THE CITY OF WINNIPEG (DEFENDANTS) APPELLANTS; 1887

AND

ARCHIBALD WRIGHT (PLAINTIFF).....RESPONDENT. *May 4. *May 11.

Appeal—Dismissed by Judge in chambers—Motion to rescind order—Special circumstances.

A party seeking an appeal obtained an extension of time for filing his case but failed to take advantage of the indulgence so granted, whereupon, on the application of the respondent, the appeal was dismissed by the judge in chambers. On motion to rescind the order dismissing the appeal:

Held, Strong and Gwynne JJ. dissenting, that under the circumstances of the case the court would not interfere by rescinding the judge's order and restoring the appeal.

MOTION to rescind an order made by Mr. Justice Taschereau, in chambers, dismissing the defendant's appeal.

The facts presented to the court on the motion were:

That judgment in the case was delivered in the Supreme Court of Manitoba on December 1st, A. D. 1886. That notice of appeal was duly given and the time for perfecting the security was extended to January 15th, 1887, and security was perfected on January 14th. That on March 15th an order was made by Mr. Justice Strong in chambers, extending the time for filing the case to April 8th. The case was not filed within the time allowed, and on April 25th, on application to Mr. Justice Taschereau in chambers, an order was made dismissing the appeal. The present motion was made to rescind the order of Mr. Justice Taschereau and have the appeal restored.

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

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The only ground upon which the motion was founded, and the delay in prosecuting the appeal accounted for, was, as appeared by the affidavits read, that from the length of the case and the pressure of work in the printing office it could not have been printed earlier, and the appellants offered to go to hearing during the then present sitting of the court.

McCarthy Q. C., in support of the motion, asked leave to read affidavits not before the judge in chambers, citing Chit. Arch. Q. B. Prac. (1), which the court granted. The learned counsel then read the affidavits excusing the delay, and contended that the motion should be granted as the plaintiff would not be prejudiced if the case was argued at the present sitting. The appeal could, under no circumstances, have been brought on before, and if there was any improper delay the infliction of costs would be sufficient punishment.

Gormully, *contra*, claimed that the court had no jurisdiction to entertain the motion. The matter can be dealt with by a judge in chambers, and there is no appeal from his decision. Citing Rev. Stats. Can. Ch. 135, sec. 53. *Kilkenny* v. *Fielding* (2).

McCarthy Q. C. in reply referred to *Regina* v. *Mayor &c*, *of Maidenhead* (3).

Sir W. J. RITCHIE C.J.—This is a case in which the proceedings were entirely regular. The appellants obtained an extension of time in the court below to enable them to perfect their security, which was accomplished on the 14th of January. This gave them until the 14th of February to file their case which they did not do, but on the 15th of March they obtained, by an order of a judge of this court, a further extension of time until the 8th of April to enable them to file their case.

(1) 14 Ed. p. 1420. (2) 2 L. M. & P. 125 note a.
(3) 9 Q. B. D. at p. 498.

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Of this indulgence the appellants neglected to avail themselves, and also neglected to apply for any further extension of time. In fact they took no steps whatever in the case with a view to the prosecution of their appeal.

The respondent, being entirely regular, was entitled, under the statute and rules of the court, to have the appeal dismissed, and applied to Mr. Justice Taschereau for an order dismissing the appeal. When this application came on for hearing, and not until then, the appellants simply asked that further time be granted, but were not, even then, in a position to have the case inscribed, or to file their factum, neither being ready. This was only seven days before the sitting of the court in this present month of May, and not in time to comply with the rules of the court to bring the case on for hearing in the ensuing sittings.

The learned judge, in the exercise of his discretion, refused to grant any further time, but granted the order of dismissal asked for. There was no illegality, irregularity, or impropriety whatever in what the the learned judge did.

I do not think the appellants have shown any sufficient excuse for having neglected to avail themselves of the indulgence granted to them, nor any reason for having neglected to apply within the proper time for an extension of time had they desired it. The appeal having been thus regularly dismissed, in accordance with the statute and rules of the court, and the respondent being legally entitled to the benefit of his judgment, and no miscarriage having been shown, the learned judge not having gone wrong in law, and there having been no mistake of facts shown, nor anything in the circumstances of the case that would justify this court in saying that there had not been a reasonable exercise of discretion which should not be lightly interfered with,

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I can discover no grounds for rescinding an order thus legally and regularly made.

The rights of parties in judgments pronounced in their favor are very clearly set forth in three cases to which I shall call attention. The first I shall read at length, as it has likewise a bearing on the cases of *O'Sullivan* v. *Harty* (1) and *Walmsley* v. *Griffith* (2) lately decided by this court, as to which there appears to have been considerable misunderstanding in the Court of Appeal for Ontario.

In *International Financial Society* v. *City of Moscow Gas Company*, (3) James L. J. says:

"No other appeal"—that is, an appeal from a judgment or order, from a judgment, technically so called, or an order other than an interlocutory order.—"No other appeal shall, except by such leave, be brought after the expiration of one year"—that is a positive direction. Then, of course, the year would be calculated from the time at which the judgment is supposed to take effect; and by the order and by some of the former rules the judgment takes effect from the time when it was actually pronounced. That would be the natural construction if it stopped there. But there is a further provision made as to calculating time. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected (I am paraphrasing it) except in the case of the refusal of an application, and in that case the said respective periods shall be calculated from the date of such refusal. It appears to me impossible to say that it is not the plain grammatical construction of these words. That is to say, where it is necessary for any purpose, in order to enable a man to see what he is appealing from, that the judgment or order should be perfected, so that he may see exactly what is the final form which it takes, and by which he may be aggrieved, then he has a twelvemonth from that time to consider his appeal; but where the application for final judgment or order is simply refused, although refused with costs, he knows exactly the fate of his application, and then he has a twelve-month from the time at which he knows that the order with which he is dissatisfied has been made. It appears to me that that is the meaning of the words, and is exactly within the object for which the rule is framed. You take it from the time of refusal—that is all the appellant wants to know—you take it from the time when the order

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

(3) 7 Ch. Div. 244.

is perfected when there may be reasonable ground for his saying, I want to see the shape in which the final order is made. In this case there was an application made to the court—as every bill used to be drawn—praying that a certain deed might be set aside, or a certain relief granted, and that application was refused.

Thesiger L. J.:

And lastly, it being admitted that there are some final judgments and orders which do come within the words "in case of the refusal of the application," for that has been practically admitted, it seems to me to reasonably follow that all judgments or orders, whether final or interlocutory, should be included in those words, and consequently an appeal against the refusal of an application of whatever sort should date from the time when the decision is given, and not from the time when an entry of that decision is made, and the same case on application to enlarge the time for appealing.

And in the same case, on application to enlarge the time for appealing, James L. J. said:

I am of opinion that we cannot give any time. The respondents here say they are within the rule, and they have a right (and I think it is as valuable a right as anything which a subject has in this country) to know when they can rely upon the decree or order in their favour. The limitation of the time to appeal is a right given to the person in whose favor a judge has decided. I think we ought not to enlarge that time unless under some very special circumstance indeed, that is to say, if there had been any misleading through any conduct of the other side, as was mentioned in the analagous case of vacating inrolment which came before Lord Cottenham, and afterwards before Lord Chelmsford, in which it was laid down that the right of the suitor was *ex debito justitiæ* to keep his inrolment of the decree if it was made in due time, unless in very special cases. See *Wardle* v. *Carter* (1); *Wildman* v. *Lade* (2). For instance, where there was anything like misleading on the part of the other side, or where some mistake had been made in the office itself, and a party was misled by an officer of the court, or again where some sudden accident which could not have been foreseen—some sudden death, or something of that kind, which accounted for the delay; in such cases leave might be given. But simply where a man says, "I looked at the order, and I *bonâ fide* came to the conclusion that I had up to a particular day, and I determined to take the last day I could," then he has taken upon himself to calculate the last day, and if he has made a mistake in calculating the last day he must

(1) 1 Mylne & C. 283. (2) 4 DeG. & J. 401.

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abide by the consequences of that mistake. Beyond all question, in this case there was abundance of time to have brought the appeal if it was intended really and *bonâ fide* to appeal from the order as pronounced.

Baggallay L. J.:

Ritchie C.J.

I am of the same opinion. This court has before expressed an opinion that the mere fact of a misunderstanding by the parties concerned of the provisions of the rules is not such a special circumstance as to induce the court to give that special leave which is required to extend the time.

In *Craig* v. *Phillips* (1), Jessel M. R. said:

This is an an application for leave to appeal from a final order or judgment of Vice Chancellor Bacon pronounced on the fourth of April, 1876, dismissing the plaintiff's bill with costs. Nothing then remained to be done; it was a final judgment entirely disposing of the suit. No fund remained in court; there were no accounts to be taken; the whole litigation was at an end. If the plaintiff meant to appeal, his appeal ought to have been brought within a year, but it was not so brought. Thereupon, subject to the judicial discretion of the Court of Appeal to enlarge the time for appealing, the right of the defendant, under the judgment of the Vice Chancellor, was complete.

Thesiger L. J.:

I am of the same opinion. I think that this court ought not lightly to interfere with the time fixed for bringing appeals, and ought to require very special circumstances to be shewn before exercising its judicial discretion to enlarge the time.

In *Ex parte Hinton, In re Hinton*, marginal note (2):

Notice of an appeal must be given within twenty-one days from the day on which the order appealed from was pronounced, not from the day on which it was drawn up.

Sir James Bacon C.J.:

I have heard all that could be said on this subject, because of the reluctance that one must naturally feel to give effect to a purely technical objection. But the law of the court is very clearly expressed in the rule, and in the decisions which have been referred to. The reason of the policy of the law in this respect is very obvious. It was in the appellant's power to have got the order drawn up on the 3rd of November, or, at any rate, within the period of twenty one days after. The words of rule 143 are clear. The order must be considered as made upon the day on which it was

(1) 7 Ch. Div. 250. (2) L. R. 19 Eq. 266.

pronounced. Indeed, on the face of the order it is stated that the application was heard and disposed of on the 3rd November. I am precluded from hearing this appeal, and it must be dismissed. But I shall give no costs, for the appellant has been misled by the act of the Registrar.

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Under these authorities, and under the peculiar circumstances of the case, I do not think we ought to reverse the decision of the judge in chambers to whom the legislature has given express power to deal with the matter. I think no sufficient circumstances have been shown of such an extraordinary character as would warrant us in doing so, in face of the manifest neglect, and setting at defiance, of the rules of the court by the appellant. If we were to set aside this order I know of no case in which a party, after being guilty of the grossest violation of the rules of the court, could not, with such a precedent, insist on having any regular order rescinded.

STRONG J.—I think the indulgence sought by the appellant was one which might not unreasonably have been granted. The respondent would have been subjected to no delay. The appeal would have been heard as early as if all the steps had been taken with the utmost promptitude.

The English cases decided upon applications to enlarge the time for appealing to the Court of Appeal do not, in my opinion, apply to appeals to this court. The only preliminary proceeding which appeals to the English Court of Appeal require is a notice of motion; the proceedings are already printed and no security is given the appeal being, in fact, a mere re hearing. Here the appellant has to print the proceedings and also to find sureties and perfect his security. To do this thirty days appear to me to be a very short time. The time allowed for an appeal to the House of Lords, which is much more like an appeal to this court than an appeal

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to the Court of Appeals, is one year, and in the Privy Council two years are allowed.

I think the respondent here could have had nothing to complain of if the appellant had been ordered to pay all costs and had been put upon terms of bringing the appeal to a hearing at the next term following the application.

FOURNIER J.—I concur in the reasons given by His Lordship the Chief Justice and think the motion should be refused.

HENRY J.—The law provides that an application of this nature may be made either to the court or a judge in chambers, and discretionary power is granted to be fully and equally exercised by either. When a judge in chambers exercises that discretionary power it is doubtful if the court has the power to review his decision, and, in my opinion, it should not be done in any event unless it can be shown that there are circumstances in the case which were not brought to his notice. When the judge gives a decision I am very strongly of opinion that this court has no jurisdiction to interfere with it in any way. The law does not provide, as in other cases, for an appeal from his decision, and although the court assumes certain functions not provided for by law, I think we have no right to interfere with the discretionary powers of a judge.

In this case I can see no reason why the court should interfere. The appellants were to blame all through. They very properly obtained two extensions, but failed to take advantage of the indulgence granted them. No application for further time was made, and they must have known that the appeal was liable to be dismissed. They take no further steps in the matter until the application to dismiss the appeal is made and they then come and say: "Admitting we were all

wrong we ask as a favor to have the time further extended."

Under the circumstances I think the discretionary power exercised by the judge should not be interfered with. To say that a regular judgment by a judge in chambers should be set aside on a mere motion, without showing any usurpation of power on his part, is, I think, totally unauthorized.

I think, therefore, that this application should be dismissed with costs.

GWYNNE J.—I wish to prevent its being supposed that I am of opinion that the case being supposed to be, by the order of the judge in chambers, out of court, deprives us of the right to interfere to grant an indulgence such as that asked; and as the appellants declared themselves ready to proceed with the argument at this court, I think that visiting them with the payment of all costs would have been sufficient to attain the ends of justice. In a matter of practice I do not like differing from a majority of the court, but as I cannot concur in the grounds upon which the refusal of the motion is rested, I think it right to make these observations.

Motion refused with costs.

Solicitor for appellants: *Chester Glass.*

Solicitor for respondent: *W. Redford Mulock.*