ALBERT GENET - - - - *Appellant.*

9th February, 1923.

v.

FRITZ SCHUMACHER & ALFRED STRAUMANN - - - - *Respondents.*

Application for conditional leave made more than three months after decision—Costs.

The facts of this case are sufficiently set out in the judgments.

Appeal from a judgment of Purcell, C.J., in the Supreme Court of the Colony of Sierra Leone.

Sawyerr for the Appellant.

Wright for the Respondents.

McDONNELL, Acting J.

In this appeal, Mr. Wright, for Respondents, raised a preliminary objection to the effect that the application made to the lower Court for conditional leave was out of time, as, although notice of motion was filed within three months from the date of the decision, the date on which the notice stated the Court would be moved and the date on which the Court actually was moved, were more than three months after the date of the decision.

It appears from the record that Mr. Wright, on the application for conditional leave on June 16th, 1922, " objected that Mr. Sawyerr was late "; the record goes on, " he did not waive " the point, but would raise it in the Court of Appeal."

No decision on the point was given by the lower Court.

Mr. Sawyerr, at the present hearing, asked that this part of the record of appeal should be expunged as not being included in the record of appeal as specified in section 5 of the Schedule to Ordinance No. 14 of 1912[1]. This the Full Court refused to do, and proceeded to consider Mr. Wright's objection.

In sections 7, 8 and 9[2] of the schedule, the words " applica- " tion for leave to appeal " are employed, and the proviso to 9 states that if no sitting of the Full Court occurs within six months of the decision, and a notice to move that Court is given

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[1] Now Cap. 205, Schedule, sec. 5, Vol. II, p. 1438.
[2] Now Cap. 205, Schedule, secs. 7, 8 & 9, Vol. II, p. 1439.

GENET v. SCHUMACHER & STRAUMANN.

McDONNELL, ACTING J.

within six months, that motion may be dealt with at the next sitting of the Court.

The effect of a proviso, according to the ordinary rules of construction, is to qualify something enacted in the preceding part of the enactment, and it is only on the assumption that " application for leave " means something quite different from " notice to move," that this proviso can be given any meaning at all.

If the two things mean the same thing, there is no point in making special provision for times when the Full Court is not sitting, for notice to move it can be filed at any time, and the proviso is then mere surplusage, an interpretation in conflict with the settled canon of construction enunciated in Queen *v.* Bishop of Oxford (1879), 4 Queen's Bench Division, at page 261, per Cockburn, C.J., " that a statute ought to be so construed that if " it can be prevented, no clause, sentence or word shall be super- " fluous, void or insignificant."

It is true that section 5 speaks of "*filing* an application " for final leave," but the fact that this is so does not, I hold, affect the only interpretation of section 9, which makes the whole enactment, proviso and all, intelligible.

I asked Mr. Sawyerr, for Appellant, in the course of the argument, to consider section 29 of the Schedule[1]. It seems clear from the record that, although no decision was given in the lower Court on the point of law as to time, yet there was no final direction by the Supreme Court that judgment should be entered provisionally, subject to a point of law which it reserved for further argument or consideration in the sense contemplated by section 29.

Finding himself faced with this point in the lower Court, the Appellant could have abandoned his application for conditional leave there, and, being within time, could have come to the Full Court for special leave. His failure to do that seems to dispose of any argument as to costs.

In my opinion, therefore, the appeal must, on Mr. Wright's preliminary objection, be dismissed, with costs.

PURCELL, C.J.

I agree.

[1] Now Cap. 205, Schedule, sec. 29, Vol. II, p. 1441.

SAWREY-COOKSON, J.

I agree, and desire to add only a few words on the question of costs. At the conclusion of arguments of Counsel in the case of Genet *v.* Schumacher, the learned Chief Justice intimated that the Court were unanimous in the view that Mr. Wright had sustained his preliminary objection to this Court, entertaining the appeal, and that the reasons for that conclusion would be given in a judgment to be delivered to-day with the other judgments reserved. Thereupon, on Mr. Wright asking for his costs, Mr. Sawyerr objected on the ground that, although this Court had upheld his (Wright's) preliminary objection, it was still open to him to apply to this Court for special leave to appeal, and that it was, therefore, premature at this stage to give Mr. Wright his costs.

Mr. Sawyerr took more than one point, but mainly omitted, I think, to appreciate the all-important fact that it was, or should have been, perfectly clearly understood by him that Mr. Wright had deliberately, before the lower Court stated that he did not waive the preliminary objection, to be taken as to the power of that Court to entertain this appeal, but, on the contrary, intended to take the objection before this Court.

That being so, Mr. Sawyerr had the course clearly open to him to abandon his claim to final right to appeal, and to have applied for special leave to appeal.

That course he did not take, so that it is very difficult to understand what valid objection he can have to Mr. Wright being allowed his costs. Mr. Wright's objection, had it been argued before the learned Chief Justice, would presumably (in view of the unanimity of this Court) then have been upheld; but it was clearly left for this Court to uphold or overrule, and if it should uphold it, so to dispose of the whole matter in Mr. Wright's favour. It is difficult to conceive of a case in which the discretion of the Court in such matters should more properly or reasonably be exercised in a successful litigant's favour.