THOMAS B. MARTIN (PLAINTIFF).....APPELLANT; 1897

AND *Jan. 15.
*Jan. 25.

WILLIAM SAMPSON AND H. R. ANGUS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

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

On the trial of an action to set aside a chattel mortgage the plaintiff obtained a declaration that the mortgage was void and an order setting it aside without costs. This decision was reversed on appeal and the action dismissed, with costs both in the Court of Appeal and in the court below, by a judgment pronounced on the seventh of November, 1895. The minutes of judgment were not settled until some days afterwards, and at the time of the settlement the draft minutes were altered by the Registrar of the Court of Appeal refusing costs to one of the respondents and changing a direction therein as to the payment over of funds on deposit abiding the decision of the suit.

An application was made to the Registrar of the Supreme Court, sitting as judge in chambers, more than sixty days after the judgment was pronounced, for approval of security under sec. 46 of the S. & E. C. Act:

Held, per Gwynne J. affirming the decision of the Registrar, that nothing substantial remained to be settled by the minutes so as to take the case out of the general rule that the time for appealing runs from the pronouncing of the judgment, and the application was too late.

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MOTION by way of an appeal from the decision of the Registrar sitting as Judge in Chambers dismissing an application made for approval of security under section 46 of the Supreme and Exchequer Courts Act.

The 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 incorrect and insufficient under the statute. During the pendency of the action, by consent of the parties, the property mortgaged was sold and the proceeds deposited in the Bank of Hamilton to abide the final judgment. In the trial court the judge held that the chattel mortgage was void, and directed that it should be set aside without costs. An appeal to the Court of Appeal for Ontario by the mortgagee was allowed and the action dismissed with costs both in appeal and in the court below. This judgment was rendered on the 7th November, 1895, and the plaintiff did not move for approval of security for costs to be given on an appeal to the Supreme Court of Canada until the 8th January, 1896, when he made an application to that effect before Mr. Justice Osler, one of the judges of the Court of Appeal for Ontario. Assuming that the time for bringing the appeal, as limited by section 40 of the Supreme and Exchequer Courts Act, began to run from the pronouncing of the judgment, the application was too late, but the plaintiff contended that the time ran from the entry of the judgment and not from the date when it was pronounced, and consequently that his application was within the prescribed time.

The facts upon which the plaintiff's contention was based, appeared from affidavits filed to be as follows:— After the rendering of the judgment on the 7th November, 1895, the solicitors for the appellant, (the mortgagee), served the usual notice for settlement of

the minutes of the judgment and in their draft minutes as served included a direction that costs should be paid both to the appellant and the respondent the mortgagor (he having been joined in the action and named with the mortgagee, the appellant, as a defendant), but the plaintiff contended that although named as a respondent in the appeal, the mortgagor was never actually a party to the appeal and was not represented by counsel nor heard upon the appeal. The draft minutes also contained a direction that the Bank of Hamilton should pay over the funds on deposit there to the defendant, the mortgagee. Upon the settlement of the minutes the Registrar of the Court of Appeal held that the mortgagor had not been a party to the appeal and was not entitled to costs on appeal, but to verify the minute in his own book he undertook to refer to the Chancellor's note book in order to ascertain whether in fact the mortgagor had been present or represented by counsel, and his minute having been confirmed by the Chancellor's note of the case, he decided that the mortgagor was not entitled to any costs of appeal. He also refused to make the direction as to payment by the bank as drafted by the solicitors, as the bank was not a party, but he altered the draft minutes by making the provision in this respect to read as a declaration that the defendant, mortgagee, was entitled to the moneys on deposit. No objection was taken by either side to this alteration, nor to the alteration of the draft minutes respecting payment of costs to the mortgagor, and the minutes were not spoken to before either a judge or the court, but the plaintiff on the application to be allowed to give security which he made to the judge of the Court of Appeal, (Osler J.) contended that as the subject-matter of these alterations was substantial, and that as until the minutes

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were finally settled and entered the plaintiff could not know exactly from what he had to appeal, therefore under the Supreme Court decisions on the subject the time should run only from the entry of the judgment, and that in any event, if the judge held that the time ran from the pronouncing of the judgment he ought to extend the time under the provisions of the 42nd section of the Supreme and Exchequer Courts Act.

After conferring with Maclennan J., Osler J. held that the time ran from the date when the judgment was pronounced and that the application was too late, and also refused to extend the time.

The plaintiff, appellant, then made application to the Registrar of the Supreme Court upon the same grounds, and the Registrar having heard counsel came to the same conclusion as Mr. Justice Osler as to the application having been made too late, which was the only question before him, there being no power in the Supreme Court or a judge of that court to enlarge the time for appealing.

GWYNNE J. on appeal from the Registrar, confirmed his decision with costs.

Motion dismissed with costs.

George Kidd for the appellant.

Hamilton Cassels for the respondents.