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*March 23.

*Dec. 10.

ARCHIBALD M. ROBERTSON AND ANOTHER (DEFENDANTS)..... } APPELLANTS;

AND

SOLOMON WIGLE (PLAINTIFF)..... RESPONDENT.

THE ST. MAGNUS.

ON APPEAL FROM THE MARITIME COURT OF ONTARIO.

Appeal—Notice—Rules of Maritime Court—Effect of—R. S. C. ch. 137 ss. 18 & 19—Judgment of Surrogate—Pronouncing of—Entry by registrar.

Rule 269 of the rules of the Maritime Court of Ontario (1) requires notice of appeal from a decision of that court to the Supreme Court of Canada to be given within fifteen days from the pronouncing of such decision.

A judgment of the Maritime Court was handed by the Surrogate to the registrar, but not in open court, on August 31, and was not drawn up and entered by the registrar for some time after.

Held, Taschereau J. *dubitante,* that notice of appeal within fifteen days from the entry of such judgment was sufficient under the said rule.

Quaere—Is such rule 269 *intra vires* of the Maritime Court?

APPEAL from an order of Henry J. in Chambers dismissing a motion to quash appeal for want of notice required by rule 269 of the rules of the Maritime Court of Ontario.

This appeal is in an action in the Maritime Court for Ontario arising from a collision between the plain-

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* PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau and Gwynne JJ.

(Mr. Justice Henry heard the argument but died before the judgment was delivered.)

(1) R. S. C. ch. 137 s. 19 (Maritime Court Act) provides as follows:—

The practice, procedure and powers, as to costs and otherwise, of the Supreme Court of Canada in other appeals shall, so far as applicable, and unless such court otherwise orders, apply and extend to appeals under this act, when no other provision is made under this act or under "The Supreme and Exchequer Courts Act."

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tiff's tug, the "Bob. Hackett" and the steam propeller "St. Magnus," belonging to the defendants. The motion to quash is founded on rule 269 of the Maritime Court which the respondents claim was not complied with.

Rule 269 is as follows: "A party intending to appeal from a decision of the court to the Supreme Court of Canada must give notice of his intention to appeal to the opposite party within fifteen days from the time of pronouncing the decision appealed from, and otherwise the appeal to be governed by the rules of the Supreme Court."

The action was tried on March 13th, 1886. On August 31st the Surrogate handed to the registrar his written judgment, but this was not done in open court and no notice was given to the defendants of the intention to deliver judgment. The formal judgment was not drawn up for some days afterwards. Notice of appeal was given within fifteen days from the entry of the judgment, but more than fifteen days after the judgment was given to the registrar by the Surrogate, namely, August 31st.

Security for costs of the appeal by the defendants was allowed by Mr. Justice Henry. The plaintiffs moved before the registrar to set aside the order allowing the security, and, subsequently, to dismiss the appeal; both motions were referred by the registrar to Mr. Justice Henry and both were dismissed. The plaintiffs appealed to the full court from the order of Henry J. dismissing the motion to quash the appeal.

S. White in support of the motion referred to rule 269 of the Maritime Court, R. S. C. c. 137 s. 19; Supreme Court Act sec. 25 (*c*). *In re New Callao* (1).

McKelcan Q.C. and *Lash* Q.C. *contra.*

The Maritime Court can only make rules regula-

(1) 22 Ch. D. 484.

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ting its own procedure and cannot interfere with the jurisdiction of this court.

If the rule is *intra vires* the time would not run until the entry of the judgment, as the decision was not pronounced in open court and we had no knowledge of it.

The following authorities were cited: *Hill* v. *Curtis* (1); *Holmes* v. *Russel* (2); *Re Crosley* (3); *Re Callao* (4); *Herr* v. *Douglas* (5); *Re Manchester Economic Building Society* (6); *Re Stockton Iron Furnace Co.* (7); *Re Blyth and Young* (8); *Little's Case* (9); *Pierce* v. *Palmer* (10).

Sir W. J. RITCHIE C.J.—I think the court only had authority to make rules for regulating its practice and procedure, and had no power to make rules affecting the jurisdiction of the Supreme Court of Canada. If the rule relied on in this case has that effect it is *ultra vires;* if it has not that effect it merely relates to practice and procedure, and in that case it could be waived and, in my opinion, it was waived.

As there was no judgment delivered in open court on August 31, 1887, I am not prepared to differ from the opinion that the time would not run until entry of the judgment on September 15, 1887, and therefore the appeal is properly before this court.

STRONG J.—The action having been heard on the 13th of March, 1886, at Sandwich, the judgment of the Maritime Court was handed (not in court) by the surrogate to the registrar on 31st August, 1887.

The judgment or decree was, however, not drawn up until some days afterwards; the exact day on which

(1) 1 Ch. App. 425.
(2) 9 Dowl. 487.
(3) 34 Ch. D. 664.
(4) 22 Ch. D. 484.
(5) 4 P. R. (Ont.) 102.
(6) 24 Ch. D. 488.
(7) 10 Ch. D. 348.
(8) 13 Ch. D. 416.
(9) 8 Ch. D. 806.
(10) 12 P. R. (Ont.) 308.

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it was drawn up by the registrar does not appear, but I understood it to be conceded on the argument of the motion, that within fifteen days after the judgment was actually drawn up by the registrar notice of appeal to the Supreme Court of Canada was given. The appeal was perfected by the allowance of the security by Mr. Justice Henry on the 28th of September, 1887.

The Maritime Court Act, R. S. C. ch. 137 secs. 18 and 19 are as follows:—

Sec. 18. An appeal shall lie to the Supreme Court of Canada from every decision of the court having the force and effect of a definitive sentence or final order.

Sec. 19. The practice, procedure and powers as to costs and otherwise of the Supreme Court of Canada in other appeals shall, as far as applicable, and unless such court otherwise orders, apply and extend to appeals under this act when no other provision is made, either by this act, or the general rules made under this act, or under "The Supreme and Exchequer Courts Act."

By rule 269 of the Maritime Court it is provided that:

A party intending to appeal from a decision of the court to the Supreme Court of Canada must give notice of his intention to appeal to the opposite party within fifteen days from the time of pronouncing the decision appealed from, and otherwise the appeal to be governed by the rules of the Supreme Court.

At the time this appeal was taken the Supreme Court Act required notice of an appeal from a final judgment to be given within thirty days from the date of the judgment being pronounced.

In the view I take I do not feel called upon to express any opinion as to whether rule 269 of the Maritime Court is *ultra vires* or not. I am inclined to think it comes within the powers conferred by sec. 19 of R. S. C. ch. 137. But whether this is so or not I consider that the motion to quash must be refused on the ground that inasmuch as the notice of appeal was served within fifteen days of the date at which the order was actually drawn up by the registrar it comes within the terms of rule 269.

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I do not recognize the handing by the judge to the registrar, not in open court but in his office or perhaps in the street, as a "pronouncing of a decision" within the terms of rule 269.

Then, if we are not to take the date of the 31st of August, 1886, as the time from which the fifteen days began to run, to what other date are we to ascribe the commencement of that period? There is only one other date to which it can be referred, and that is the date at which the registrar completed the judgment, and before the fifteen days, calculated from that time, had run out it is admitted that notice of appeal was duly served.

The motion to quash must be refused with costs.

FOURNIER J.—I concur in the judgment of the Chief Justice.

TASCHEREAU J.—I was inclined to think the notice of appeal too late, but I will not dissent on a question of practice.

GWYNNE J.—I entirely concur in the judgment of my brother Henry in chambers when the matter was before him, and in the judgment of the Chief Justice pronounced in open court to-day.

Motion refused with costs.

Solicitors for appellants: *Mackelcan, Gibson & Gausby.*

Solicitors for respondents: *White & Ellis.*