

*Opinion of the Lords of the Judicial Committee of the Privy Council on a Petition of the Respondent praying for certain costs in the Appeal of Milson v. Carter, from the Supreme Court of New South Wales, which Appeal stood dismissed for non-prosecution under the terms of Rule V. of Her Majesty's Order in Council of the 13th June 1853; delivered 29th July 1893.*

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Present:

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

This is an application on the part of the Respondent in the appeal now dismissed of *Milson v. Carter* asking for an order directing the Appellant to pay the costs of and incidental to the appeal, and also the costs of the present application.

The appeal stood dismissed without special order under Rule V. of the Order in Council of the 13th of June 1853 for want of prosecution.

On that Rule taking effect and on the dismissal being notified by the Registrar of the Privy Council in the usual way the Respondent applied to the Supreme Court for payment of his costs. The Appellant took the objection that the Order of the Supreme Court granting leave to appeal made no provision for the case which had actually occurred. The Chief Justice after

consulting with the other Judges expressed the opinion that the Supreme Court had no jurisdiction to make any Order as to the costs, and that the application should have been made to this Board.

It seems that when the Order granting leave to appeal was made the Order in Council of the 13th of June 1853 was over-looked. The Order of the Court which is dated the 26th of September 1890 merely directed that the costs of both parties of and incidental to the motion for leave to appeal and the preparation of the transcript record should be taxed, and that such costs should abide the judgment of Her Majesty in Council in the said appeal in that behalf. It omitted to add the words—"or the result of the appeal, in case the appeal shall be dismissed for want of prosecution" or any similar words which would have made the Order complete.

The Rule under which appeals stand dismissed without special order has been in force for 40 years, and their Lordships are informed by the Registrar that this is the first occasion so far as he is aware on which any difficulty as to costs has occurred. It is obvious that the omission to provide for the case of dismissal under the Order of June 1853—a case of constant occurrence—must have been an accidental omission for which the Registrar of the Supreme Court, or perhaps the Respondent himself, is to blame. It is impossible to suppose that the Court could have intended to give the Appellant an opportunity of shuffling out of his just liability by making default in the prosecution of his appeal.

Their Lordships do not doubt that the Court has power at any time to correct an error in a Decree or Order arising from a slip or accidental omission, whether there is or is not a general order to that effect. A recent instance of the exercise of this power occurred in the case of

*Hatton v. Harris* before the House of Lords (1892 App. Ca. 547), where an error arising from an accidental omission was corrected after the lapse of 40 years. The House of Lords in that case approved the views expressed by the Court of Appeal in *Mellor v. Swire* (30 Ch. D. 239).

Their Lordships observe that the fund which was intended to be a security for the costs of the Appeal is still in Court. It can not be dealt with except by the Order of the Supreme Court. It can only be dealt with in accordance with the real meaning and intention of the Order of the 26th of September 1890 by first correcting the slip in that Order. The existence of this fund in the hands of the Court would seem to remove any difficulty that could possibly be suggested in the way of an application directed to that purpose.

Unfortunately the Respondent did not take the proper course of applying to the Supreme Court to correct the accidental omission in the Order granting leave to appeal. If he had done so no doubt the mistake would have been put right as a matter of course.

Their Lordships will allow this application to stand over with liberty to amend, so that in the very improbable event of any difficulty occurring in correcting the Order of the 26th of September 1890 the Respondent may be in a position to apply for special leave to bring up that Order on appeal, together with any Order that may be made on any application which the Respondent may be advised to make with the view of having the slip corrected.

It will be the duty of the Respondent forthwith to communicate this opinion to the Appellant, so that if so advised he may by timely submission prevent any further costs in this very idle dispute.

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