THE NEWS PRINTING COMPANY OF TORONTO (DEFENDANTS)..... } APPELLANTS;

AND

MACRAE & MACRAE (PLAINTIFFS)..RESPONDENTS.

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*Sept. 29.
*Oct. 13.
*Oct. 26.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Time limit—Commencement of—Pronouncing or entry of judgment—Security—Extension of time—Order of judge—Vacation—R. S. C. c. 135, ss. 40, 42, 46.

On the trial of an action for libel the plaintiffs obtained a verdict which the Divisional Court set aside. The Court of Appeal allowed the appeal and restored the judgment at the trial, reducing the amount of damages by a specified sum.

Held, that nothing substantial remained to be settled by the minutes on entering the formal judgment of the Court of Appeal, and the time for appealing therefrom to the Supreme Court ran from the pronouncing and not from the entry of such judgment. *O'Sullivan* v. *Harty* (13 Can. S. C. R. 431); *Walmsley* v. *Griffith* (13 Can. S. C. R. 434); and *Martley* v. *Carson* (13 Can. S. C. R. 439) followed.

By sec. 42 of the Supreme and Exchequer Courts Act (R. S. C. c. 135) a court proposed to be appealed from or a judge thereof may allow an appeal after the time prescribed therefor by sec. 40 has expired, but an order extending the time will not authorize the Supreme Court or a judge thereof to accept security after the 60 days have elapsed.

The delay of 60 days for appealing to the Supreme Court prescribed by sec. 40 of the Act is not suspended during the vacation of the court established by its rules.

MOTION before Mr. Cassels, the Registrar in Chambers, to allow security for costs of appeal.

The circumstances under which the application was made are sufficiently set out in the judgment.

MacTavish Q.C. for the motion. *Sinclair* contra.

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THE REGISTRAR.—On the 9th September last an application was made before me sitting in chambers, on behalf of the above named appellants, "for an order extending the time for the allowance of the security for the costs of the respondents in this court until the said 9th day of September, 1896."

The judgment sought to be appealed from was rendered by the Court of Appeal for Ontario on the 30th day of June, 1896.

I dismissed the application on the ground that I had no jurisdiction to extend the time.

On the 29th September last MacTavish Q.C. moved for an order allowing the bond filed in this court on the 1st of September last as security for costs of an appeal from the said judgment.

Upon this application Mr. MacTavish, and Mr. Sinclair who appeared for the respondents, both agreed that the bond should be considered unobjectionable provided the right to appeal was held to exist.

Mr. MacTavish produced the following order made by the Honourable Mr. Justice Osler, of the Court of Appeal for Ontario, in chambers on the 18th September, 1896:

Upon the application of the above named defendants, upon hearing read the affidavit of William Henry Irving, the affidavit of Hubert H. Macrae and the exhibits therein referred to, and the defendants' counsel undertaking to get the appeal down for the October sittings of the Supreme Court if the rules or practice of the court admit of the same being done, and upon hearing counsel as well for the plaintiffs as the defendants.

1. It is ordered that the time for the filing and allowance of the security required by the rules of the Supreme Court be extended up to and inclusive of the 30th day of September instant.

2. And it is further ordered that the costs of and incidental to this application be costs in the appeal to the plaintiffs in any event of the appeal.

Mr. MacTavish also read a number of affidavits

and produced a copy of the certificate of the Court of Appeal of the 30th June, 1896, which appears not to have been entered until the 21st September, 1896, subsequent to the obtaining of the order from Mr. Justice Osler hereinbefore recited, and subsequent to the application to me first above mentioned.

Mr. MacTavish contended as follows:

1. That the time of vacation of the Supreme Court did not count in the sixty days within which, according to sec. 40 of the Supreme and Exchequer Courts Act, the appeal should have been brought. Therefore the application was in ample time.

2. That if the time of vacation did count, the order of Mr. Justice Osler had the effect of extending the 60 days, and that during such extended time this court or a judge thereof might allow the appeal.

3. That in any event the 60 days counted, not from the time when the judgment was *pronounced*, but from the time it was *entered*.

4. That the respondents' solicitor waived the requirement as to the time and consented to an extension of it.

I propose to deal with these contentions in the inverse order to that in which I have stated them.

1st. As to the waiver. I see nothing in any of the affidavits to lead me to believe that the respondents' rights were in any way waived by his solicitor.

2nd. As to the contention that the time runs in this case from the entry of the judgment and not from the pronouncing of it. I am of opinion that there are no circumstances connected with the settlement of this order in appeal which will bring it within the exception to the ordinary rule laid down in *O'Sullivan* v. *Harty* (1); *Walmsley* v. *Griffith* (2); and *Martley* v. *Carson* (3). And see also per Ritchie C. J. in *Vaughan*

(1) 13 Can. S. C. R. 431. (2) 13 Can. S. C. R. 434.
(3) 13 Can. S. C. R. 439.

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v. *Richardson* (1); and per Ritchie C. J. in *City of Winnipeg* v. *Wright* (2). There was no necessity to speak to the minutes; as a matter of fact they were not spoken to before either a judge or the court, and it is apparent from the facts set out that the judgment was as simple a one to settle as could well come before the registrar.

The action of the appellants' solicitor in applying for the order of Mr. Justice Osler, and in making the application to me to extend the time, *before* the judgment was entered, shows that he himself, then at least, must have been of the opinion that the time for appealing ran from the pronouncing of the judgment.

3rd. As to the contention raised on the order of Mr. Justice Osler.

That order purports to extend the time for the filing and allowance of the security "required by the rules of the Supreme Court." Now the filing and allowance of the security is not required by the rules of the Supreme Court, but by the Supreme and Exchequer Courts Act, sec. 46. Rule 6, the only rule relating to the security, provides merely for the necessary evidence being furnished to the Supreme Court that the requirement of the statute in this regard has been complied with. Section 46 is as follows:

46. No appeal shall be allowed until the appellant has given proper security, to the extent of five hundred dollars, to the satisfaction of the court from whose judgment he is about to appeal, or a judge thereof, or to the satisfaction of the Supreme Court, or a judge thereof, that he will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court:

2. This section shall not apply to appeals by or on behalf of the Crown, in election cases, in cases in the Exchequer Court, in criminal cases, or in proceedings for or upon a writ of *habeas corpus*. 38 V. c. 11, s. 31; 42 V. c. 39, s. 14.

Section 40 provides as follows:

(1) 17 Can. S. C. R. at p. 705. (2) 13 Can. S. C. R. at p. 444.

40. Except as otherwise provided every appeal shall be brought within sixty days from the signing, or entry, or pronouncing of the judgment appealed from.

Several classes of cases are otherwise provided for—Criminal appeals, Exchequer Court appeals, Election appeals; and by sec. 42 it is provided as follows:

42. Provided always, that the court proposed to be appealed from, or any judge thereof, may, under special circumstances, allow an appeal, notwithstanding that the same is brought within the time hereinbefore prescribed in that behalf; but in such case, the court or judge shall impose such terms as to security or otherwise as seems proper under the circumstances; but the provisions of this section shall not apply to any appeal in the case of an election petition. 38 V. c. 11, s. 26.

It has been decided that approving the security is a mode of allowing the appeal. *Fraser* v. *Abbott* (1). When a judge of the court below, or of the Supreme Court, has made an order approving the security the appeal is no longer subject in any way to the jurisdiction of the court below; see *Lakin* v. *Nuttall* (2); *Walmsley* v. *Griffiths* (3); *Starrs* v. *Cosgrave Brewing & Malting Co.* (4); with the exception of the settlement of what is called the "Case," which, if it cannot be settled by agreement between the parties, has, under the provisions of sec. 44 of the Supreme and Exchequer Courts Act, to be settled by a judge of the court below.

In *Re Smart* (5), it was held that in a *habeas corpus* appeal, in which no security has to be given, the bringing of the appeal is the filing of the "Case" in the Supreme Court.

As I understand it, the right of appeal is one which is not subject in any way to the discretion of any court or judge, but is a right given *de plein droit*, to be

(1) Cass. Dig. 2 ed. p. 695, no. 125.
(2) 3 Can. S. C. R. 691.
(3) Cass. Dig. 2 ed p. 697, no. 129.
(4) Cass. Dig. 2 ed. p. 697, no. 130.
(5) 16 Can. S. C. R. 396.

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exercised as a matter of course if exercised within the limited time. Some classes of appeals, however, are an exception to this principle; for instance, appeals under the Winding-Up Act, and appeals *per saltum*, which need not be considered now.

But how if the time has elapsed, if the 60 days have passed? Is there any remedy for a person wishing to bring an appeal?

There is none within the jurisdiction of the Supreme Court or a judge of that court; see *Walmsley* v. *Griffiths* (1); and other cases have been decided laying down the same principle.

Sec. 46 says the security may be approved of by the court below or a judge thereof, or by the Supreme Court or a judge thereof.

That, however, is subject to the provision as to time contained in sec. 40.

But sec 42 comes in and provides a remedy. It says "the court proposed to be appealed from, or any judge thereof, may, under special circumstances, *allow an appeal*, notwithstanding that the same is not brought within the time hereinbefore prescribed in that behalf."

Now it seems to me that the order of Mr. Justice Osler must have been made in view of this section. It is the only section under which the court below or a judge of that court could deal with an appeal which has not been brought within the time limited by sec. 40.

In Rule 70 of the Supreme Court, which relates to extending or abridging time, the words "court or a judge" mean the Supreme Court or a judge of that court. See rule 76.

I am asked, I believe, to infer that Mr. Justice Osler was under the impression that he could extend the time for appealing and that the Supreme Court or a

(1) Cass. Dig. 2 ed. p. 670, no. 6.

judge thereof could allow the appeal within such extended time.

But section 42 confers no such power on a judge of the court below. Under that section he *may allow the appeal*, but not extend the time to permit the Supreme Court or a judge thereof to allow it.

In *Vaughan* v. *Richardson* (1) the present learned Chief Justice says: "The expression 'allow an appeal' [in sec. 42] means only that the court or judge may settle the case and approve the security."

Therefore under this section, the only remedy for the appellant is to go to the Court of Appeal or a judge thereof.

Lastly, with respect to the contention, that the time of vacation of the Supreme Court did not count in the 60 days mentioned in sec. 40.

This is an important question, and so far as I know has never been definitely passed upon by the Supreme Court or any of the judges. In only two cases has the point been touched upon, *The Bank of British North America* v. *Walker* (2) and *O'Sullivan* v. *Harty* (3).

In *The Bank of British North America* v. *Walker* (2), an application came before Mr. Justice Strong (the present Chief Justice) in chambers, in August, 1881, to allow the deposit of $500 as security and he refused the application on the ground, 1. That the application should not have been made in chambers during vacation, not being urgent; and on the further ground, 2. That the application should have been on notice.

Now the statute at that time was not as it now is, but every appeal had then to be brought within 30 days, and at the time the application was made the 30 days had expired. The judgment had been rendered on the 27th June, so that the appellant could be in no worse position by waiting till after vacation and the application was not urgent.

(1) 17 Can. S. C. R. 703. (2) Cass. Dig. 2 ed. 706.
(3) 13 Can. S. C. R. 431.

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Mr. Justice Fournier, when the application was renewed before him after vacation, on the 13th of September following, did approve of the security. This would be conclusive that Mr. Justice Fournier, at any rate, was of opinion that the time of vacation did not count, if it were not that the case came subsequently before the court on a motion to quash the appeal, and on that motion the majority of the court held (Mr. Justice Fournier being one) that the appeal was in reality an appeal *per saltum*, and that the section limiting the bringing of an appeal in that way did not apply to such appeals, which were provided for by a separate Act passed in amendment of the original Supreme Court Act. Under the Supreme and Exchequer Courts Act, R. S. C. ch. 135, consolidating and amending the various statutes relating to the Supreme Court, appeals *per saltum*, like other appeals, would now appear to be governed by sec. 40 respecting time.

The only other case in which the point was raised was *O'Sullivan* v. *Harty* (1). In that case the Court of Appeal held that the time of vacation in that court did not prevent the time from running, and refused to allow an appeal because the security was not given within the 30 days.

The Supreme Court allowed the appeal upon the ground that the time counted from the *entry of the judgment* under the circumstances of that case, and it did not decide in any way the other question. The only remark made with reference to it was by Sir Wm. Ritchie. He said:

> It is claimed that in Ontario the time for appealing should run from the time the judgment is pronounced, and that as the judgment in this case was pronounced before vacation the application should have been made during vacation. I was of opinion at first that the

(1) 13 Can. S. C. R. 431.

party was not obliged to apply during vacation, but this application need not be decided on this point.

If any inference at all can be drawn from this it seems to me it is that although *at first* of the impression stated, the learned Chief Justice upon consideration was not able to come to that conclusion. Perhaps the inference ought to be that he had not found it necessary to give sufficient consideration to the point to come to any conclusion at all about it.

There are two cases, however, in which the question has been raised as to whether the time for filing the case fixed by rule 5 of the Supreme Court should be considered as running during vacation.

In *Herbert* v. *Donovan* (1), a motion was made to dismiss an appeal for want of prosecution. The judgment of the Court of Appeal was pronounced on the 30th June, 1885. On the 3rd July following the appellant put in his bond for security for costs, which was allowed, but being under the impression that the time of vacation did not count he did not further prosecute his appeal. Notice of motion to dismiss was given on the 17th September, 1885, and was heard by Mr. Justice Henry who held, on the 3rd October, that under the circumstances the time for filing the case should be extended to the 10th October, and dismissed the motion but without costs. The learned judge did not say that he was of opinion the time of vacation did not count, nor did he express the opinion that it did. He had power in such case, under rule 70 hereinbefore mentioned, to extend the time whether vacation counted or not, and he did extend the time.

The other case referred to, *McArthur* v. *McDowall*, was one in which an application was made in vacation (17th August, 1892), to Mr. Justice Patterson to extend the time for filing the case. There is no written

(1) Cass. Dig. 2 ed. 706, no. 149.

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judgment by the learned judge but he made an order extending the time, and so far as I have been able to ascertain the facts he made it notwithstanding the contention of the solicitor for the respondent that it was not a necessary application because the time of vacation did not count, nor a proper application for vacation because not a matter of urgency, the learned judge's opinion being that it was the duty of the appellant to file his case in vacation and that the time for filing the case did count in vacation.

I infer that if Mr. Justice Patterson held that vacation did not interrupt the time fixed by the *rule* of the Supreme Court, he would also have held that it did not interrupt the time fixed by the *statute*.

These are all the cases in the Supreme Court, so far as I am aware, bearing on the question.

I have given the question careful consideration and investigation, and I have come to the conclusion that the Court of Appeal of Ontario, the Court of Queen's Bench, appeal side, of Quebec, the Supreme Court of New Brunswick, the Supreme Court of Nova Scotia, have not, indeed, so far as I can find, no court of any of the provinces has, attempted to limit in any way the provision of section 40. I have not overlooked the cases referred to by Mr. MacTavish, and I have seen many others, but they nearly all turn upon rules which are very different from ours. The question is: Has the Supreme Court, by its rules with respect to vacation, intended to interfere with sec. 40? I cannot come to the conclusion that it has. I think the statute when it says "every appeal," means just what it says, and not every appeal unless the time of vacation of the Supreme Court intervenes, so far as applications to that court or a judge thereof are concerned. I believe the judges of the Supreme Court when making rules under sec. 109 did not think it would insure "the

better attainment of the objects" of the Act to make any such limitation, even if they thought they had the power. I can foresee that in a great many cases, if it were held otherwise, where judgments are delivered within the 60 days prior to the vacation of the Supreme Court, an appellant will wait and make his application to this court or a judge thereof after vacation, although if applying to his own court he might have to apply very much sooner.

It has been attempted to show that the appellant in this case would have made his application sooner if the Registrar had not been absent. But although the Registrar is not bound to sit in vacation, his jurisdiction is not taken away during vacation, and I have never known any difficulty arise in disposing of an application of urgency.

The appellant seems to have been under the impression that this court or a judge thereof had power to extend the time for appealing and instead of filing his bond within the 60 days and giving notice of an application to have it allowed, he waited *till after the time had elapsed* before filing his bond, and then applied for an indulgence which could not be granted to him under the statute, that is, an extension of time to bring his appeal.

I have looked at the following cases, among others: *Wilby* v. *Standard Ins. Co.* (1); *Anderson* v. *Thorpe* (2); *Hespeler* v. *Campbell* (3); *Hogaboom* v. *Cox & Co.* (4); *Fournier* v. *Ledoux* (5); *Chapman* v. *Real Property Trust* (6); *Crom* v. *Samuels* (7); *Runtz* v. *Sheffield* (8); *Wallingford* v. *Mutual Society* (9); *Steedman* v. *Hakim*

(1) 10 Ont. P. R. 34; and H. & L. p. 80.
(2) 12 Gr. 542.
(3) 14 Ont. P. R. 18.
(4) 15 Ont. P. R. 127.
(5) 13 L. C. Jur. 332.
(6) 7 Ch. D. 732.
(7) 2 C. P. D. 21.
(8) 4 Ex D. 150.
(9) 5 App. Cas. 685.

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(1); *Sugden* v. *Lord St. Leonards* (2); *Re Coulton* (3); *Re Tussaud* (4).

The application is refused with costs.

An appeal was taken to Mr. Justice Girouard in chambers, who affirmed the decision of the Registrar in the following judgment:—

GIROUARD J.—This is an appeal from the order made by the Registrar in chambers dismissing an application for allowance of security under section 46.

O'Gara Q.C. for the motion. *R. V. Sinclair contra.*

The contentions before the Registrar were four in number.

1. That the time of vacation of the Supreme Court did not count in the 60 days within which, according to sec. 40 of the Supreme and Exchequer Courts Act, the appeal should have been brought.

2. That if the time of vacation did count the order made by Mr. Justice Osler on the 18th September last, set out by the Registrar in the reasons given by him for his decision, had the effect of extending the time within which this court or a judge thereof might allow the appeal.

3. That in any event, the 60 days counted, not from the time when judgment was pronounced, but from the time it was entered.

4. That the respondent's solicitor waived the requirement as to time and consented to an extension of it.

On the argument before me, O'Gara Q.C. for the applicants abandoned the first and fourth grounds and relied only on the second and third grounds stated. But after reading the considered judgment of the Registrar, I have come to the conclusion that, for the

(1) 22 Q. B. D. 16.
(2) 1 P. D. 209.
(3) 34 Ch. D. 22.
(4) 31 Sol. J. 703; 36 Sol. J. 22.

reasons given by him, the applicants must fail, not only in the contentions which have been abandoned, but also in those which have been argued before me, and that the appeal from the Registrar should be dismissed with costs.

Motion refused with costs.

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