THE CORPORATION OF THE COUNTY OF ELGIN (DEFENDANTS) ..... } APPELLANTS;

AND

ANTOINE ROBERT (PLAINTIFF).....RESPONDENT.

1905

*April 11.

ON APPEAL FROM THE CHANCELLOR OF ONTARIO.

Appeal per saltum—Time limit—Pronouncing or entry of judgment.

To determine whether the sixty days, within which an appeal to the Supreme Court must be taken, runs from the pronouncing or entry of the judgment from which the appeal is taken no distinction should be made between common law and equity cases.

The time runs from the pronouncing of judgment in all cases except those in which there is an appeal from the Registrar's settlement of the minutes or such settlement is delayed because a substantial question affecting the rights of the parties has not been clearly dlsposed of by such judgment.

(1) 23 Can. S. C. R. 371 at p. 374. (2) 16 Can. S. C. R. 579.

*The Registrar in Chambers.

1905

COUNTY OF ELGIN v. ROBERT.

MOTION before the Registrar in Chambers for leave to appeal direct from the judgment of the Chancellor of Ontario without any appeal being first had to a Divisional Court or the Court of Appeal for Ontario.

The material facts are set out in the judgment of the Registrar.

Geo. F. Henderson for the motion.

A. F. May, contra.

THE REGISTRAR.—This is an application for leave to appeal *per saltum* from the judgment of the Honourable the Chancellor of Ontario, without any intermediate appeal being had to the Divisional Court or to the Court of Appeal for Ontario. The facts of the case are, shortly, as follows:

The London and Port Stanley gravel road is a toll road vested in the corporation of the County of Elgin. In 1857 the defendants leased the said road to the predecessors in title of the plaintiff, and the lease contained a provision whereby the defendants covenanted that whenever the corporation could legally sell or convey the road to the plaintiff's predecessors in title, his heirs, executors, administrators or assigns, or to any company to be formed by him for that purpose, that the municipal council should thereupon convey their right, title and interest in the road upon payment of the first nineteen years' rent reserved by the lease and upon receiving satisfactory security for the balance of the rent.

The plaintiff then alleged that he had paid the nineteen years rent and was entitled to receive a conveyance of the toll road, but that the defendants had refused to convey the same to him. The defendants pleaded amongst other things that the lease was *ultra vires* of the municipal council, and by way of counter-

claim prayed that the lease be declared null and void.

This action was tried before the Chancellor of Ontario, in St. Thomas, on the 19th December, 1904, who gave judgment indorsed on the copy of the pleadings as follows:—

Judgment for plaintiff with costs declaring plaintiff entitled to conveyance of property to be settled by the master if parties do not agree. Stay of execution of judgment for four months; leave to apply. G. A. Boyd.

Judgment on counterclaim, that it be dismissed with costs.

The shorthand notes contained the following discussion between the chancellor and counsel when judgment was being pronounced:

His Lordship: The case of *Caughell*, (*Payne* v. *Caughell* (1), binds me as to the law.

Mr. Glenn: (for the defendant). I ask for a longer stay than ordinary stay.

His Lordship: Oh, yes.

Mr. Glenn: I intend to apply for leave from the Supreme Court to go direct there.

His Lordship: Oh, yes; I think that is reasonable. You should have all the time necessary to have an effectual pleading. There is no use going to the Court of Appeal if I understand the decision aright. The judges have committed themselves to this view of the case, so you would probably be justified in going down to the Supreme Court. Mr. Hodgins I think spoke of that before you came in about that being the forum of appeal. I think you should be facilitated in that.

Mr. Glenn: Of course it is a case in which very little can be said to Your Lordship if that opinion binds you.

His Lordship: I feel that that case binds me; if not the precise decision, the opinions of the judges.

Mr. Glenn: Of course I think the law of your own court is the law. *Payne* v. *Caughell.* (2)

His Lordship: I thought so too, at the time, but I cannot say that now. We get wiser as we go on. I think I will have to give judgment for plaintiff with costs.

The minutes of judgment were not settled and entered until the 11th day of February, 1905. The present application was launched on the 30th day of March, more than three months after the date of the pronouncing of the judgment, but within sixty days from the date of the entry of the judgment.

(1) 24 Ont. App. R. 556. (2) 28 O. R. 157.

1905

COUNTY OF ELGIN v. ROBERT.

The Registrar.

It is not alleged nor established before me that there was any difficulty in settling the minutes of judgment in this case. Apparently the successful party at his leisure drafted the minutes, and these were settled by the local master at St. Thomas according to the draft. It was not necessary to speak to the minutes, nor can I find that there would have been any difficulty whatever in settling the minutes promptly after the judgment was pronounced. Probably the delay was owing to the fact that the unsuccessful party thought that, with a stay for four months, there was no urgency in having the minutes settled. Upon the argument I raised the question as to my jurisdiction to make the order asked, in view of the decisions of this court in *Barrett* v. *Syndicat Lyonnais du Klondike* (1), and *Lee* v. *Canada Mutual Loan and Investment Co.* (2), and a full consideration of the decisions of the court bearing on the application have confirmed my first impression.

Mr. Henderson in his very able argument contended that the date of the pronouncing of the judgment applied to common law cases, and the date of the entry of the judgment applied to equity cases, and that where law and equity are fused as in the Province of Ontario, a case which under the old practice would have resulted in a decree in equity, the time would begin to run from the date of the entry of the judgment, and in support of his contention cited the words used by Chief Justice Ritchie in *Vaughan* v. *Richardson* (3). The learned Chief Justice is there dealing with the effect of section 41 of the Act which required that a notice of appeal should be given within twenty days from the time the judgment was pronounced, and he makes use of the following words:—

It (the notice) must be given in a case such as this within twenty days from the time that judgment is pronounced, for we have held that in

(1) 33 Can. S. C. R. 667. (2) 34 Can. S. C. R. 224.
(3) 17 Can. S. C. R. 703.

common law cases the time runs from the pronouncing of the judgment. A different rule prevails in equity cases where the minutes have to be settled before judgment can be entered.

Assuming that, in the view of the Chief Justice, the distinction between common law and equity judgments was the feature which determined the date from which time should run, it does not appear that a judgment on this point was necessary to a decision in the case. He there held that no appeal lay to the Supreme Court because the notice required to be given by section 41 never had been given either within the twenty days or after, and this is the reason also given by Mr. Justice Strong and Mr. Justice Taschereau for quashing the appeal.

The later cases, in my opinion, are not consistent with the view of Chief Justice Ritchie on this point. In *Martin* v. *Sampson* (1), an action was brought by an assignee for the benefit of creditors to set aside a chattel mortgage which was alleged to be void on the ground that the affidavit of *bona fides* was insufficient under the statute. The trial judge held the chattel mortgage void. The Court of Appeal set aside the judgment below and dismissed the action with costs. This latter judgment was rendered on the 7th November, 1895. Immediately after the rendering of judgment, the solicitors for the mortgagee served the usual notice for settlement of the minutes of judgment and, the draft minutes as served included a direction that costs should be paid both to the appellant and the mortgagor, he having been joined in the action, and named with the mortgagee as a defendant, but the plaintiff contended that the mortgagor was never actually a party and was not represented by counsel nor heard upon the appeal. The Registrar of the Court of Appeal, in settling the minutes, held that the

(1) 26 Can. S. C. R. 707.

1905

COUNTY OF ELGIN v. ROBERT.

The Registrar.

mortgagor was not entitled to costs. He also in other respects altered the draft minutes of judgment by making a provision that the mortgagee was entitled to moneys deposited in the Bank of Hamilton to abide the final judgment in the action. No objection was taken by either side to the alterations in the draft minutes made by the Registrar, and the minutes were not spoken to before either a judge or the court. It was held both by Mr. Justice Osler in the court below, before whom the first application to allow the security was made, and by the Registrar of the Supreme Court, affirmed by Mr. Justice Gwynne, before whom a second application was made to allow the security, that, under the decisions of the Supreme Court, the time should run from the pronouncing and not from the entry of the judgment.

It will be seen, therefore, that this was a case which, under the old practice, whould have required a bill filed in equity to obtain the relief asked by the plaintiff, and if the view of Chief Justice Ritchie in *Vaughan* v. *Richardson* (1) was adopted, it was a case in which the court should have held that the time ran from the date of the entry of the judgment.

In *O'Sullivan* v. *Harty* (2), and *Martley* v. *Carson* (3) where the court held that the time ran from the date of the entry of the judgment, we find that questions arose upon settlement of the minutes by the Registrar which were brought before the court appealed from for determination, and this, it seems to me, was the factor which, in the view of the Supreme Court, determined in these cases the date from which the time should begin to run.

In my opinion, according to the jurisprudence of the Supreme Court, the date from which time begins to

(1) 17 Can. S. C. R. 703. (2) 13 Can. S. C. R. 431.
(3) 13 Can. S. C. R. 439.

run in appeals under sec. 40 of the Act is always the date of the pronouncing of the judgment, unless an application is made to the court appealed from to review some decision made by the Registrar on the settlement of the minutes, or some substantial question affecting the rights of the parties has not been clearly disposed of by the judgment as pronounced, and the determination of this has delayed the settlement of the minutes.

Application dismissed with costs.

NOTE.—This application, with the decision thereon, having been referred by the Registrar to His Lordship, the Chief Justice, under General Order No. 83, the judgment of the registrar and his reasons therefor were approved.