

FULL COURT—(Griffith, C.J.,
Barton, Isaacs, Gavan Duffy
and Rich, JJ.)
(Sydney.)

May 11, 13.

**SINGH, Plaintiff Appellant v. KARBOWSKY,
Defendant Respondent.**

Practice — Appeal from Supreme Court of State—Security not given in prescribed time—Power to extend time—Special leave to appeal—“High Court Procedure Act 1903” (No. 7 of 1903), secs. 35, 36, 37—High Court Rules of May 25th, 1911, Order LIII., r. 6—Appeal Rules, sec. III., r. 12; sec. V., r. 1.*

The plaintiff gave notice of appeal from a decision of the Supreme Court of New South Wales, but did not give security within three months after service of the notice of appeal, as required by r. 12 of sec. III. of the Appeal Rules.—

Held, per Griffith, C.J., Barton and Gavan Duffy, JJ. (Isaacs and Rich, JJ., dissentientibus), that the time for giving security could not be enlarged under r. 6 of Order LIII.

Seemle.—The words “procedure of the Court in its appellate jurisdiction” in r. 1 of sec. V., relate to interlocutory proceedings in an appeal which has been duly instituted.

Decision of O'Connor, J., in *E. Ryan and Sons Limited v. Rounsevell*, 17 A.L.R. 32, approved of.

But *held per Griffith, C.J., Barton and Gavan Duffy, JJ. (Isaacs and Rich, JJ., dissentientibus),* that, under the circumstances, special leave to appeal should be granted.

APPLICATION by the plaintiff under r. 6 of Order LIII. of the High Court Rules of May 25th, 1911, for extension of time for giving security for an appeal to the High Court from the Supreme Court of New South Wales. Notice of appeal was given on December 18th, 1913, but security was not given within three months after service of the notice of appeal as required by r.

* “High Court Procedure Act” (No. 7 of 1903), sec. 37.—

“Appeals to the High Court shall be instituted within such time and in such manner as is prescribed by Rules of Court.”

High Court Consolidated Rules, Part II., Appeal Rules—

Sec. III., r. 12.—“Within three months after service of notice of appeal, or such other time as is prescribed by an order giving leave to appeal, the appellant shall give the prescribed security for the costs of the appeal, and shall give notice thereof to the respondent.

“Such security shall be given in the Court from which the appeal is brought.

“If the security is not given within the prescribed time, the appeal shall be deemed to be abandoned.

“As soon as it is given, the appeal shall be deemed to be duly instituted.”

Sec. V., r. 1.—“The Rules of Court relating to the procedure of the Court in its original jurisdiction shall, so far as they are respectively applicable to appeals, apply to the procedure of the Court in its appellate jurisdiction.”

Order LIII., r. 6.—“The Court or a Justice may enlarge or abridge the time for doing any act or taking any proceeding allowed or limited by these Rules, or allowed or limited for the like purpose by any order of the Court or a Justice, whether so allowed by way of enlargement or otherwise, upon such terms, if any, as the justice of the case requires; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time originally allowed or limited.”

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12 of sec. III. of the Appeal Rules. In the alternative, the plaintiff asked for special leave to appeal.

It appeared from the plaintiff's affidavit that he had forwarded £50 to his solicitor to be lodged as security in ample time to permit of the security being given as required by r. 12 of sec. III. of the Appeal Rules, but the solicitor stated that he misunderstood the purpose for which the £50 had been paid to him by his client, and instead of lodging the £50 as security, had applied it in payment of certain costs due to him by his client. The mistake was not discovered until the time for giving the security had expired, and the appellant then applied to Rich, J., in Chambers for an extension of time for giving security. At the hearing of this application, a question was raised as to the jurisdiction of the learned Judge to make the order, as the time prescribed for giving the security had elapsed, and the application was referred by Rich, J., to the Full Court. The matter in dispute exceeded £300 in value.

Wise, K.C., and Jordan for the plaintiff.

Ferguson, for the defendant, opposed the application.

Reference was made to—*Hunter v. S. S. Hesketh*, (1891) A.C. 628; *Stafford and Wheeler, Privy Council Practice*, p. 932; *Lever Bros. v. G. Mowling and Son*, 14 A.L.R. 73; *Miller v. Major*, 13 A.L.R. 127; *E. Ryan and Sons v. Rounsevell*, 17 A.L.R. 32; *Carter v. Stubbs*, 6 Q.B.D. 116; *Seto Luchmeechund v. Seto Zorawar Mull*, 9 Moo. P.C. 351; *In re Taylor, Ex parte Bolton*, (1909) 1 K.B. 103; *International Financial Society v. City of Moscow Gas Co.*, 7 Ch. D. 241; *In re Coles and Ravenshear*, (1907) 1 K.B. 1.

Cur. adv. vult.

GRIFFITH, C.J., read the following judgment of himself, BARTON and GAVAN DUFFY, JJ.:—This is a motion to extend the time for giving security for the costs of an appeal from the Supreme Court of New South Wales, notice of which was given on 18th December last. Rule 12 of sec. III. of the Appeal Rules, requires the appellant to give security within three months after service of the notice of appeal, and declares that if it is not so given, the appeal shall be deemed to be abandoned, and that as soon as it is given, the appeal shall be deemed to be duly instituted. Until, therefore, the security is given the intending appellant's right is inchoate only, and there is no cause pending in this Court. Upon failure to give the security, the inchoate right is *ipso facto* at an end.

The application is made under rule 6 of Order LIII., which provides that the Court or a Justice may enlarge or abridge the time for doing any act or taking any proceeding limited by the rules, and that the enlargement may be made even after the expiration of the time originally allowed or limited, and which, it is contended, is by rule 1 of sec. V. of the Appeal Rules, made applicable to proceedings for the purpose of instituting an appeal to the High Court. That rule provides that the Rules of Court relating to the procedure of the Court in its original jurisdiction shall,

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as far as applicable to appeals, apply to the procedure of the Court in its appellate jurisdiction.

In our opinion, this rule has no application to the present case. Sec. 37 of the "High Court Procedure Act" directs that appeals to the High Court shall be instituted within such time and in such manner as is prescribed by Rules of Court. The time and manner have been so prescribed by rule 12 of sec. III. already mentioned. We think that compliance with the rules as to the time of instituting an appeal is a condition precedent to the coming into existence of a cause in the appellate jurisdiction.

We think, also, that the words in rule 1 of sec. V., "procedure of the Court in its appellate jurisdiction," relate only to interlocutory proceedings in an appeal which has been duly instituted. The provisions of rule 2 immediately following, which empower the Court in certain cases to expedite the hearing of an inchoate appeal which has not been completely instituted, would be quite unnecessary if the construction contended for were adopted. On that construction a single Justice might not only enlarge, but abridge, the time for appealing, a result which, we think, is inconsistent with the intention of Parliament as expressed in sec. 37 of the "High Court Procedure Act."

Our conclusion is in accord with that of O'Connor, J., in the case of *E. Ryan and Sons Limited v. Rounsevell*, 17 A.L.R. 32, which we think was rightly decided.

An alternative application was made for special leave to appeal, which it is clearly within the discretion of the Court to grant. Under the circumstances of the case, which are very special, we think that this discretion may properly be exercised in favour of the appellant.

ISAACS, J., read the following judgment of himself and RICH, J.:—The applicant had a statutory right of appeal under the Constitution as modified by sec. 35 of the "Judiciary Act," because the civil right exceeded £300 in value. That was an absolute vested right. Then, as a matter of procedure—but procedure only—directions are given by Parliament in sec. 35 of the "High Court Procedure Act," that security shall be given "in such manner as shall be prescribed by "Rules of Court for the prosecution of the appeal without delay." But that Act does not give the appeal, it adds the requirement of security as procedure in connection with it, when given by the Constitution as qualified by the "Judiciary Act."

The "High Court Procedure Act" says nothing whatever as to the consequence of not giving security, except as to any additional security which may be ordered. But it allows the Court or a Justice to reduce the security prescribed—it may be to a shilling, or to increase it—it may be to £1000. That is discretion dependent on circumstances, and when an order is made altering the security, the security so ordered is the "prescribed security" within the mean-

ing of rule 12 of sec. III. appellate rules. Then sec. 37, under the special head of "procedure" relative to appeals to this Court, says—"Appeals shall be instituted within such time and in such manner as is "prescribed by Rules of Court." That is affirmative only, and enacts no consequence of failure to comply with any rule. That is left to the rules themselves.

Now we turn to the rules. Sec. III., rule 12, prescribes the time for giving security. It divides appeals into two classes (1) appeals without leave, three months; (2) appeals by leave, three months, or any other time mentioned in the order. If nothing is said on the point, the prescribed time is three months; if the order varies that, the varied time is the prescribed time—see, for instance, *In re Oliver and Scott's Arbitration*, 43 Ch. D. 310. As to both classes, it says of the security—"As soon as it is "given, the appeal shall be deemed to be duly instituted." Now, it is material to inquire what the rule assumes has already taken place. The notice of appeal has been given, which is one step (sec. 3, rule 1), affidavits are headed "In the High Court of Australia" (rule 6), the cause being pending in the lower Court until leave is granted (*ib.*); but after that the parties are called "appellant" and "respondent" respectively (r. 7), and a copy of the notice of appeal is filed in the High Court (r. 8). Also, by rule 2 of sec. V., an order may be made by this Court expediting the hearing of the appeal, and ordering "the appeal" to be set down, and may abridge the time within which security is to be given, &c.

Nothing is said there about enlarging time, but the very fact that abridgment, as a consequential act expediting the hearing, is possible, shows the contemplation of jurisdiction over the matter, just as is connoted by sec. 36 of the "High Court Procedure Act." But it no more connotes the absence of the power elsewhere, than the mention in rule 6 of Order LIII. of the power to alter the time fixed by a curial order connotes the absence of such a power otherwise. All these considerations indicate to us that the giving of security within the time is mere procedure, auxiliary to the main fact of the existing constitutional appeal already vested. Not giving the security involves this, that the "appeal" is deemed to be "abandoned." Therefore there is an "appeal" which can be "abandoned."

In *Lever v. Mowling*, 14 A.L.R. 73, the learned Chief Justice thought there was no jurisdiction to make an order extending the time for giving security, but did not find it necessary to decide it. As the rules then stood in 1907, we think that opinion was well founded, because, as in England formerly, the original jurisdiction rules did not apply to appeals. But since then, viz., 1908, sec. 5, rule 1, expressly applies them. O'Connor, J., in *Ryan v. Rounsevell*, 17 A.L.R. 32, decided in 1910, appeared to think *Lever's Case* was decided on the same state of law. Now, supposing, instead of mere reference, the original jurisdiction

rules were bodily set out in the appellate part of the rules, we cannot see how any doubt could arise that rule 6 of Order LIII., would apply.

Carter v. Stubbs, 6 Q.B.D. 116, appears to us a most distinct authority that a rule worded as that rule is, and specifically made to apply to appellate jurisdiction, enables the Court to enlarge the time, though the application is not made until the original time has expired. When enlarged as that case shows, the enlarged time is the time prescribed, and the matter is revived. *Burke v. Rooney*, 4 C.P.D. 226, is another case exactly in point. Now, the English rule (Order LVII., rule 6), under which those cases were decided, is set out on p. 230, and will be seen to present no material difference so far as this matter is concerned from our own rule.

We, therefore, are of opinion there is jurisdiction to grant the application to enlarge the time in a proper case, and that if an order be made enlarging the time, the time so enlarged is the "prescribed time" within the meaning of rule 12. The question was debated as to the principles upon which the Court will act in exercising statutory discretion. As to this, we think it important to quote some words of Loreburn, L.C., in *Hyman v. Rose*, (1912) A.C. 623 at p. 631, which are of general application, his judgment being agreed to by the whole House. The Lord Chancellor said—"It is 'one thing to decide what is the true meaning of the 'language contained in an Act of Parliament. It is 'quite a different thing to place conditions upon a 'free discretion entrusted by Statute to the Court 'where the conditions are not based upon statutory 'enactment at all. It is not safe, I think, to say 'that the Court must and will always insist upon 'certain things when the Act does not require them, 'and the facts of some unforeseen case may make the 'Court wish it had kept a free hand.' This passage has a double bearing on the case. Mr. Wise made an alternative application for special leave under sub-sec. (1) (b) of sec. 35 of the "Judiciary Act."

As to the merits, the two applications require separate consideration. In framing sec. 35 of the "Judiciary Act," Parliament was exercising its power under sec. 73 of the Constitution to make "exceptions" and "regulations" with reference to appeals, and it is clear the Privy Council rules of practice were the model. Sub-sec. (1) (a) is an enumeration of the cases in which appeals may be had as of right. And that right is subject to such "regulations" as are elsewhere prescribed. Unless power exists in this Court to relax those regulations, we cannot do so, and what we are not authorised to do directly, we certainly should not attempt to do indirectly. If, therefore, the right to appeal has been lost, as suggested, beyond power of recall under Order LIII., r. 6, then as that is the legislative will, we cannot recall it. If, in other words, the rules which are of statutory authority establish that the would-be appellant has abandoned his right of appeal, and therefore the

respondent has a right to retain his judgment as a finally vested right, it cannot, as it appears to us, be held with any show of consistency that it is right and just to deprive him of that right. If it is the appeal as distinguished from the right of appeal that is abandoned, then the appeal was in the Court. That, of course, has nothing in common with leave as to interlocutory matters.

The party must then depend upon the exceptional power granted to this Court under the head of "special leave." That exceptional power has been interpreted in several cases, as *Hannah v. Dalgarno*, 9 A.L.R. (C.N.) 85; *Backhouse v. Moderana*, 1 C.L.R. 675; *Johansen v. City Mutual*, 11 A.L.R. 6, and other cases, including several criminal cases, and the practice of the Privy Council on applications for special leave—see *Stafford and Wheeler*, p. 732.

Now, this dilemma presents itself to our minds. Either the rule laid down in the numerous cases in which special leave has been refused is the true interpretation of the sub-section, or it is not. If it is, then it means we have no jurisdiction to grant special leave otherwise than with reference to the intrinsic character or merits of the cause itself, any accident or slip of one of the parties, after the judgment complained of, having nothing to do with the matter.

If, on the other hand, it is not the true interpretation, but as said by the Court in *Johansen's Case*, at p. 7, merely a rule of practice laid down for itself by the Court, then it is an unwarranted judicial fetter on the unrestricted discretion conferred by the Legislature, and to follow it is to alter the Act and decline jurisdiction. In that view, the authorities above mentioned—*Hyman v. Rose*, (1912) A.C. 623; and *Rumbold's Case*, 100 L.T. 259, show that the rule of judicially-made law ought to be abandoned.

If, therefore, it be considered in the present case that special leave to appeal should be granted on the ground advanced, we cannot see how the doctrine previously laid down can any longer be considered good law. And that is so either in civil or criminal cases, for the Statute places both on the same footing, and we are not warranted in discriminating between them. But, as we think the true interpretation of the sub-section is that of the rule previously prevailing according to the Privy Council practice, we come to the conclusion that as to the alternative application for special leave, it would be contrary to the intentment of that sub-section to grant it, seeing that it has not been shown on the materials before us that the case presents any question of law, important or unimportant, or any case of clear injustice, or even any question of fact that does not depend on the credibility of witnesses. As to the application to extend the time for giving security, this stands on a wholly different footing, there being no question of "special leave" in the rule, and no necessity for considering the merits of the appeal—*Rumbold v. London County Co.*, 100 L.T. 259, a decision of the full Court of Appeal, consisting

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of the Master of the Rolls and five Lord Justices—which accords with what Brett, L.J., said in *Carter v. Stubbs*, 6 Q.B.D. 116 at p. 121. As to this, we have indicated there is no fetter on the discretion of the Court. The rule itself says "as the justice of the case requires." The respondent claims to have a vested right in the judgment he holds; that is true in a sense, but it is a defeasible right—that is, it is subject to the Court being satisfied that justice to the appellant requires the matter to be re-opened, and does not offer any opposing consideration of substance on the part of the respondent beyond what may be compensated by costs or otherwise. Under this rule it is not the merits of the cause, but the merits of the parties external to the merits of the cause, that are to be considered. We think it is the broad principle of justice which should guide the Court in all cases arising under the rule, and that therefore the proper order here should be to permit an extension of the time for giving security, the parties being restored to their original situation by the applicant paying the costs of this application.

Special leave granted.

[Solicitors—For appellant, A. H. Jones; for respondent, Lawrence and Lawrence.] C. E. W.

FULL COURT—(Barton,	}	May 26, 27, 28,
Isaacs and Rich, JJ.)		29, 30.
(Adelaide.)		

DREW, ROBINSON AND CO., Defendants
Appellants v. JOHN SHEARER and
Another, Plaintiffs Respondents.

Patent—Alleged infringement—Combination—Claim—Novelty.

In the specification of an invention for an "improved" share and footpiece for ploughs and other cultivating implements," the patentee claimed—

2. In ploughs and cultivating implements the combination of a share having on the land side a part turned inward and upward, forming a flange and tongue adapted to fit over a corresponding downwardly-projecting rib on the foot, and with a bolt or other suitable fastening on the wing side substantially as described and illustrated; and

3. A plough or cultivator share having a flange or tongue turned inwardly and upwardly from the land side adapted to engage a rib on the bottom of the front piece substantially as described.—

Held, on the true construction of these claims, that the patentee was limited to the inward flange and upward tongue in combination, and that on the evidence there had been no infringement.

Judgment of the Supreme Court of Western Australia reversed.

APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

The plaintiffs (respondents) were the holders of Letters Patent for an "Improved share and footpiece" for ploughs and other cultivating implements." The

defendants (appellants) sold shares made by J. and T. Muir, for use with the plaintiffs' patent footpiece, which the plaintiffs alleged were an infringement of their patent.

An action was brought by the plaintiffs, claiming an injunction restraining the defendants from infringing their patent and for other usual relief. The defendants denied infringement, and disputed the validity of the plaintiffs' patent, on the grounds of want of subject-matter, want of utility, want of novelty, and prior publication.

The trial Judge (McMillan, J.) held that the plaintiffs' patent was valid, and had been infringed by the defendants, and he gave judgment for the plaintiffs for an injunction, and ordered an inquiry as to damages. The defendants appealed by special leave.

The following claims in the plaintiffs' specification are material:—

2. In ploughs and cultivating implements the combination of a share having on the land side a part turned inward and upward, forming a flange and tongue adapted to fit over a corresponding downwardly projecting rib on the foot, and with a bolt or other suitable fastening on the wing side substantially as described and illustrated.

3. A plough or cultivator share having a flange and tongue turned inwardly and upwardly from the land side adapted to engage a rib on the bottom of the foot-piece substantially as described.

Stare for the appellants.—The questions at issue turn upon the proper construction of the specification. The plaintiffs' real claim is for a share having a flange and a tongue turned inwardly and upwardly on the land side in combination with a bolt or other suitable fastening on the wing side. If they claim the tongue as an essential feature, we have not taken it; if they do not so claim, then the form of share is old. The appellants submit that there has been no infringement, and alternatively that the plaintiffs' patent is bad for want of novelty. Claim 2 is a claim for a combination. Claim 3 is essentially the same—*Broken Hill South Silver-Mining Co. Limited v. Guthridge*, 8 C.L.R. 187 at 210. The downward flange is old. The respondents are driven to say the tongue is the essential feature. If they claim the flange with the upward turn, and not the tongue as the essential feature, then they are clearly anticipated—*Frost on Patents* (4th ed.) pp. 351-2. He referred to—*N. Guthridge Limited v. Wilfley Ore Concentrator Co. Limited*, 12 A.L.R. 398, affirmed by Privy Council, *ib.* (C.N.) 21.

Paris Nesbit, K.C., and *Poole* for the respondents.—As to the construction of the specification, it must be taken as a whole, not the isolated claim. There is a claim here for the share in combination with the foot-piece, and for a share separately. The shares are professedly and confessedly made to fit Shearer's patent footpiece—*Incandescent Gaslight Co. Limited v. The De Marc Gaslight System Limited*, 13 R.P.C. 301. The