IN RE DAVIES

Full Court (Purcell, C.J., Sawrey-Cookson, J. and McDonnell, Ag. J.): February 14th, 1922

[1] **Civil Procedure — appeals — time for appeal — leave to appeal — if appeal from Supreme Court lapses, new application for leave may in some circumstances be made to Supreme Court — must be within three months of decision on merits:** If an appeal from the Supreme Court or Circuit Court has been abandoned or has lapsed a new application for leave to appeal may in certain circumstances be made to such court under the proviso to r. 5 of the schedule to the Supreme Court Amendment Ordinance, 1912, but is subject to the time limit of three months prescribed by r. 8 of the schedule; these provisions do not apply to applications to the Full Court (page 13, line 23 — page 14, line 1).

[2] **Courts — Full Court — appeals — leave to appeal — if appeal lapses new application for leave may in some circumstances be made within three months to court below under Supreme Court Amendment Ordinance, 1912, Schedule, r. 5 proviso — proviso does not apply to applications to Full Court:** See [1] above.

[3] **Time — time for application for leave to appeal — appeals to Full Court — if appeal from Supreme Court lapses, new application for leave may in some circumstances be made to Supreme Court — must be within three months of decision on merits:** See [1] above.

The applicant applied for special leave to appeal.

The applicant was granted special leave to appeal by the Full Court in January 1920 and was directed to apply to the court below for conditions of appeal. His counsel failed to make the application and the appeal lapsed.

Two years later the applicant made the present application to the Full Court under the proviso to r. 5 of the schedule to the Supreme Court Amendment Ordinance, 1912, contending that the proviso applied in all cases where an appeal had lapsed or had been abandoned and that it was not governed by the time limits laid down in rr. 8 and 9 of the schedule. The applicant also sought redress for his counsel's alleged professional negligence in failing to make the application as directed.

The application was dismissed.

Legislation construed:

Supreme Court Amendment Ordinance, 1912 (No. 14 of 1912), Schedule, r. 5:

> "The appellant shall give security to the satisfaction of the Court below .... He shall also pay into the Court below the amount of the expense

of making up and transmission to the full court, of the record of appeal. He shall also give notice of the appeal to all parties directly affected by the appeal . . . .

If security, payment, and notice are so given and made within one month after the application for conditional leave to appeal . . . the court below shall give leave to appeal:

Provided that where the conditions of appeal have not been perfected within such period as aforesaid, or where the appeal shall, for any reason, have lapsed or been abandoned, and the appellant shall again make application for leave to appeal, the Court may either refuse to grant leave or may impose any terms that it thinks proper, in addition to the terms above mentioned."

The applicant appeared in person.

McDONNELL, Ag. J.:

In this case the would-be appellant was given special leave to appeal by the Full Court sitting in January 1920, and the order directed him to go to the court below in order that he might be put on terms.

He states that, owing to the omission of his counsel, such application was not made. Any remedy which he has against his counsel lies in his hands alone in the form of an action. I cannot entertain the view which he puts forward that the Full Court can take any steps against the counsel concerned in respect of the negligence which he alleges.

He has urged upon the court the proviso in r. 5 of the schedule to the Supreme Court Amendment Ordinance, 1912, but that proviso must be read with the preceding paragraphs of the rule which relate only to the court below.

If a party in that court who has been granted conditional leave to appeal, on condition that:

(a) Within a month of the application he gives security,

(b) He pays the expenses of the making-up and transmission of the appeal, and

(c) He gives notice to other parties,

omits to perfect those conditions in that month, or allows the appeal to lapse or be abandoned, the proviso allows — in certain circumstances — a new application for leave to appeal to be made. There is nothing in this which governs the case before us. Rules 8 and 9 of the schedule limit the time for applications in the court below to three months and in this court to six months.

The proviso to r. 5 must be read in the light of r. 8. In the case of a lapsed or abandoned appeal the second application under the proviso to r. 5 must, I hold, be made within the three months

prescribed by r. 8. Rule 9 limits applications for leave to appeal to those of which notice is given within six months of the decision.

For these reasons I hold that the present application must fail.

PURCELL, C.J. concurred.

SAWREY-COOKSON, J.:

I agree, and only wish to add that if this court entertained this application for the reasons urged by the applicant it is obvious that an injustice would result to the holder of the judgment appealed against simply because there would be no limit of time fixed, beyond which his judgment would be reversed.

Time limits have been fixed and although it is true that in certain instances the courts may and should extend the time, there is nothing in the schedule to the Supreme Court Ordinance which justifies this court in creating such a manifestly absurd precedent as it is in effect here asked to create.

The applicant has perhaps forgotten the maxim — *interest reipublicae ut sit litium finis.*

Application dismissed.

NICHOLAS v. BOYAWA

Full Court (Purcell, C.J., Sawrey-Cookson, J. and McDonnell, Ag. J.): February 14th, 1922

[1] **Civil Procedure — appeals — time for appeal — leave to appeal out of time — only to be given in exceptional circumstances when necessary in interests of justice — lack of money, incorrect legal advice or counsel's incompetence delaying application, not grounds for special leave:** The court will grant leave to appeal out of time only in very exceptional circumstances when the interests of justice require it, for once the prescribed time for appealing has expired the successful party to an action has a vested right to the judgment; the fact that an applicant did not appeal within the time limit because of his counsel's incompetence or incorrect legal advice or because of lack of money gives him no grounds for special leave to appeal (page 16, line 40 — page 17, line 1; page 18, line 40 — page 20, line 9).

[2] **Time — time for appeal — leave to appeal out of time — only to be given in exceptional circumstances when necessary in interests of justice — lack of money, incorrect legal advice or counsel's incompetence delaying application not grounds for special leave:** See [1] above.

The applicant applied for leave to appeal out of time.

The applicant brought an action for damages against the respon-

dent in the circuit court. Although judgment was given in his favour he was awarded considerably less than he had claimed and was also ordered to pay his own costs. He intended to appeal but did not apply to the lower court for leave within the prescribed time as he had no money and was advised by his counsel that the delay would not prejudice his position. His counsel also "experienced a further difficulty in making an application to the circuit judge in his capacity at the time of Acting Chief Justice" and this caused a further delay.

Three months after the time limit had expired the applicant made the present application for special leave to appeal on the grounds that it was in the interests of justice that the court should grant him leave since (a) he had failed to apply in time not through his own fault but because of lack of money; (b) he was advised that the delay would not prejudice his position; and (c) the delay was partly due to some difficulty experienced in making an earlier application.

The application was dismissed.

Cases referred to:

(1) *Amponduro v. Wereku* (1905), Ren. 313.

(2) *Collins v. Vestry of Paddington* (1880), 5 Q.B.D. 368; 42 L.T. 573, applied.

(3) *Concession Nos. 164 & 169* (1902), Ren. 223.

(4) *In re Manchester Economic Bldg. Socy.* (1883), 24 Ch. D. 488; 49 L.T. 793, *dicta* of Brett, M.R. considered.

Barlatt for the applicant;
de Hart for the respondent.

PURCELL, C.J.:

This is an application by Mr. Barlatt in behalf of Kalim Nicholas, the plaintiff in this action, for special leave to appeal from a judgment delivered on August 21st, 1921, by Parodi, Ag. C.J. sitting as judge of the Circuit Court. In order to understand this matter aright I will first of all read the affidavit filed by Mr. Barlatt which reads as follows:

"I Samuel Josiah Sigismund Barlatt, Barrister-at-law and Solicitor of this Honourable Court, make oath and say as follows:

1. That the above action was commenced at the Circuit

Court of the Sierra Leone Protectorate, Moyamba, on January 10th, 1921.

2. That His Honour the Circuit Judge being under an obligation to leave for Freetown on official duties before the completion of the hearing, it was proposed that there should be an adjournment *sine die* and that arrangements should be made for its completion in Freetown.

3. That the further hearing took place in Freetown, and final judgment was delivered on August 21st, 1921, in Freetown.

4. That the plaintiff was dissatisfied and aggrieved at the said judgment and was most anxious to exercise his right of appeal.

5. That the plaintiff was then in an impecunious condition, having had to borrow his fare to return to the Protectorate after the said judgment, and was not in a position, financially, to institute proceedings for the appeal until after the time for doing so at the court below had expired.

6. That I was advised and verily believed that the provisions of ss. 7 to 9 of the Schedule attached to the Supreme Court Amendment Ordinance, 1912 provided an alternative course, and advised the plaintiff accordingly.

7. That in view of s. 46 of the Protectorate Courts Jurisdiction Ordinance, 1903, I experienced a further difficulty in making an application to the circuit judge in his capacity at the time of Acting Chief Justice of the Colony of Sierra Leone.

8. I am convinced that the plaintiff's grounds for appeal are good and substantial, and that the partial judgment in his favour was a virtual admission of the validity of the plaintiff's contention at the hearing.

9. That the points at issue are of the utmost importance as regards the interests of British subjects carrying on business in the Protectorate generally, and that a further discussion of the questions involved before this Honourable Court would lead to a definite settling of a great question of law about which much uncertainty at present exists."

I will proceed to deal *seriatim* with these grounds for granting special leave to appeal.

Now as regards the plaintiff's alleged impecuniosity, much as one regrets it, it can furnish no possible ground for this court to

grant the plaintiff special leave to appeal. Impecuniosity — as I understand it and as I know from personal experience — is a grave disability to all those called upon to fight the battle of life in this sublunary sphere. So far as I am concerned I have often felt discontented at having to do without things which (had I possessed it) money could buy for me. In a word money can command most of the good things of this world. Even in such a commonplace thing as litigation a rich litigant is obviously in a better position than a poor litigant, as he is able to retain fashionable counsel and prosecute an appeal, if necessary, to the highest tribunal in the realm. But impecuniosity has never been held to furnish a litigant with any claim to indulgence such as is sought for here.

In para. 5 of the affidavit Mr. Barlatt draws a pathetic picture of the plaintiff's return to the Protectorate and of his having had to borrow money to pay for his railway fare. It occurs to me that really he might have walked. I have known many people better placed in the world than the plaintiff who have had to do that by stress of circumstances. In fact I am not ashamed to say that I have done it myself — I have tried since reading this affidavit to conjure up before me the plaintiff's state of mind as the train carried him past Cline Town and on past Waterloo up into the Protectorate. One recalls those words of Virgil — "*Sunt lacrimae rerum et mentem mortalia tangunt*" finely translated by the late Matthew Arnold — "the sense of tears in human affairs." This exodus apparently took place last August, so I trust that I am justified in assuming that during the interval things have prospered with the plaintiff or otherwise he would hardly now be able to retain counsel's services to make the present application which, if successful, will entail still further expenditure.

With regard to para. 6 of the affidavit I can only express my surprise that Mr. Barlatt is not better informed and instructed with regard to the practice regulating appeals and the time within which such applications must be made. Not only has this appeal court been in existence for nearly 10 years but the rules regulating these matters are perfectly well known and have on several occasions been discussed at length in this court. This whole matter was decided by the Full Court of the Gold Coast (of which I was then a member) in the case of *Amponduro v. Wereku* (1). The decision in that case seems to me so important in this connection that I will read it (Ren. at 313):

"*Interpretation of Appeal — Order or rule.*

Appeals

On this matter of the time within which an appeal must be effectuated, we have come to the following conclusions:—

(1) Conditional leave must be applied for in three months from date of decision on merits, Order 52, Rule 10.

(2) After this is done, the conditions must be fulfilled within one month from the date of application for conditional leave. The result of this is that if the conditional application be made on the last day of the three months, the conditions must be fulfilled within four months from date of decision on the merits. It has been decided by the Full Court that the application for final leave must be made by motion. We think that this motion must be filed on or before the last day of the month from date of application for conditional leave, and when the conditions have been duly fulfilled. Seven days after this the grounds of appeal must be filed.

We are quite certain that the object of the rules was to limit the time during which an appeal could be kept hanging over a successful litigant's head, and during which he could be kept out of the fruits of his judgment. If, having complied with the conditions, the motion for final leave could be hung up during the pleasure of the appellant, the respondent could be so long kept out of these fruits, unless he gave security, as provided by Rule 13. The usual rule is that the respondent can proceed to execution; the appellant must show good cause for the ordering of security by the respondent.

We are not quite sure that the rules originally contemplated a motion for final leave. We are inclined to think that the conditions being complied with, the appeal was made final or effectual, and the grounds would have to be filed in seven days."

It is true that this decision is not binding on this court, but it is a decision by a Full Court on the construction of an Ordinance identical with our own Ordinance.

There is also another decision of the Full Court of the Gold Coast given in the case of *Concession Nos. 164 and 169* (3) with regard to special leave, and here again I will also read a portion of the judgment (Ren. at 224):

"In giving its previous decision refusing special leave to

appeal, this Court after dealing with the foregoing circumstances also had occasion to refer to the general laxity and slackness displayed by certain practitioners in this colony, of which this was only a particular case. It pointed out that some practitioners habitually neglected the ordinary opportunities given them by law, and depended on the special jurisdiction of the Court, a jurisdiction only to be exercised in special circumstances. There being no special circumstances shown in this case other than the neglect by the practitioner in charge of the matter to take advantage of the ordinary opportunities allowed him, this Court declined to grant the special leave sought for.

This Court having already exercised its discretion, and having in my opinion exercised it judiciously, and for substantial reasons, think that this is not a case in which it ought to grant leave to appeal."

These are decisions with which Mr. Barlatt should be familiar.

With regard to para. 7, I fail to understand how there could have been any difficulty in making the application to the Circuit judge, which Mr. Barlatt states he experienced. This action was commenced in the Circuit Court and partly heard in the Protectorate, and then removed to Freetown by the Governor's fiat and was concluded at Freetown, and Mr. Barlatt's proper course was to apply before the learned judge sitting in Freetown, whoever he might be, within three months from the date of judgment for leave to appeal. I regret that Mr. Barlatt has put forward such an excuse or has thought that on such grounds this court would grant his client special leave to appeal.

As was said by Thesiger, L.J. in the case of *Collins v. Vestry of Paddington* (2) (5 Q.B.D. at 381; 42 L.T. at 576):

"In the interest of the public the Court ought to take care that appeals are brought before it in proper time, and as between the parties it has often been remarked, in the branch of this Court which sits at Lincoln's Inn, that when a judgment has been pronounced, and the time for appeal has elapsed without appeal, the successful party has a vested right to the judgment, which ought, except under very special circumstances, to be made effectual. And I think that the legislature intended that appeals from judgments should be brought within the prescribed time, and that no extension of

time should be granted except under very special circumstances."

The major portion of the protracted allocution addressed to us by Mr. Barlatt was based on a principle which was enunciated by Lord Esher (then Brett, M.R.) in the case of *In re Manchester Economic Bldg. Socy.* (4) (24 Ch.D. at 497; 49 L.T. at 796) — "the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that that leave should be given."

There are only two objections to the arguments Mr. Barlatt addressed us on that point:

It supports a principle of practice which has never been disputed and it is in my opinion utterly irrelevant to the present application. I have taken the trouble since this application was made to us to ascertain exactly what it was that the plaintiff claimed in this action and what the decision was.

The plaintiff's claim was:

"(i) For damages for trespass in that on or about September 5th, 1920, the defendant entered his compound at Kangahun which the plaintiff held as tenant to Professor J. Abayomi Cole and closed his well and ousted the plaintiff therefrom	£50.10s.0d.
(ii) For taking possession of his crops on the said land, that is, the product of 3 bushels of rice, 20s. worth of cocoa, 20s. worth of yam planted therein and about £12 worth of cassada plant valued in all	40. 0s.0d.
(iii) For damages for causing the plaintiff's shop to be closed and his business to be stopped from September 5th to November 30th, 1920, 74 days (exclusive of Sundays) at £1 per day	74. 0s.0d.
Total	£164.10s.0d."

Now, what does it all amount to, shorn of all the glamour and sentiment with which Mr. Barlatt has been able to invest it? Well, it really comes to this, that instead of obtaining £164.10s.0d. the plaintiff recovered £30, and had to pay his own costs. We are told that this was a test case. Be it so, the test apparently was whether this man could be turned out of the Protectorate by a native chief, and it has been decided that he could not be so turned out, so that point was decided in his favour. In point of fact this is not a test

case at all, but is merely an attempt by a person who has been disappointed in failing to extract as large a sum of money from the coffers of the government as he wished and hoped to do, to litigate the matter further, and in order to enable him to do so, it has been urged upon us with great insistence that a grave act of injustice will ensue unless we accede to this application. For myself I think the time has come when this court should speak with no uncertain voice on the question of these applications by a would-be appellant who has merely neglected to take advantage of the machinery which the law allows him with regard to appealing. I think that this court should let it be known that in future it will not, except under very peculiar and extraordinary circumstances, grant special leave to appeal. I do not think that this can be too widely understood or recognised. So far as the present application is concerned, and for the reasons I have already stated, I think that this application should be dismissed with costs.

We desire to express our obligations to Mr. de Hart for the very great assistance he rendered to this court in so ably and lucidly marshalling all the necessary authorities.

McDONNELL, Ag. J. and **SAWREY-COOKSON, J.** concurred.

Application dismissed.

IN THE ESTATE OF PARKER (DECEASED), HAGEN and ANOTHER v. JOHN and OTHERS

Full Court (Purcell, C.J., Sawrey-Cookson, J. and McDonnell, Ag. J.): February 14th, 1922

[1] **Civil Procedure — law applicable — Rules of Supreme Court, 1908, O.LXV, r. 2 does not permit importation of every English provision omitted from local Rules — order to be interpreted strictly — if English statute largely embodied in local provision, presumption that any departure from original intentional:** Since the Rules of the Supreme Court of Sierra Leone embody many, but not all, of the provisions contained in the English Rules of the Supreme Court, there is a presumption that any departure from the English Rules is intentional; O.LXV, r. 2 of the Rules of the Supreme Court, 1908, which provides for the application of English rules when no other provision is made and when they may be conveniently applied in Sierra Leone, should therefore be strictly interpreted and does not permit the importation of every English provision omitted from the local rules (page 24, line 17 — page 25, line 26; page 26, lines 7—12).