1931

1931
*Oct. 13.
*Nov. 9.

IN THE MATTER OF THE ESTATE OF SMITH AND HOGAN, LTD., AUTHORIZED ASSIGNOR

INDUSTRIAL ACCEPTANCE CORPORATION LTD., AND CANADIAN ACCEPTANCE CORPORATION, LTD. ..... } APPELLANTS;

AND

THE CANADA PERMANENT TRUST COMPANY, TRUSTEE ..... } RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Bankruptcy—Appeal—Application to judge of Supreme Court of Canada for special leave to appeal—Power of bankruptcy judge to extend time for application—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 163 (5), 174; Bankruptcy Rule 72—Appeal to the Court from decision of judge in chambers on application for leave to appeal.

The judge sitting in bankruptcy from whose decision an appeal was taken to the Appeal Court under s. 174 of the *Bankruptcy Act* has power, under s. 163 (5) of the Act, to extend the time limited by Bankruptcy Rule 72 for applying to a judge of the Supreme Court of Canada for special leave to appeal to this court (under s. 174 (2)) from the Appeal Court's decision. Judgment of Cannon J., *ante*, p. 503, reversed.

The rule established by *Williams* v. *Grand Trunk Ry. Co.* (36 Can. S.C.R. 321) and other cases, that a decision by a judge of this court in chambers granting or refusing, on the merits, an application for leave to appeal is not appealable to the Court, does not extend to a case where the judge has granted leave to appeal in disregard of some essential statutory condition of the right of the applicant to have his application for leave heard and passed upon, or to a case where the judge, owing to a misunderstanding touching the effect of a statute, decides that an applicant for leave to appeal is not entitled to have his application heard, although in truth he has complied with all the statutory and other prerequisites of such an application.

MOTION by way of appeal from the decision of Cannon J. in chambers (1), dismissing an application for special leave to appeal to this Court from the judgment of the Appeal Division of the Supreme Court of New Brunswick (2), dismissing an appeal taken from the judgment of Barry, C.J.K.B., sitting in bankruptcy (3); the ground of

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) *Ante*, p. 503 (2) (1931) 12 C.B.R. 468.
(3) (1930) 12 C.B.R. 93.

the decision of Cannon J. being that he had no jurisdiction to hear the application, as the time fixed by Bankruptcy Rule 72 for such an application had expired, and that the order of Barry, C.J.K.B., as the judge sitting in bankruptcy, granting an extension of time for such application, was made without jurisdiction.

The judgment of the Court on the present motion was that the decision of the Judge in Chambers to the effect that the applicants were not entitled to apply for leave to appeal be rescinded; and that the applicants might proceed with their application; the costs of the abortive application before the Judge in Chambers to be costs in the application, and the costs of the proceedings before the Full Court to be costs to the applicants in any event of the application.

L. A. Forsyth K.C. for the motion.

E. H. Charlson, contra.

THE COURT.—We have come to the conclusion that Barry, C.J.K.B., as the judge sitting in bankruptcy had authority to grant an extension of time for applying for special leave to appeal to this Court.

Section 163, subsection 5, of the *Bankruptcy Act* is in these terms:

5. Where by this Act, or by General Rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose.

By sec. 174 an appeal is given to any person dissatisfied with an order or decision of the court or a judge in proceedings under the Act. By subsec. 2 of sec. 174 it is enacted that the decision of the Appeal Court shall be final unless "special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of that court." By sec. 161 the Governor in Council is authorized to make general rules, "not inconsistent with the terms of this Act, for carrying into effect the objects thereof." By Rule 72 of the general rules made pursuant to the authority conferred by sec. 161, it is provided as follows:

72. An application for special leave to appeal from a decision of the Appeal Court and to fix the security for costs, if any, shall be made to a Judge of the Supreme Court of Canada within thirty days after the pro-

1931

In re SMITH & HOGAN LTD.

INDUSTRIAL ACCEPTANCE CORP. LTD. AND CANADIAN ACCEPTANCE CORP. LTD. *v.* CANADA PERMANENT TRUST CO.

nouncing of the decision complained of and notice of such application shall be served on the other party at least fourteen days before the hearing thereof.

Subsec. 5 of sec. 163 confers upon the Bankruptcy Court a power, the ambit of which embraces "any act or thing" the time for "doing" which is limited by "this Act or by General Rules." *Ex facie* an application under sec. 174 to which Rule 72 applies, is within that ambit.

Moreover, sec. 163 is found in Part VII, which embraces the sections beginning with sec. 152 and ending with sec. 174. The scope of Part VII is indicated by the general heading "COURTS AND PROCEDURE"; and sec. 174, which is the last of the sections within the part, deals with the subject of appeals, including appeals to the Supreme Court of Canada. Sec. 163 is one of a fascicle of provisions under the subhead "Procedure." In passing, it may be observed, that while the right of appeal is, speaking generally, not matter of procedure but of substantive law, the rules regulating the various steps in initiating and prosecuting an appeal are rules of procedure; and regulation 72 is a rule of that character.

It is, of course, the duty of a court or judge, in construing subsec. 5 of sec. 163, to give effect to the language of the subsection according to the ordinary sense of the words selected by the legislature to express its intention; unless there is to be found in some qualifying context, or in the subject matter or general purpose and object of the statute, sufficient ground for ascribing to it another reading. Our attention has not been drawn to anything of the kind; and of course judicial tribunals cannot act upon vague notions, not susceptible of definite statement, as to the intention of the legislature, and there is no consideration, arising out of the general scope of the legislation and capable of being so formulated, to justify a departure from the construction that is dictated by the ordinary meaning of the words.

We agree with the view expressed by Ritchie, C.J., and Strong, J., in *In re Sproule* (1), that where "jurisdiction is conferred on a judge in chambers a right to revise his decision is impliedly conferred on the court unless there is something in the subject matter or context leading to a contrary conclusion." In *Williams* v. *Grand Trunk Ry. Co.* (2),

(1) (1886) 12 Can. S.C.R. 140, at pp. 180 and 209 respectively.

(2) (1905) 36 Can. S.C.R. 321.

it was held that no appeal lies to the Full Court from a refusal on the merits of an application for leave to appeal from an order of the Board of Railway Commissioners under the provisions of the *Railway Act*. It has many times been held for obvious reasons that a decision by a judge in chambers dealing with an application for leave to appeal on the merits, whether granting or refusing the application, is not appealable. The chief purpose in requiring leave to appeal is to prevent frivolous and unnecessary appeals, a purpose which would, in great degree, be frustrated if an appeal were permitted from such a decision. Authorities giving effect to this view are cited in the judgment of Taschereau, C.J., in *Williams'* case (1) and need not be reproduced here.

But *Williams'* case (1) should not be regarded as governing cases in which the judge in chambers has granted an application for leave to appeal in disregard of some essential statutory condition of the right of the applicant to have his application for leave heard and passed upon. It was in pursuance of this principle that this court, recently, in *Montreal Tramways Company* v. *C.N.R.* (2), held that an appellant who had obtained an order for leave to appeal, without giving notice of an application for leave and without affording the respondent an opportunity to answer such an application, was not entitled to proceed with his appeal without obtaining leave upon a proper proceeding. For similar reasons that authority does not extend to a case where a judge in chambers, owing to a misunderstanding touching the effect of a statute, decides that an applicant for leave to appeal is not entitled to have his application heard, although in truth he has complied with all the statutory and other prerequisites of such an application.

The order of the learned judge in chambers will be set aside and the applicant will be entitled to proceed with his application.

Motion granted accordingly.

Solicitor for the appellants: *W. Arthur I. Anglin.*

Solicitors for the respondent: *Inches & Hazen.*

(1) (1905) 36 Can. S.C.R. 321. (2) Motion, October 6, 1931.