

H. C. OF A. 1915. pay to the representatives, and the representatives are to receive from the trustees.

MOCATTA v.

MOCATTA.

Rich J.

RICH J. I agree. I can find no indication in the whole context of the will that the testator's intention was to use the word "representatives" in any other than its ordinary sense.

Appeal dismissed with costs. The difference between party and party costs and solicitor and client costs to be retained out of the shares of the daughters other than Lucy Throsby Manning.

Solicitor, for the appellant, *F. C. Petrie.*

Solicitors, for the respondents, *Wilkinson & Osborne.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FISK APPLICANT;
PLAINTIFF,

AND

ANDERSON AND OTHERS RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A.
1915.

MELBOURNE,

Feb. 22.

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

Practice—Appeal to High Court—Appeal in formâ pauperis—Appeal not instituted—Reducing or dispensing with security—Res judicata—Rules of the High Court 1911, Part I., Order III., r. 1 ; Part II., Sec. III., r. 12 ; Sec. V., r. 1.

On an application to reduce the amount of or to dispense with the security for the costs of an appeal to the High Court from the Supreme Court of a State, where a similar application has already been refused, the matter is *res judicata*.

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The High Court has no jurisdiction to allow an appeal to be prosecuted *in formâ pauperis* where the appeal has not been duly instituted.

H. C. OF A.
1915.

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FISK
v.

ANDERSON.

REFERENCE by *Isaacs J.*

An action was brought in the Supreme Court by Robert Wilson Fisk against Thomas Anderson, Herbert Dawson Smith, James Lennox, William Jardine and the Registrar of Titles, substantially to set aside a sale under a mortgage by the plaintiff to the defendant Anderson. The action was heard by *àBeckett J.*, who gave judgment for the defendants on 20th February 1914. The plaintiff gave notice of appeal to the High Court from that decision on 12th March 1914. On 13th May 1914 an application by the plaintiff to dispense with or reduce the security for the costs of the appeal was refused by *Powers J.* The plaintiff on 19th May 1914 took out a summons for 20th May 1914 asking that he should be at liberty to prosecute the appeal *in formâ pauperis* and also that the security for the costs of the appeal should be reduced or dispensed with notwithstanding the previous order of *Powers J.* The summons came on for hearing on 23rd July 1914 before *Isaacs J.*, who referred it to the Full Court of the High Court.

H. Barrett, for the applicant, referred to *Delph Singh v. Karbowsky* (1).

Mann, for the respondents, was not called upon.

GRIFFITH C.J. The present application is in form an application for leave to prosecute an appeal *in formâ pauperis* and also—not in the alternative—to reduce the amount of or dispense with the security. The time for giving security has long since expired. Before the time expired an application was made to *Powers J.* to reduce the amount of or dispense with the security. That application was refused. No appeal was brought from his decision, and the time for appealing from it has now expired. Then the present summons was taken out. So far as the application to reduce or dispense with the security is concerned it is

H. C. OF A. *res judicata* by reason of the decision of *Powers J.* The only
 1915. thing left is an application for leave to prosecute an appeal *in*
 FISK *formá pauperis*. But the security not having been given in
 v. due time, the appeal has not been instituted and there is no
 ANDERSON. matter before the Court in which an order can be made. We
 Griffith C.J. therefore cannot make the order asked.

We allowed Mr. *Barrett* to state the facts upon which he relies to show that in some form or other he would be entitled to relief on the appeal if there were no technical difficulty in his way, but he has failed to show a case for granting special leave to appeal.

The summons must therefore be dismissed.

BARTON J. I concur.

ISAACS J. I concur.

GAVAN DUFFY J. I concur.

Summons dismissed with costs.

Solicitor, for the applicant, *W. H. Jones*.

Solicitors, for the respondents, *Dugdale & Creber*.

B. L.