KALIM NICHOLAS - - - - *Appellant.*

v.

BOYAWA - - - - - - *Respondent.*

January 14th February 1922.

Application for special leave to appeal—Limitation of time in which appeal may be lodged—Action part heard in Circuit Court of Protectorate and transferred by Governor's Fiat to Supreme Court of the Colony before the Circuit Judge when acting C.J.

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

Application for special leave to appeal from a judgment of Parodi, Acting C.J. in the Supreme Court of the Colony of Sierra Leone.

Barlatt for the Appellant states he has nothing to add to his affidavit.

De Hart, Legal Assistant, for the Respondent cites:—

International Corporation *v.* Moscow (1877), 7 Ch. D., p. 241.

Highton *v.* Trehearne, 39 L.T.R., p. 410.

In *re* Manchester Economic Building Society, 24 Ch. D., p. 288.

In *re* Wigfull, L.R., Ch. D. (1919), p. 54.

Collins *v.* Vestry of Paddington, 5 Q.B.D., p. 368.

Curtis *v.* Sheffield, L.R., 21 Ch., p. 25.

Renner's Gold Coast Reports, Peregrino *v.* Spio, p. 226, Kuakue *v.* Boehm, p. 492.

Barlatt in reply cites:—

Supreme Court (Amendment) Ordinance, 1912 (No. 14 of 1912), Schedule, sec. 7.[1]

PURCELL, C.J.

This is an application by Mr. Barlatt in behalf of Kalim Nicholas, Plaintiff in this action, for special leave to appeal from a judgment delivered on the 21st of August, 1921, by Mr. Justice Parodi sitting as Judge of the Circuit Court who happened at that time to be acting as Chief Justice of the Colony. In order to understand this matter aright I will first of all read the affidavit filed by Mr. Barlatt which reads as follows:—

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[1] Now Cap. 205, Sch., sec. 7, Vol. II, p. 1439.

SCHUMACHER & STRAUMANN v. [illegible] PURCELL, C.J.

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

" That the above action was commenced at the " Circuit Court of the Sierra Leone Protectorate, Moyamba, " on the 10th January, 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 the 21st day of " August, 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 con- " dition, 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 pro- " visions of sections 7 to 9 of the Schedule attached to the " Supreme Court Amendment Ordinance, 1912 (No. 14 of " 1912[1]), provided an alternative course, and advised the " Plaintiff accordingly.

" 7. That in view of section 46 of the Protectorate " Courts Jurisdiction Ordinance, 1903[2], 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 judg- " ment 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 import- " ance 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

[1] Now Cap. 205, Sch., secs. 7 to 9, Vol. II, p. 1439.
[2] Now Cap. 169, sec. 57, Vol. II, p. 1170.

" great question of law about which much uncertainty at
" present exists."

January.

I will proceed to deal seriatim with these grounds for granting special leave to appeal. PURCELL, C.

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 asuming 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 a still further expenditure.

With regard to paragraph 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 ten years but the rules regulating these matters are perfectly well known and have on several occasions been discussed at length in this Court. In Renner's Gold Coast Reports, Vol I., page 313, this whole matter was decided by the Full Court of the Gold Coast (of which I was then a member) in the case of In *re* Amponduro *v.* Wereku. The decision in that case seems to me so important in this connection that I will read it:—

"Interpretation of Appeal—Order or rule.

Appeals.

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

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

"(2) After this is done, the conditions must be fulfilled "within one month from the date of application for con- "ditional leave. The result of this is that if the con- "ditional 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 con- "templated 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 another case and reported on page 223 of Vol. I. of Renner's Gold Coast Reports. That was a decision in Concessions Enquiry Nos. 164 and 169, with regard to Special Leave, and here again I will also read a portion of the judgment—

" 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 juris-
" diction 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 of 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 Lord Justice Thesiger in the case of Collins v. the Vestry of Paddington. 5 Q.B.D., p. 368.

" 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 made 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 Sir Baliol Brett) Master of the Rolls, in the case of In *re* Manchester Economic Building Society. 24 Ch.D., p. 228: " 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 the 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 the 5th day of September, 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	10	0
(ii) For taking possession of his crops on the said land, that is, the product of 3 bushels of rice, 20 shillings worth of cocoa, 20 shillings worth of yam planted therein and about £12 worth of cassada plant valued in all	40	0	0
(iii) For damages for causing the Plaintiff's shop to be closed and his business to be stopped from 5th September to 30th November, 1920, 74 days (exclusive of Sundays) at £1 per day	74	0	0
Total	£164	10	0

Now, what does it all amount to, shorn of all the glamour and sentiment which Mr. Barlatt has been able to invest it with? Well it really comes to this, that instead of obtaining £164 10s. 0d. 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 insistance 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.

PURCELL, C.J.

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, Acting J.

I concur.

SAWREY-COOKSON, J.

I concur.