

1885 THOMAS WALMSLEY (PLAINTIFF).....APPELLANT ;

* Dec. 7.

AND

1886

* April 9.

KATE GRIFFITH, CARRIE L. GRIF- FITH, GEORGE WRIGHT, PHILIP J. SLATER, J. HORN BROOK, W. J. McCORMACK, JOHN DONOGH, WILLIAM BADENACH, WALTER H. BLIGHT, ROBERT DODDS AND A. G. ALLISON (DEFENDANTS).....	}	RESPONDENTS.
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Appeal—S. and E. C. Act sec. 25—When time begins to run—Substantial matters to be settled before entry of judgment—Dismissal of plaintiff's bill.

Where the Court of Appeal for Ontario reversed the judgment of the Vice Chancellor in favor of the plaintiff, and dismissed the action :

Held, that in such case no substantial question could remain to be settled before the entry of the judgment, and the time for appealing to the Supreme Court of Canada would therefore run from the pronouncing of the judgment. *O'Sullivan v. Harty* (1) distinguished.

MOTION to dismiss appeal on the ground that it was not brought within thirty days after the pronouncing of the judgment.

The suit in this case was brought for specific performance of an agreement by the defendants, the Griffiths, to sell certain lands to the plaintiff, and by the other defendants, the Oddfellows, to purchase the same lands from the plaintiff at an advance of the purchase price. The bill alleged collusion between the defendants to deprive plaintiff of the benefit of the agreement.

The defence of the Griffiths was that plaintiff had been their agent to effect a sale of the property to the

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

other defendants, but by fraudulently representing that he could not effect such sale induced them to sell to himself.

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The Oddfellows alleged, in their statement of defence, that they had been damuified by the difficulties which had arisen between plaintiff and the Griffiths, and claimed, by way of cross-relief, a rescission of their contract and re-payment of the amount paid thereon. The defendants all denied the existence of any collusion between them as alleged.

The Vice Chancellor found that plaintiff was not the agent of the Griffiths, that the two contracts were independent, and decreed a specific performance with costs.

The Court of Appeal reversed this judgment, holding that the plaintiff was guilty of such concealment, or false representation, to the Griffiths as raised an equity against him sufficient to prevent the court from awarding specific performance.

The judgment of the Court of Appeal was rendered on October 15th, 1884. On October 21st, 1884, notice of appeal was served.

On the 19th November, notice of filing bond for security, and of an application for its allowance was served. The application was made to Osler J. A. and objection was taken that the thirty days limited for bringing the appeal by section 25 of the Supreme and Exchequer Court Act had expired.

On the 26th November, notice of motion to extend time for appealing under sec. 26 of the Supreme and Exchequer Court Act was served. This motion was heard by Patterson J. A. On the 3rd December, 1884, the motion was dismissed with costs.

On the 16th day of December, 1884, the certificates of the judgment of the Court of Appeal were settled and entered.

In the appeal of the Griffiths the certificate of the

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judgment was to the effect that it was ordered and adjudged that the appeal should be allowed with the sum of \$601.06 costs, to be paid by the respondent, Walmsley, to the appellants, the Griffiths, and that the action in the court below be dismissed with costs.

In the appeal of the defendants, other than the Griffiths, the certificate was to the effect that it was ordered and adjudged that the appeal should be allowed with \$507.26 costs, to be paid by Walmsley to said defendants, and the action dismissed with costs, and that Walmsley should re-pay to the said defendants the sum of \$500, the amount of deposit paid by defendants to Walmsley, together with interest at six per cent., from the 17th February, 1882, making the sum of \$580.

On the 19th December, 1884, the application for leave to give security pursuant to sec. 31 Supreme and Exchequer Court Act, as amended by sec. 14 of the Supreme Court Amendment Act, 1879, was made to Mr. Justice Henry in chambers, who enlarged the application to the 14th January, 1885.

On the 14th January, 1885, the application was heard by the Chief Justice of the Supreme Court in chambers, who dismissed the application with costs, being of opinion that where an application has been made under sec. 26 of the Supreme and Exchequer Court Act for an extension of time for appealing, alleging "special circumstances," to a judge of the court below who had a full knowledge of all the facts of the case and who had thought proper to dismiss the application made to him, a judge of the Supreme Court of Canada ought not to interfere.

His lordship also expressed a doubt as to whether an application could be made at all to a judge of the Supreme Court of Canada under sec. 31, as amended, after the expiration of the time limited for appealing by sec. 25.

On the 15th January, 1885, the plaintiff made an application to Mr. Justice Burton for leave to pay into court to the credit of the cause, the sum of \$1,000 as security for the defendant's costs of appeal to the Supreme Court; \$500 as security to the Griffiths, and \$500 as security to the defendants other than the Griffiths.

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Judgment was reserved by Mr. Justice Burton till till the 4th November, 1885, when he allowed the application, being of opinion that the Supreme Court had decided in *O'Sullivan v. Harty* (on the 16th March, 1885,) that in all cases the time for appealing would run from the entry of the certificate of the judgment.

The defendants appealed from the order of Mr. Justice Burton to the full Court of Appeal, which court, on the 24th November, 1885, sustained the order. On the 3rd December, 1885, the case was filed in the Supreme Court of Canada.

On the 7th December, 1885, the respondents moved to dismiss the appeal.

The question to be decided was whether the time for appealing ran from the date of the pronouncing of the judgment of the Court of Appeal—the 15th October, 1884—or from the date of the entry of the certificates of such judgment—the 16th December, 1884.

Arnoldi for the defendants, the Griffiths, and *J. A. Patterson* for the other defendants, supported the motion.

J. B. Clark contra.

SIR W. J. RITCHIE C.J.—The proceedings in this case which gave rise to the present application were caused by a misunderstanding in the Court of Appeal as to the decision of this court in the case of *O'Sullivan v. Harty*. In that case the judgment of the Court of Appeal was not entered until November 14, 1884.

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although judgment had been pronounced on the 30th June, 1884, the delay having been occasioned by a substantial question affecting the rights of the parties having arisen on the settlement of the minutes. Such question was discussed before one of the judges, and subsequently before the full court before being finally determined.

On November 27, 1884, the respondent in the Court of Appeal applied to a judge in chambers of the Supreme Court of Canada for leave to give security under section 31 of the Supreme Court Act as amended by section 14 of the Supreme Court Amendment Act of 1879. This application was referred to the full bench which held that the time for appealing in that case, under section 25 of the Supreme Court Act, began to run from the 14th of November, 1884, the date of entry of the judgment of the Court of Appeal.

What we decided in that case was :

That where any substantial matter remains to be determined before the judgment can be entered the time for appealing runs from the entry of the judgment. Where nothing remains to be settled, as for instance in the case of the simple dismissal of a bill, or where no judgment requires to be entered, the time for appealing runs from the pronouncing of the judgment.

The Court of Appeal, however, appears to have been under the impression that this court had laid down a cast-iron rule that the time should run in every case from the entry of the judgment.

In this case I should have less hesitation in reaffirming the rule, because application to extend the time for appealing was made by the appellants to one of the judges who had heard the case in the Court of Appeal, who refused the application after considering all the circumstances of the case, and came to the conclusion that it was not a case in which the indulgence should

be granted, and that the time should not be extended. The appellants then applied to me, and I came to the conclusion that I ought not to interfere with the decision of the judge of the court below, and I refused the application.

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There being nothing to bring this case within the exception, as in the case of *O'Sullivan v. Harty*, I think we must act on that decision until some other rule is established. The present appeal comes within the rule heretofore acted on; we must therefore, I think, grant the motions and dismiss the appeal.

FOURNIER, HENRY, TASCHEREAU and GWYNNE JJ. concurred.

Motion granted and appeal dismissed with costs.

Solicitors for appellant: *Foster, Clarke & Bowes.*

Solicitors for respondents, the Griffiths: *Howland, Arnoldi & Ryerson.*

Solicitors for respondents, Geo. Wright and others: *Kerr, MacDonald, Davidson & Patterson.*

Solicitor for respondents, Hornbrook and McCormack: *John MacGregor.*
