Supreme Court attacked by him, and his appeal should be wholly dismissed.

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GAVAN DUFFY J. I agree.

Appeal dismissed with costs.

Solicitor for the appellant, *G. F. Michell.*

Solicitors for the respondent, *Poole & Moulden.*

B. L.

[HIGH COURT OF AUSTRALIA.]

McBRIDE . . . . . APPELLANT;
PLAINTIFF,

AND

SANDLAND . . . . . RESPONDENT.
DEFENDANT,

[No. 2.]

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Oct.* 3.

Barton, Isaacs and Gavan Duffy JJ.

Practice—Supreme Court of State—Action—Stay of proceedings—Action founded on judgment of High Court—Proposed appeal to Privy Council—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 73, 74.

On an appeal to the High Court from a judgment in an action brought in the Supreme Court of a State, the High Court made an order declaring that the plaintiff was absolutely entitled to certain land which was then in the possession of the defendant. The plaintiff having then brought an action of ejectment in the Supreme Court, the defendant applied to that Court for a stay of the action of ejectment, alleging that she had been advised the decision of the High Court was wrong in point of law and that she was taking steps to apply

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for special leave to appeal to the Privy Council from that decision. The Supreme Court granted the stay on the grounds that without a stay the proposed appeal to the Privy Council might be nugatory, that the plaintiff could not be prejudiced, and that it was not suggested that the application to the Privy Council was not *bonâ fide*. On appeal to the High Court,

Held, that the grounds stated did not justify the granting of a stay, and that it should be set aside.

Decision of the Supreme Court of South Australia (*Buchanan* J.) set aside.

APPEAL from the Supreme Court of South Australia.

An action had been brought in the Supreme Court by Robert James Martin McBride against Caroline Sandland claiming a declaration that the plaintiff was the owner in fee of certain land subject only to the defendant's tenancy by the year. Judgment having been entered for the defendant, the plaintiff had appealed to the High Court, which on 13th June 1918 allowed the appeal and made an order that judgment should be entered for the plaintiff on his claim for the declaration mentioned (*McBride* v. *Sandland* (1)). The defendant's tenancy had expired on 31st December 1915, and on 14th June 1917 the plaintiff had served the defendant with notice to quit, but the defendant continued in possession of the land. After the order of the High Court was made, correspondence took place between the solicitors of the parties as to the defendant giving up possession, and, the defendant refusing to do so, the plaintiff on 7th August 1918 issued a writ in the Supreme Court claiming an order for possession of the land and for mesne profits. On 15th August the plaintiff issued a summons for the summary disposal of the action, and on the same day the defendant issued a summons for an order staying proceedings in the action instituted by the writ of 7th August. In the affidavit in support of the summons for a stay it was alleged that the defendant had been advised that the judgment of the High Court was erroneous in point of law, and that instructions had been sent on her behalf to London to apply to the Privy Council for special leave to appeal from that judgment. On 19th August the defendant's summons for a stay was heard before *Buchanan* J., who made an order staying proceedings in the action "pending the hearing of an application to the Judicial Committee of His Majesty's Privy Council for leave to

(1) *Ante*, pp. 69 *et seqq.*

appeal against the judgment of the High Court of Australia of 13th June 1918 . . . and, in the event of such application to the Judicial Committee being allowed, pending the hearing and determination of such appeal." By the order liberty to apply was reserved to both parties. The reasons given by *Buchanan* J. for his decision were that without a stay the appeal to the Privy Council might be nugatory, that the plaintiff could not be prejudiced, and that it was not suggested that the application to the Privy Council was not *bonâ fide*. On 31st August the plaintiff, purporting to act under the liberty to apply, applied on summons for an order setting aside the order staying proceedings, but *Buchanan* J. on the same day dismissed the summons.

The plaintiff now, by leave, appealed to the High Court from the orders of 19th August and 31st August.

Cleland K.C. (with him *F. Villeneuve Smith* and *Alderman*), for the appellant. No sufficient grounds were shown for granting a stay. The fact that there is an appeal pending in the same action is not a ground for a stay (*The Annot Lyle* (1); *Barker* v. *Lavery* (2)). Nor is the fact that it is proposed to appeal to the Privy Council from a judgment of the High Court a ground upon which the Supreme Court should stay an action the foundation of which is the judgment of the High Court. There is no suggestion that if the plaintiff gets the land he will be unable to give it back to the defendant in the event of the Privy Council deciding that the judgment of the High Court was wrong. There is a caveat in respect of the land so that the defendant cannot be hurt.

[ISAACS J. referred to *Shaw* v. *Holland* (3); *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Oojoodhyaram Khan* (4).]

The judgment of the High Court is final and conclusive unless on petition special leave to appeal is granted by the Privy Council (secs. 73 and 74 of the Constitution). The application to set aside the order for a stay, which was made under the liberty to apply reserved, does not stand in the way of this appeal. The plaintiff did not thereby adopt the order for a stay but tried to get rid of it,

(1) 11 P.D., 114.
(2) 14 Q.B.D., 769.
(3) (1900) 2 Ch., 305.
(4) 10 Moo. Ind. App., 322, at p. 327.

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and the application was refused on the ground that the reservation of leave to apply did not justify it.

[ISAACS J. referred to *Penrice* v. *Williams* (1); *Klingebiel* v. *Palmer* (2).]

Sir Josiah Symon K.C. (with him *Napier* and *W. S. Bright*), for the respondent. Where an action is brought upon a judgment in another action and that judgment is under appeal, a stay will be granted almost as a matter of course. See *Taswell* v. *Stone* (3); *Cristie* v. *Richardson* (4); *Wilson* v. *Church* [*No.* 2] (5). Whether special leave to appeal has or has not been granted does not affect the question whether the action should be stayed (*Marconi's Wireless Telegraph Co.* v. *The Commonwealth* [*No.* 3] (6)), and it is sufficient that there is an intention to appeal (*Polini* v. *Gray* (7)).

BARTON J. I am of opinion that this appeal must be allowed. If this were an application to the High Court itself to stay proceedings upon the judgment of the High Court in the previous action between the same parties, what was said by the learned Chief Justice in *McLaughlin* v. *Daily Telegraph Newspaper Co.* (8), would be precisely applicable. He said :—" There is no doubt that the Court has power to stay execution of its judgments, but in this case the Constitution has provided that the Court's decision shall be final and conclusive. It is true that the Judicial Committee may give leave to appeal from our judgment. Under the system of appeals from State Courts to the Privy Council the appeal lay as of right, but it is absolutely unheard of to stay proceedings upon the judgment of a Court from which there is no appeal as of right." The last words make it clear that the word " leave " means " special leave." The High Court itself would not grant a stay of execution of one of its own judgments pending an application to the Privy Council for special leave to appeal from that judgment, unless there were some special or peculiar grounds, as indeed there were in the case of *Marconi's Wireless Telegraph Co.* v. *The Commonwealth*

(1) 23 Ch. D., 353, at p. 356.
(2) 2 S.A.L.R., 255.
(3) 4 Burr., 2454.
(4) 3 T.R., 78.
(5) 12 Ch. D., 454.
(6) 16 C.L.R., 384.
(7) 12 Ch. D., 438.
(8) 1 C.L.R., 243, at p. 283.

[*No.* 3] (1). But it must be borne in mind, in respect of all applications for a stay pending an appeal from the High Court to the Privy Council, that there is no appeal of right, and therefore the citing of cases in which there was a right of appeal is beside the question in this case.

The circumstances are these :—There having been litigation between the appellant and the respondent in the Supreme Court of South Australia as to certain land, that litigation was decided in favour of the appellant by a declaratory order of the High Court. That order laid down, practically, that the appellant's title to the land under the Torrens Act was absolute, and was not impaired by the equitable considerations alleged by the respondent. Founded upon that judgment and dependent upon the appellant's right to possession of the land not having been rendered merely fiduciary by any equitable right of the respondent, an action of ejectment was begun by the appellant in the Supreme Court of this State, and it is in respect of that action that an order to stay proceedings was granted by *Buchanan* J.

I pause here to say that I do not think that the proceeding taken by the appellant to discharge that order of *Buchanan* J. is an obstacle to the present appeal. That proceeding was taken in order to get rid of, and not to carry out, the order in question. In addition to that, the learned Judge did not listen to the appellant's application, but held that it did not lie at all. In those circumstances I do not think that the way to this present appeal is barred.

We find, then, that there is the judgment of the High Court making a declaratory order, and that the action which has been stayed by *Buchanan* J. is dependent upon that declaratory order. In view of the respondent's continued occupation of the land, the action of ejectment is the most direct method known to the law of making effectual the right to the property which was declared by the High Court. The stay of proceedings in that action operates really as a total or partial stay on the judgment of this Court. The grounds upon which *Buchanan* J. acted are practically, as far as we know (and no others are suggested), that without a stay

(1) 16 C.L.R., 384

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Barton J.

the appeal to the Privy Council might be nugatory, that the appellant could not be prejudiced, and that it was not suggested that the application to the Privy Council was not *bonâ fide* or was for delay. It may be granted that the application was *bonâ fide* and was not undertaken for delay. But in any case there was no appeal as of right. An appeal could not be entertained unless and until special leave to appeal was granted. So far as argument proceeded upon the other grounds, they seem to me to be insufficient. The argument here mainly proceeded on a ground which might possibly have some weight on an application to this Court to exercise its discretion in favour of a stay of its own order, namely, that the respondent was by reason of her insufficient means in a position of peculiar hardship. I do not think that is a sufficient ground for the stay by another Court, and it is substantially the only ground. The question was whether *Buchanan* J. should have made an order for a stay on the materials before him. I do not think that he had sufficient grounds for making it, and I also do not think, having regard to authority, that in any sense the Supreme Court, without the very strongest grounds, should make an order the possible effect of which would be to render nugatory, even for a time, a judgment of the High Court.

The ordinary principle is that a successful party is entitled to the fruits of his judgment. That being so, there must be sound reasons sufficient to justify the Court in suspending his right. It is not a sufficient ground to say that he, being a rich man, cannot be prejudiced by having his right temporarily denied to him.

For these reasons I think that the stay ought not to have been granted, and that the appeal must be allowed.

ISAACS J. I agree that the appeal must be allowed. This Court heard an appeal from the Supreme Court of South Australia and has made a declaration in favour of the present appellant, declaring that he is absolutely entitled to the property in question. That order under sec. 73 of the Constitution was final and conclusive, but sec. 74 recognizes that by virtue of the royal prerogative the Sovereign has a right to grant special leave to appeal to the King in Council.

It is, of course, the right of a subject to petition the Sovereign for that special leave. That is the right—a right to petition, quite different from a right to appeal. The Supreme Court, however, was dealing with a separate action in its own jurisdiction in which a stay was asked. The stay was applied for on the ground that it was intended to exercise the right of petition for leave to appeal. The Supreme Court was bound to consider the judgment of this Court as final and conclusive subject to any appeal that might be permitted. It had also the right to consider that the subject had the right to ask the Sovereign for special leave to appeal. The only fact, however, that *Buchanan* J. had before him was that the present respondent *bonâ fide* intended to ask for that special leave. That, in my opinion, is not a sufficient ground for staying proceedings. It is an element to be considered, but in this case there was nothing more in the matter so far as the facts were before *Buchanan* J.

There is, however, another matter which is an essential to a stay of proceedings. It was laid down by the Privy Council, in *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Oojoodhyaram Khan* (1), that one essential was that a serious injury would result to the petitioner unless a stay was granted. No evidence showing the existence of that essential was before the Court, and the sole ground upon which, on the materials before the Court, the order was made was that the judgment of this Court might be wrong. In my opinion that is not a sufficient ground. The Supreme Court cannot, in my opinion, accept that as a sufficient ground for staying proceedings.

Reference was made by Sir *Josiah Symon* to the position in which his client would be if judgment in the ejectment action went against her, supposing that the Privy Council did grant special leave to appeal and afterwards allowed the appeal. I think that this argument is met by the circumstance that the present appellant bases this application on the position that the success of the order for a stay depends purely upon the validity or invalidity of the judgment of this Court. He is bound by that.

For these reasons I think that the appeal should be allowed.

GAVAN DUFFY J. I think that this appeal should be allowed.

(1) 10 Moo. Ind. App., at p. 327.

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Gavan Duffy J.

In an action in the Supreme Court of South Australia it was declared that the present respondent was entitled to certain rights in respect of land which she had occupied for a considerable time. There was an appeal to this Court, and this Court held that the land was the absolute property of the present appellant. The respondent thereupon directed that an application should be made to the Privy Council for special leave to appeal from that decision, which is final unless the Privy Council chooses to give such leave. There has been no undue delay in making the application, but it has not yet been made. In the meantime the appellant, acting upon the declaration of this Court that the land was his property, gave notice to the respondent to give him possession, and, on her refusing to do so, commenced an action of ejectment against her in the Supreme Court of South Australia. No application had then or has since been made to this Court for any stay in respect of its order. If such an application had been made, it might be that this Court would have thought, and if such an application is made in the future, it may be that this Court will think, that inasmuch as some time must elapse before the respondent can ascertain whether she will get leave from the Privy Council or not she should not be ejected from the land and that the action of ejectment should be discontinued during that period. The circumstances of hardship which Sir *Josiah Symon* pointed out, might be considered by this Court in determining whether proceedings under its order should be stayed or whether the appellant should give certain undertakings if no such check was imposed on him. No application for a stay has been made to this Court, but an application was made to a Judge of the Supreme Court of South Australia to stay the action of ejectment which is founded upon the assumption that the decision of the High Court on the appeal was right. He should, in my opinion, have refused to consider the probability or the possibility of special leave to appeal being granted by the Privy Council in respect of an order of this Court where application to stay proceedings on such order might have been, but in fact has not been, made to this Court. It is not necessary to consider what circumstances might have justified a stay of proceedings; it is enough to say that the circumstances which have been shown to exist do not, to my mind, justify the making of such

an order as was made by *Buchanan* J., and that that order should be set aside. I think that the appeal should be allowed.

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Appeal allowed. Order appealed from discharged. Respondent to pay costs of appeal.

Solicitor for the appellant, *H. G. Alderman.*
Solicitors for the respondent, *Bright & Bright.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPELLANT;

AND

SNOW . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Criminal Law—Case reserved at the trial—Subsequent amendment of case asking new question—Misdirection—Misinterpretation of evidence—Special leave to appeal to High Court—Judiciary Act 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *sec.* 72.

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MELBOURNE, *Sept.* 5, 12.

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

On a trial in the Supreme Court of a State for trading with the enemy the accused was convicted, and the trial Judge thereupon reserved a case for the Full Court pursuant to sec. 72 of the *Judiciary Act* 1903-1915. On appeal to the High Court from the decision of the Full Court thereon the case was remitted to the trial Judge for amendment by the addition, for the consideration of the Full Court, of certain evidence admitted at the trial. On the case as amended coming again before the Full Court, the trial Judge further amended it by stating that in his direction to the jury he had misinterpreted a part of that evidence and had told the jury upon that misinterpretation that they might find the accused guilty of an attempt to trade with the enemy,