himself reaches a final conclusion upon the question of all such penalties. Treating the defendant as having applied for a stay of proceedings upon the judgment which the plaintiff is now at liberty to enter, I refuse a stay.

The defendant will pay the costs of the present summons which I referred into court and I certify for counsel, including senior counsel.

Application granted in part.

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FEDERAL COMMISSIONER OF TAXATION v. TRAUTWEIN.

Solicitor for the applicant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *A. R. Baldwin & Co.*

J. B.

[On 26th April 1937 the Privy Council refused special leave to appeal from the above decision and the decisions in *Trautwein* v. *Federal Commissioner of Taxation*; *R.* v. *Federal Commissioner of Taxation*, *ante*, p. 63, and *Ibid.* [*No.* 2], *ante*, p. 196.]

[HIGH COURT OF AUSTRALIA.]

EX PARTE BUCKNELL.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Appeal—High Court—Leave to appeal—Interlocutory judgment of State Court—Principles governing grant of leave—Judiciary Act 1903-1934 (*No.* 6 *of* 1903—*No.* 45 *of* 1934), *sec.* 35 (1).

Principles in accordance with which applications under sec. 35 (1) of the *Judiciary Act* 1903-1934 for leave to appeal against an interlocutory judgment of a State Court should be determined, stated.

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SYDNEY, *Nov.* 30; *Dec.* 15.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

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

The Commercial Banking Co. of Sydney Ltd. brought an action in the Supreme Court of New South Wales against Norman Charles Bucknell for moneys lent by the plaintiff to the defendant by way of overdraft and for interest and charges thereon to the amount, in all, of £2,272 15s.

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The defendant pleaded that the plaintiff's claim was barred by the Statute of Limitations.

At the hearing of the action before *Stephen* J. and a jury, the plaintiff relied upon a letter written by the defendant and bearing date 20th December 1933 as an acknowledgment of the debt sufficient to take the case out of the Statute of Limitations, but the plaintiff was nonsuited on the ground that its right of action was barred by the statute.

An appeal by the plaintiff was upheld by the Full Court of the Supreme Court on the ground that the letter constituted a sufficient acknowledgment to take the case out of the Statute of Limitations, the nonsuit was set aside and a new trial ordered: *Commercial Banking Co. of Sydney Ltd.* v. *Bucknell* (1).

The defendant applied to the High Court for leave to appeal from that decision, and, in his affidavit in support, submitted that leave should be granted because not only was an important point of law involved, but, also, the decision of the Full Court in effect concluded the action in favour of the plaintiff.

Monahan K.C. (with him *Wesche*), for the applicant, agreed that, in the event of the appeal for which leave was sought being dismissed, judgment should be entered in favour of the plaintiff for the amount claimed with interest thereon to date of judgment at the rate claimed.

LATHAM C.J. Leave to appeal is granted subject to the condition consented to by Mr. *Monahan* on behalf of the applicant. Reasons for the granting of leave in an application of this nature will be given later.

Dec. 15.

THE COURT delivered the following written judgment :—

This is an application for leave to appeal from an interlocutory order. The plaintiff claimed £2,272 15s. and interest. The plaintiff was nonsuited, the learned trial judge holding that the claim was barred by the Statute of Limitations. The plaintiff appealed, and the Full Court, holding that there was a sufficient acknowledgment to take the case out of the statute, ordered a new trial. The result,

(1) (1936) 36 S.R. (N.S.W.) 607 ; 53 W.N. (N.S.W.) 203.

in the circumstances of this case, is that the plaintiff must succeed upon the new trial which has been ordered. Thus the interlocutory order really determines the controversy between the parties, as the only defence to the claim depends upon the Statute of Limitations. The order is a judgment given in respect of a sum amounting to the value of £300, and an appeal may be brought to this court by leave of the Supreme Court or of this court (*Judiciary Act* 1903-1934, sec. 35 (1) (*a*) (1)). The court takes this opportunity of stating the principles in accordance with which such applications should be determined.

Sec. 35 (1) of the *Judiciary Act* 1903-1934 provides that the appellate jurisdiction of the High Court with respect to judgments of the Supreme Court of a State shall extend to :—" (*a*) Every judgment, whether final or interlocutory, which—(1) is given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of three hundred pounds ; or (2) involves directly or indirectly any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of three hundred pounds ; or (3) affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency ; but so that an appeal may not be brought from an interlocutory judgment except by leave of the Supreme Court or the High Court."

Sec. 35 (1) (*b*) provides that the appellate jurisdiction of the High Court shall extend to " any judgment, whether final or interlocutory, and whether in a civil or criminal matter, with respect to which the High Court thinks fit to give special leave to appeal."

The purpose of the distinction thus drawn by the section between leave to appeal and special leave to appeal is evident. In the case of judgments and orders from which an appeal would lie as of right, if they were final, the leave of a court is made necessary if they be interlocutory, in order to check appeals which will not result in final determinations of the parties' rights. The leave of the Supreme Court pronouncing the order or of this court will enable the party to appeal. But when the judgment or order falls altogether outside the class from which an appeal as of right lies, an appeal may not be brought unless this court gives special leave to appeal. The power thus given to this court to admit an appeal where otherwise it

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would not lie is discretionary, but, beyond the use of the word " special," the grounds upon which the discretion should be exercised are not indicated. This was inevitable in view of the great variety of circumstances which might make it desirable to permit in particular cases an appeal to be brought and of the impossibility of foreseeing them all and defining them in advance. But the policy of the provision and of sec. 39 (2) (*c*) was to make it the prima facie rule that such judgments and orders should not be subject to appeal to this court and to empower this court to make exceptions in such particular cases as appeared to it to possess features making them special. Accordingly, in the case of applications for special leave there must be special circumstances in the case in order to justify the granting of the application. It is not necessary or desirable to attempt to enumerate all the classes or circumstances which may be regarded as special in this connection. Indeed, the very use of the word " special " is designed to make it possible for the court to deal with each case individually in relation to its own particular circumstances. Decisions of the court have indicated a number of characteristics which justify special leave to appeal.

But, in the case of orders from which an appeal does not lie without leave only because they are interlocutory, it is clear from the terms of the section that the existence of special circumstances is not made necessary in order to justify the grant of leave to appeal. At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under sec. 35 (1) (*a*) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment.

In the first place, it should be noticed that the section provides that the interlocutory order must itself fall within one of the three classes mentioned in the section. It is not enough that the action

or other proceeding in which the interlocutory order is made is one that will terminate in a final judgment which would fall within one of these classes. The first question, therefore, is whether the interlocutory order from which leave to appeal is sought is an order from which, if final, an appeal would lie as of right; one, for example, which "is given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of three hundred pounds." It must not be forgotten that it is the interlocutory nature of the order, not the nature of the motion or other prooceedings in which the court made the order, that determines whether leave is required (*Adams* v. *Herald and Weekly Times Ltd.* (1)). An interlocutory order affecting only the course of proceedings in an action or suit can seldom fall within the prescribed classes of sec. 35 (1). For example, it is difficult to imagine orders relating to interrogatories, discovery, examining witnesses out of court, the giving of particulars, or like procedural matters, prejudicing a party to the extent of £300. But, to appoint a receiver, to grant an interlocutory injunction, to order a new trial, to give judgment on demurrer holding one of several pleas to be bad, or to give leave to sign summary judgment, may well affect rights of the necessary value.

It is apparent that many different considerations may be raised by cases in which leave only is needed and that all the grounds upon which applications may succeed cannot be stated in advance. It is possible, however, to say how certain types of cases should be dealt with. But any statement of the matters which would justify granting leave to appeal must be subject to one important qualification which applies to all cases. It is this. The court will examine each case and, unless the circumstances are exceptional, it will not grant leave if it forms a clear opinion adverse to the success of the proposed appeal.

There is one class of case which raises little difficulty. If the interlocutory order, being an order of the character specified in sub-pars. 1, 2, or 3 of sec. 35 (*a*), has the practical effect of finally determining the rights of the parties, though it is interlocutory in form, a prima facie case exists for granting leave to appeal. For example, a judgment for either party on a demurrer might, in effect,

(1) (1934) 50 C.L.R. 1.

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be decisive of the whole litigation. Although such a judgment would often be interlocutory, it might be final in determining the issue between the parties, and, in such a case, leave would be granted almost as of course. Again, an order giving leave to sign final judgment is in its form interlocutory (*Cox Brothers (Australia) Ltd.* v. *Cox* (1)). Yet in its effect it is final. But, in such a case, the court is under a duty to take care that a defendant who is unlikely to succeed in his appeal does not by appealing to this court and obtaining a stay defeat the very purpose of proceedings by way of summary judgment.

A class of case which raises more difficulty is to be found in judgments ordering a new trial. As to these it is, perhaps, impossible to lay down any complete set of rules, but the following considerations may be mentioned as relevant in applications for leave to appeal from such orders. If, having regard not only to the order itself but also to the reasons on which it is based, it appears to amount, either as a matter of law, or from a practical point of view, to a decision of the matter at issue in favour of one party so that the new trial had in pursuance of the order can have but one result, leave to appeal should, prima facie, be granted. Of course, upon every application for leave to appeal from a new trial order, if the High Court is clearly of opinion that an appeal would not succeed, leave should be refused. But even if a party seeking leave is able to make the correctness of the order for a new trial appear doubtful in relation to the grounds assigned for it, yet this court may refrain from giving leave on other grounds associated with the litigation which lead to the opinion that the verdict was unsatisfactory. If the effect of the judgment ordering a new trial is not such as to determine the substantial matter at issue between the parties in the manner stated, an application for leave to appeal may nevertheless succeed if the appeal would raise a matter of general importance. Further, it may be shown that intervention at an early stage by granting leave to appeal from an order for a new trial may save an appeal at a later stage and thus avoid or diminish expenditure in costs.

Similar considerations apply to orders granting interlocutory injunctions. If the decision upon an application for an interlocutory

(1) (1934) 50 C.L.R. 314.

injunction practically determines some important issue between the parties, leave would readily be granted, if, of course, the case falls within the sub-paragraphs of the sub-section. But the court will take into account the possibility or probability of the question being affected by further evidence adduced at the trial.

Finally, a decision by the High Court upon an interlocutory matter may, in some cases, save much expense and delay. When it is shown that this is the case, or that it may probably be the case, the court will be more ready to grant leave to appeal.

It is difficult, if not impossible, to give any more precise statement of the matters by which the discretion of the court is guided upon applications for special leave to appeal and for leave to appeal from judgments of the Supreme Court of a State.

In applications under sec. 39 (2) (*c*) of the *Judiciary Act* for special leave to appeal from inferior courts exercising Federal jurisdiction additional considerations may exist justifying the grant of special leave.

In this particular case the interlocutory order for a new trial really determines the matter in controversy between the parties. The amount directly involved is more than £300, and leave to appeal is therefore granted. If the appeal should be dismissed, the new trial should be only a matter of form and would involve useless expense. In order to prevent this expense the court grants leave to appeal upon the condition (which has been accepted on behalf of the defendant) that, if the appeal is dismissed, judgment should be entered for the plaintiff for the amount claimed, with interest at the rate claimed to date of judgment.

Leave to appeal granted, the applicant by his counsel undertaking that, if the appeal be dismissed, judgment may be entered by this court for the plaintiff for the amount claimed in the writ with interest at the rate claimed in the writ from 19*th June* 1934 *to date of judgment.*

Solicitors for the applicant, *Jennings & Jennings.*

J. B.