

[HIGH COURT OF AUSTRALIA.]

MARION FRANCES RUSSELL PLAINTIFF ;

AND

ALFRED GEORGE RUSSELL DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

Practice—High Court—Appeal from Supreme Court of a State—Notice of appeal not within prescribed time—Inadvertence of solicitor—Special leave—Rules of the High Court 1911, Part II., Sec. III., r. 5 (1)—Judiciary Act 1903-1915 (No. 6 of 1903—No. 4 of 1915), sec. 35.

Through inadvertence on the part of the defendant's solicitor, notice of appeal to the High Court from the judgment of the Supreme Court of a State, an appeal from which to the High Court lay as of right, was not given within the prescribed time, although the defendant had duly instructed the solicitor to institute the appeal and supplied him with sufficient money to be lodged as security.

Held, that in the special circumstances of the case special leave to appeal should be granted.

H. C. OF A.
1917.
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PERTH,
Nov. 2.
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Isaacs,
Gavan Duffy
and Rich JJ.

APPLICATION for special leave to appeal.

This was an application for special leave to appeal to the High Court from a judgment in an action in the Supreme Court of Western Australia. The judgment was one from which an appeal would, in ordinary circumstances, lie as of right to the High Court ; but in this case, owing to inadvertence on the part of a solicitor, the notice of appeal was not given within the prescribed time.

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The plaintiff in the action was Marion Frances Russell, who was formerly the wife of the defendant, Alfred George Russell. The plaintiff claimed a declaration that the business of store-keeper and pearler carried on by the defendant at Broome and the assets of the said business were her property, and that the defendant carried on the same as her manager and agent. The defendant, who denied the facts, claimed that the assets were his property, and counterclaimed in the alternative remuneration for work done and services rendered by him as the plaintiff's manager. The action was heard by *Rooth J.*, who, on 9th October 1917, pronounced judgment for the plaintiff on the claim and counterclaim, and ordered that the form of judgment should be settled by himself in Chambers. On 24th October the form of judgment was settled. The judgment was dated 9th October 1917. On 23rd October the defendant left Perth for Broome, and prior to leaving he gave instructions to his solicitor to appeal to the High Court and left with him the sum of £50 to deposit as security. The solicitor, through inadvertently failing to notice that the judgment was dated back to the 9th, omitted to give notice of appeal within the prescribed time, the last day of which was 30th October. The solicitor discovered the mistake on the following day, and the defendant now applied to the High Court for special leave to appeal.

Downing, in support. This application is made at the first available opportunity. The objections to the judgment in question are that the Judge, in holding that the transfer of the banking account of the business, which was then in the defendant's name, into the name of the plaintiff operated as a transfer of the business, was wrong in point of law; that in taking certain formal and necessary documents—an authority to the defendant to operate on the banking account and a power of attorney—at their face value without regarding the surrounding facts and circumstances, the Judge was wrong in point of law; that he was wrong in refusing to allow anything on the defendant's counterclaim. As the case is one affecting property of considerable amount and of a substantial character, special leave should be granted (*Dalgarno v. Hannah* (1);

Backhouse v. Moderana (1) ; *Johansen v. City Mutual Life Assurance Society* (2) ; *Norton v. Taylor* (3)). There are special circumstances in this case justifying the grant of special leave. The defendant was entitled to appeal as of right (*Judiciary Act* 1903-1915, sec. 35). The slip or mistake of his solicitor in failing to give notice of appeal within the time prescribed by the *Rules of the High Court* 1911, Part II., Sec. III., r. 5 (1), should not deprive the defendant of an appeal. *Delph Singh v. Karbowsky* (4) is an authority for the grant of special leave in the present case. [He also referred to the *Rules of the High Court* 1911, Part I., Order LIII., r. 6.]

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ISAACS J. The majority of the Court think that the leave to appeal ought to be granted.

Special leave to appeal granted.

Solicitors for the applicant, *Durston & Ackland*.

- (1) 1 C.L.R., 675.
(2) 2 C.L.R., 186.
- (3) 2 C.L.R., 291.
(4) 18 C.L.R., 197.

[HIGH COURT OF AUSTRALIA.]

BROOKS APPELLANT ;
INFORMANT,

AND

KENNEDY RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Pastures Protection—Destruction of rabbits and noxious animals—Duty of owner when not occupier to destroy—Pastures Protection Act 1912 (N.S.W.) (No. 35 of 1912), secs. 4, 58, 59, 61-64.

H. C. OF A.
1917.
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SYDNEY,
Dec. 4.
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Barton, Isaacs
and Rich JJ.