

## [HIGH COURT OF AUSTRALIA.]

SMITH'S WEEKLY PUBLISHING COMPANY }  
 LIMITED . . . . . } APPLICANT;  
 DEFENDANT,

AND

MYERSON . . . . . RESPONDENT.  
 PLAINTIFF,

*Practice—High Court—Appeal from Supreme Court of State—Leave to appeal—Prior application to Supreme Court for leave to appeal to Privy Council—Order in Council of 2nd April 1909 (Imp.), r. 2.* H. C. OF A.  
 1924.

In an action for libel in the Supreme Court of New South Wales a verdict had been given for the defendant which, on appeal by the plaintiff, had as to one count been set aside and a new trial ordered. The defendant applied to the Supreme Court, under rule 2 of the Order in Council of 2nd April 1909, for leave to appeal to the Privy Council, but leave was refused.

SYDNEY,  
 Mar. 24.  
 Knox C.J.,  
 Isaacs,  
 Gavan Duffy  
 and Starke JJ.

*Held*, that leave to appeal to the High Court from the order of the Supreme Court directing a new trial should be refused.

Leave and special leave to appeal from the Supreme Court of New South Wales (Full Court): *Myerson v. Smith's Weekly Publishing Co. Ltd.* [No. 2], (1923) 24 S.R. (N.S.W.) 51, refused.

APPLICATION for leave to appeal from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Emanuel Myerson against Smith's Weekly Publishing Co. Ltd. for libel in respect of matter published in the defendant's newspaper. The declaration contained four counts, and the jury found a verdict for the defendant



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on each count. One of the defendant's pleas (the fifth) to the first count was that the statements complained of were true, and that their publication was for the public benefit. On appeal by the plaintiff the Full Court granted a new trial on the first count and upheld the verdict of the jury on the other three counts, and ordered the fifth plea to be struck out: *Myerson v. Smith's Weekly Publishing Co. Ltd.* (1). The defendant thereupon applied to the Full Court, pursuant to rule 2 of the Imperial Order in Council of 2nd April 1909, for leave to appeal to the Privy Council, on the ground that the questions involved in the proposed appeal were of great general and public importance and ought to be submitted to the Privy Council for decision. The Full Court dismissed that application: *Myerson v. Smith's Weekly Publishing Co. Ltd.* [No. 2] (2).

The defendant now applied, on motion to the High Court, for leave to appeal to the High Court from the judgment of the Supreme Court ordering a new trial.

*Watt* K.C. (with him *Weston* and *Evatt*), for the applicant. The order of the Supreme Court granting a new trial is an order as to which an appeal lies to the High Court by leave. The fact that the applicant for leave has taken abortive steps to appeal to the Privy Council does not deprive it of the right to appeal to the High Court. If the fact that a litigant has elected to appeal to the Privy Council is a ground for refusing leave to appeal to the High Court, an application to the Supreme Court for leave to appeal to the Privy Council is not a final election to so appeal. There is no such final election until the litigant has applied to the Privy Council itself for special leave to appeal. If the order of the Supreme Court stands and a new trial is had, it will be fought under unreal conditions, for the defendant will be unable to avail itself of the defence raised by the fifth plea, which has been ordered to be struck out.

*Broomfield* K.C. and *Mason*, who by leave of the Court appeared or the respondent to oppose the motion, were not called upon.

(1) (1923) 24 S.R. (N.S.W.) 20.

(2) (1923) 24 S.R. (N.S.W.) 51.



The judgment of the COURT, which was delivered by KNOX C.J., was as follows :—

We are all of opinion that leave to appeal should not be granted. The position can be stated in a very few words. The proposed appellant, having had an order for a new trial made against it by the Supreme Court, applied to the Supreme Court under the Order in Council for leave to appeal to the Privy Council. The Supreme Court, for reasons which it thought sufficient, refused that leave. That decision was either right or wrong. Probably we ought to consider that it was right as it has not been challenged. If it was right, it was right on the ground that the case was not one which, by reason of its public importance or otherwise, ought to be submitted to His Majesty in Council for decision. If that is so, it is difficult to see why leave should be granted to appeal to this Court. On the other hand, looking at the possibility that the Supreme Court in refusing leave was wrong, although its decision was not challenged, the proposed appellant still has its means of redress. It has selected the Privy Council as its tribunal, and can apply to the Privy Council for special leave to appeal from either decision of the Supreme Court. The application will be refused.

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*Watt* K.C., formally moved for special leave to appeal from that portion of the order of the Supreme Court which ordered the fifth plea to be struck out.

PER CURIAM. Special leave to appeal will be refused.

*Leave and special leave to appeal refused.*

Solicitors for the appellant, *Norton Smith & Co.*

Solicitors for the respondent, *John Williamson & Sons.*

B. L.