *O'Connor* J. in *E. Ryan & Sons Ltd.* v. *Rounsevell* (2), decided in 1910, appeared to think *Lever's Case* was decided on the same state of law.

Now, supposing instead of mere reference the original jurisdiction rules were bodily set out in the appellate part of the Rules, we cannot see how any doubt could arise that rule 6 of Order LIII. would apply.

Carter v. *Stubbs* (3) appears to us a most distinct authority

(1) 5 C.L.R., 510.
(2) 10 C.L.R., 176.
(3) 6 Q.B.D., 116.

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that a rule worded as that rule is, and specifically made to apply to appellate jurisdiction, enables the Court to enlarge the time, though the application is not made until the original time has expired. When enlarged, as that case shows, the enlarged time is the time prescribed and the matter is revived. *Burke* v. *Rooney* (1) is another case exactly in point. Now, the English rule (Order LVII., rule 6) under which those cases were decided is there set out (2), and will be seen to present no material difference so far as this matter is concerned from our own rule.

We, therefore, are of opinion that there is jurisdiction to grant the application to enlarge the time in a proper case, and that if an order be made enlarging the time, the time so enlarged is the "prescribed time" within the meaning of rule 12.

The question was debated as to the principles upon which the Court will act in exercising statutory discretion. As to this, we think it important to quote some words of Lord *Loreburn* L.C., in *Hyman* v. *Rose* (3), which are of general application, his judgment being agreed to by the whole House. The Lord Chancellor said:—"It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by Statute to the Court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand." This passage has a double bearing on the case. Mr. *Wise* made an alternative application for special leave under sub-sec. 1 (*b*) of sec. 35 of the *Judiciary Act*.

As to the merits, the two applications require separate consideration. In framing sec. 35 of the *Judiciary Act* Parliament was exercising its power under sec. 73 of the Constitution to make "exceptions" and "regulations" with reference to appeals, and it is clear the Privy Council rules and practice were the model. Sub-sec. 1 (*a*) is an enumeration of the cases in which

(1) 4 C.P.D., 226.
(2) 4 C.P.D., 226, at p. 230.
(3) (1912) A.C. 623, at p. 631.

appeals may be had as of right. And that right is subject to such "regulations" as are elsewhere prescribed. Unless power exists in this Court to relax those regulations we cannot do so, and what we are not authorized to do directly, we certainly should not attempt to do indirectly. If therefore the right to appeal has been lost, as suggested, beyond power of recall under Order LIII., rule 6, then as that is the legislative will, we cannot recall it. If in other words the rules which are of statutory authority establish that the would-be appellant has abandoned his right of appeal and therefore the respondent has a right to retain his judgment as a finally vested right, it cannot, as it appears to us, be held with any show of consistency that it is right and just to deprive him of that right. If it is the appeal as distinguished from the right of appeal that is abandoned, then the appeal was in the Court. That, of course, has nothing in common with leave as to interlocutory matters.

The party must then depend upon the exceptional power granted to this Court under the head of "special leave." That exceptional power has been interpreted in several cases, as *Hannah* v. *Dalgarno* (1); *Backhouse* v. *Moderana* (2); *Johansen* v. *City Mutual Life Assurance Society Ltd* (3), and other cases, including several criminal cases, and the practice of the Privy Council on applications for special leave: See *Safford and Wheeler*, p. 732.

Now, this dilemma presents itself to our minds. Either the rule laid down in the numerous cases in which special leave has been refused is the true interpretation of the sub-section, or it is not. If it is, then it means we have no jurisdiction to grant special leave otherwise than with reference to the intrinsic character or merits of the cause itself—any accident or slip of one of the parties, after the judgment complained of, having nothing to do with the matter.

If on the other hand it is not the true interpretation, but as said by the Court in *Johansen's Case* (4) merely a rule of practice laid down for itself by the Court, then it is an unwarranted judicial fetter on the unrestricted discretion conferred by the

(1) 1 C.L.R., 1.
(2) 1 C.L.R.., 675.
(3) 2 C.L.R., 186.
(4) 2 C.L.R., 186, at p. 188.

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legislature, and to follow it is to alter the Act and decline jurisdiction. In that view, the authorities above mentioned—*Hyman* v. *Rose* (1) and *Rumbold's Case* (2)—show that the rule of judicially-made law ought to be abandoned.

If, therefore, it be considered in the present case that special leave to appeal should be granted on the ground advanced, we cannot see how the doctrine previously laid down can any longer be considered good law. And that is so either in civil or criminal cases, for the Statute places both on the same footing, and we are not warranted in discriminating between them.

But as we think the true interpretation of the sub-section is that of the rule previously prevailing according to the Privy Council practice, we come to the conclusion that as to the alternative application for special leave it would be contrary to the intendment of that sub-section to grant it, seeing that it has not been shown on the materials before us that the case presents any question of law, important or unimportant, or any case of clear injustice, or even any question of fact that does not depend on the credibility of witnesses. As to the application to extend the time for giving security, this stands on a wholly different footing, there being no question of "special leave" in the rule, and no necessity for considering the merits of the appeal: *Rumbold* v. *London County Council* (2), a decision of the full Court of Appeal, consisting of the Master of the Rolls and five Lords Justices, which accords with what *Brett* L.J. said in *Carter* v. *Stubbs* (3). As to this we have indicated that there is no fetter on the discretion of the Court. The rule itself says—"as the justice of the case requires." The respondent claims to have a vested right in the judgment he holds; that is true in a sense, but it is a defeasible right, that is, it is subject to the Court being satisfied that justice to the appellant requires the matter to be re-opened and does not offer any opposing consideration of substance on the part of the respondent beyond what may be compensated by costs or otherwise. Under this rule it is not the merits of the cause, but the merits of the parties external to the merits of the cause, that are to be considered.

(1) (1912) A.C., 623. (2) 100 L.T., 259.
(3) 6 Q.B.D., 116, at p. 121.

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We think it is the broad principle of justice which should guide the Court in all cases arising under the rule, and that therefore the proper order here should be to permit an extension of the time for giving security, the parties being restored to their original situation by the applicant paying the costs of this application.

Special leave to appeal granted, the plaintiff's solicitor undertaking to pay costs of motion and of reference within fourteen days after taxation. Notice of appeal to be given within seven days and security to be lodged within fourteen days. Plaintiff to pay costs of the application.

Solicitor, for the plaintiff, *Albert H. Jones.*
Solicitors, for the defendant, *Laurence & Laurence.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF INCOME TAX (QUEENSLAND) . . . . . APPELLANT;

AND

THE BANK OF NEW SOUTH WALES . RESPONDENTS.

H. C. OF A. 1914.

BRISBANE, *April* 30.

Griffith C.J.

IN CHAMBERS.

Practice—Costs—Review of taxation—Counsel's fees—Case called on in one State and transferred by order of Court to another State for argument—Counsel holding other briefs at same sitting in the latter State.

Where a case has been called on in one State and transferred to another for argument by order of the Court, and there argued by counsel originally briefed, the Registrar ought, on the taxation of the costs, to allow such sums for counsel's fees as will be reasonable, taking into consideration the distance travelled or the length of time counsel are compelled to be absent from their own State.

Where such counsel are briefed in more than one case to be heard at the same sitting that fact should be taken into consideration.