1936
* June 17.

IN THE MATTER OF THE TRUSTEE ACT (SASKATCHEWAN)

AND

IN THE MATTER OF THE MOOSE JAW ELECTRIC RY. CO.

D. R. STREET.....APPELLANT;

AND

BRITISH AMERICAN OIL CO. LTD. AND OTHERS ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Appeal—Practice—Jurisdiction—Failure to obtain approval of security and allowance of appeal within the sixty days fixed by s. 64 of Supreme Court Act (R.S.C. 1927, c. 35)—Secs. 64, 67, 70 of the Act—Appeal from Registrar's order refusing to approve security and affirm Court's jurisdiction—Procedure—Rules 1, 2, 3, 86, 87, 88 of Rules of Supreme Court of Canada.

To bring an appeal to the Supreme Court of Canada in compliance with s. 67 of the *Supreme Court Act* (R.S.C. 1927, c. 35), it is not sufficient to give notice of appeal and pay $500 into court as security within the 60 days fixed (except as otherwise provided) by s. 64; there must be also, within the said time limited, approval of the security and allowance of the appeal.

An order of the Registrar, on a motion made returnable after expiry of said period of 60 days, refusing, on above ground, to approve the security and affirm the Court's jurisdiction to hear the appeal, was affirmed by the Court.

The question arising out of the fact that the allowance of the appeal was not obtained within the said period of 60 days, was considered as raising the question of the Court's jurisdiction to hear the appeal (*Ohene Moore* v. *Akesseh Tayee*, [1935] A.C. 72); and hence the appeal from said order of the Registrar was dealt with, not as one governed by rules 86, 87 and 88 of the Rules of the Supreme Court

* PRESENT:—Rinfret, Cannon, Crocket, Kerwin and Hudson JJ.

of Canada, but as one governed by rule 3 thereof, which provides for an appeal from the Registrar's order to the Court, and fixes no delay within which the notice of appeal must be served.

MOTION by the respondents for an order quashing an appeal from an order of the Registrar, as set out below. Also the appellant's appeal from said order of the Registrar was heard on its merits as set out below.

The appellant appealed from the judgment of the Court of Appeal for Saskatchewan, dated November 4, 1935 (1), which held that the interest payable on certain bonds issued by the Moose Jaw Electric Ry. Co. should not be regarded, under certain provisions of *The Saskatchewan Railway Act* (R.S.S. 1930, c. 96), as "working expenses" so as to entitle the claims of the bondholders for such interest to rank *pro rata* with the claims of certain creditors who were referred to as "work creditors," on certain moneys in the hands of the National Trust Co. Ltd. as trustee.

On January 3, 1936 (the last day of the 60 days for bringing the appeal to this Court under s. 64 of the *Supreme Court Act,* R.S.C. 1927, c. 35), the appellant paid into court $500 as security for costs and gave a certain notice of motion, returnable on January 15, 1936, before the Registrar of this Court, for an order approving of the security tendered by the appellant and for an order affirming the jurisdiction of the Court to hear the appeal. The motion was adjourned from time to time and was heard by the Registrar on February 17, 1936. The Registrar refused the motion. He gave reasons as follows:

THE REGISTRAR.—This is a motion, which was made returnable before me on 15th January, 1936, but adjourned from time to time, and finally brought on before me on 17th February, 1936, for an order approving of the security tendered by the appellant, and for an order affirming the jurisdiction. The motion was contested on the ground that the appeal was not brought within sixty days from the signing or entry or pronouncing of the judgment appealed from, and that there was no jurisdiction in this Court to hear the appeal, inasmuch as the amount or value of the matter in controversy in the appeal did not exceed $2,000.

(1) [1935] 3 W.W.R. 419; [1936] 1 D.L.R. 226.

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Mr. Justice Embury of the Court of King's Bench for the Province of Saskatchewan, by his judgment dated 26th March, 1935, held that interest on certain bonds secured by a mortgage covering the assets of the Moose Jaw Electric Railway Company was properly chargeable as working expenses, under the provision of the *Saskatchewan Railway Act*. The creditors appealed to the Court of Appeal for the Province of Saskatchewan, which Court, by a judgment dated November 4, 1935, reversed Mr. Justice Embury's judgment, holding that the interest on bonds should not be declared to be a working expense or working expenditure within the meaning of the *Saskatchewan Railway Act*.

Section 64 of the *Supreme Court Act* provides:—

> Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from, but the months of July and August shall be excluded in the computation of the said sixty days.

3rd January, 1936, was thus the last day for bringing the appeal.

Section 67 of the *Supreme Court Act* provides:—

> No writ shall be required or issued for bringing any appeal in any case to or into the Court, but it shall be sufficient that the party desiring so to appeal shall, within the time herein limited in the case [namely, sixty days], have given the security required and obtained the allowance of the appeal.

Section 70 provides that no appeal shall be allowed until the appellant has given proper security, to the extent of $500, 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, etc.

On the 3rd of January, 1936, the appellant paid into court $500 as security for costs and, the respondent's solicitors not having any Ottawa agents, posted up on a board in the Registrar's office a notice of motion, (*a*) for an order approving of the security tendered by the appellant, and (*b*) for an order affirming the jurisdiction of the Supreme Court of Canada to hear the appellant's appeal, returnable on 15th January, and they also sent a copy of the notice of motion, dated 31st December, 1935, to the solicitors for the respondent at Moose Jaw, by registered mail, which was received by them on 8th January, 1936.

In my opinion the statute requires the appellant to bring his appeal by serving a proper notice of appeal, giving the security required and obtaining the allowance of the appeal, within the sixty days. I think it is not sufficient that he should have paid the security into court, posted up a notice of appeal and notice of intention to apply for approval of the security (thus having the appeal allowed), returnable after the sixty days had expired. If the sixty days be too short a time to perfect the security, an application must be made under section 66 of the Act, to the court proposed to be appealed from or any judge thereof, based upon the special circumstances required by that section, to allow the appeal, although the same is not brought within the time prescribed in that behalf, namely, 60 days. The motion to approve the security must be refused, with costs.

In view of the foregoing conclusion, it may be unnecessary to deal with the question of jurisdiction, but, in case it is desired to appeal from my order, I may say that I am satisfied that the amount or value of the matter in controversy in the proposed appeal exceeds the sum of $2,000.

The Registrar's order refusing appellant's said motion was made on the 17th day of February, 1936.

On the 21st day of May, 1936, the solicitors for the appellant gave notice that a motion would be made on behalf of the appellant to the Court on Tuesday, the 6th day of October, 1936, by way of appeal from the order of the Registrar and to reverse that part of the order disallowing the appeal, and for an order allowing the said appeal, upon the ground that the Registrar erred in deciding that the *Supreme Court Act* required the appellant to bring his appeal by a proper notice of appeal, giving the security required, and obtaining the allowance of the appeal, all within sixty days of the decision complained of.

Thereupon the agents of the solicitors for the respondents applied for an order quashing the appeal from the order of the Registrar, on the ground that the said appeal was not launched in time or with due diligence; or, in the alternative, for an order dismissing the said appeal; or, in the further alternative, in case the said appeal was allowed, for an order directing the appellant to proceed with his appeal from the judgment of the Court of Appeal of

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Saskatchewan dated the 4th day of November, 1935, at the sittings of this Court commencing on Tuesday, the 6th day of October, 1936.

R. Quain K.C. for the appellant.

R. S. Smart K.C. for the respondents.

On the hearing of the motion to quash it was urged on behalf of the respondents that the Registrar's order was made in pursuance of his jurisdiction under rules 82 *et seq.* of the Rules of the Supreme Court of Canada, 1929, and accordingly that the notice of appeal therefrom should have been "served within four days after the decision complained of, * * * or served within such other time as may be allowed by a Judge of the said Court or the Registrar" (rule 87); moreover, that the appeal lay to a Judge of the Court, not to the Full Court, and should have been brought on for hearing on the first Monday after the expiry of the delays provided for by rule 87, or so soon thereafter as the same could be heard (rule 88).

On the other hand, it was argued for the appellant that the question whether the appeal from the Court of Appeal for Saskatchewan had been properly launched within the requirements of s. 67 of the *Supreme Court Act* involved the further question whether the Court was competent to hear it, and, therefore, was one of jurisdiction governed by rules 1 *et seq.* of the Court. Under rule 3, the appeal from an order of the Registrar, either affirming or refusing to affirm the jurisdiction of the Court, had to be made to the Court itself upon a notice of such appeal being served; and no delay was provided by the rules within which the party dissatisfied with the order of the Registrar had to serve notice of the motion to the Court.

The Court found that the appeal from the Registrar's order undoubtedly was not launched with due diligence, there having elapsed more than three months between the date of the order and that of the notice of appeal.

But, upon the authority of the judgment of the Privy Council in the case of *Ohene Moore* v. *Akesseh Tayee* (1), the question arising out of the fact that the allowance of

(1) [1935] A.C. 72.

the appeal was not obtained within the sixty days might be considered as raising the question of the jurisdiction to hear the appeal in the premises.

As a result, the appeal from the Registrar's order would not be an appeal governed by rules 87 and 88 of this Court, but an appeal governed by rule 3, wherein no delay is fixed within which to serve the notice of appeal.

The Court, therefore, intimated that, without passing upon the respondents' motion to quash the appeal from the Registrar's order, it would hear the appellant immediately on the merits of the appeal from the Registrar's order, and, after the argument of counsel for the appellant, and without calling upon counsel for the respondents, the Court delivered the following judgment:

RINFRET J.—We shall not require to hear you, Mr. Smart.

Section 67 of the *Supreme Court Act* prescribes the minimum required for bringing an appeal, in any case, into this Court. The appellant, within the time limited by sec. 64 of the Act (viz., sixty days), must "have given the security required and obtained the allowance of the appeal."

In this case, the security was given within the time limit, but it was not approved and the allowance of the appeal was not obtained; and, under the circumstances, the Registrar very properly, we think, refused to approve the security after the time was expired.

There is no hardship in the premises; for the appellant, if he could show special circumstances, could always have secured the allowance of the appeal, although it was not brought within the time prescribed in that behalf, by applying either to "the court proposed to be appealed from, or any judge thereof" (sec. 66 of the *Supreme Court Act*).

The appeal from the order of the Registrar must, therefore, be dismissed with costs.

Appeal from Registrar's order dismissed with costs.

Solicitors for the appellant: *Quain & Wilson.*

Solicitors for the respondents: *Grayson & McTaggart.*