APPEAL FROM ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

1884
May 10.

RAMEY (PLAINTIFF) PETITIONER *v.* BROUGHTON (DEFENDANT) OPPOSITE PARTY.*

Limitation Act XV of 1877, *ss.* 4, 5, *and* 12, *and Sch. II, Art.* 151—*Appeal—Time requisite for obtaining a copy of the decree.*

A plaintiff wishing to appeal from a decision passed against him on the Original Side of the High Court, dated 16th August 1883, presented for filing his memorandum of appeal to the Registrar on the 5th September 1883, but by reason of the decree not having been signed on that date, no copy of the decree was presented therewith. The Registrar refused to accept the appeal.

On the 6th September the decree was signed, and on the 7th an office copy thereof was obtained by the defendant's attorney, who, on the 8th September, served a copy at the office of the plaintiff's attorney. On the 12th September, the plaintiff applied for an office copy, which he obtained on the 13th, and on the 15th tendered such copy and his memorandum of appeal to the Registrar. The Registrar refused to accept the appeal, unless under an order of Court, it being in his opinion out of time.

On the 6th December 1883 a Judge sitting on the Original Side admitted the appeal. The appeal subsequently came on for hearing, when the defendant contended that the appeal was barred, it not having been filed within twenty days from the date of the decree. The Court held that the appeal was so barred.

Held, on review, that the plaintiff having allowed five days to expire after the decree was signed before applying for a copy, and not having filed his appeal, after so obtaining a copy, at the earliest opportunity possible, such a delay, being entirely unaccounted for, could not be held to be "time requisite for obtaining a copy of the decree," and that, therefore, the appeal was out of time.

IN 1882 the plaintiff brought a suit against the Administrator-General (the administrator of the estate of one Louis Ramey, deceased) to have it declared that he was the son and legal personal representative of the said Louis Ramey, and for the construction of a document alleged to be the last will and testament of the deceased, and for possession of the estate of the deeased and for an account.

* Review of judgment of GARTH, C.J., and CUNNINGHAM, J., in Original Appeal No. 33 of 1884, dated 22nd February 1884.

The suit came on for hearing before Mr. Justice Norris, and was dismissed on the 16th August 1883.

No appeal having been filed against the decree within the twenty days allowed for such appeal, the property, the subject of the suit, was advertised for sale, and the sale fixed for the 15th September 1883.

It appeared, however, that on the 5th September 1883 (the last day on which such appeal could have been filed) the plaintiff's attorney presented the memorandum of appeal to the Registrar, but the Registrar refused to file the same inasmuch as no office copy of the decree was filed therewith. On the same day the plaintiff's attorney made enquiries at the office of the Registrar as to the original decree in the suit, and was informed that the decree was not then prepared.

On the 6th September the decree was signed, and on the 7th September a copy of the said decree was obtained by the defendant's attorney, who on the 8th September served a copy at the office of the plaintiff's attorney, but the latter did not for some reason become informed of the fact, and was not aware that the office copy was ready up to the 12th September, when he immediately applied for an office copy. On the 13th September such office copy was obtained, and on the 15th September the grounds of appeal, with such office copy, were tendered for filing, but were rejected as being out of time, the Registrar refusing to accept them after time without an order of Court being obtained granting permission therefor.

On the 6th December 1883 an application was made before Mr. Justice Pigot for the admission of the appeal, and on the above facts being stated to the Court, the appeal was admitted, and on the same date the appeal was duly filed, and notice thereof was served on the defendant's attorney.

On the 13th December 1883 the defendants obtained a rule calling upon the plaintiff to show cause why the memorandum of appeal should not be taken off the file, but on the 7th December the rule was discharged on the ground that the Appeal Court (before which the appeal would be heard) was then sitting; the order of discharge being made without prejudice to any application which might be made to the Appellate Bench to take the memorandum of appeal off the file.

1884

RAMEY
v.
BROUGHTON.

No such application was made to the Appellate Court, but on the appeal coming on for hearing the objection was taken that the appeal was barred by limitation, and the Chief Justice, and Mr. Justice Cunningham, before whom the case was heard, decided that the appeal was barred.

The plaintiffs subsequently on the 20th Feburary 1884 obtained a review of such judgment; at the hearing of the rule, Mr. *Phillips* (with him Mr. *Amir Ali*) appeared for the plaintiff.

Mr. *Phillips.*—We were taken by surprise when the appeal was called on.

In the first place the Court had intimated that no long case would be taken, and consequently counsel had abstained from preparing themselves and had made other engagements, and were, when the appeal was called on, actually addressing other Benches of the Court.

In the second place the plaintiff had no notice that the point of limitation would be raised, and therefore was not prepared to deal with it.

That point ought not to have been taken without previous notice. It lies upon the other side to show why the admission of the appeal by Mr. Justice Pigot was wrong, and that must be made out upon some materials, consequently we ought to have had notice that it was intended to raise the point.

The appeal was, we submit, in time, and the memorandum ought not to have been refused by the Registrar, and was rightly admitted by the Judge.

The Act excludes from the time allowed for an appeal "the time requisite for obtaining a copy of the decree appealed against." This necessarily implies that the time requisite for the decree to come into existence should be excluded, since no copy can be obtained until the decree comes into existence in a form in which it can be copied. Moreover, any other construction would involve absurdity. Suppose a decreee is drawn up twenty-five days after the judgment, *i.e.*, twenty-five days after the time has begun to run, the appellant would be barred before the decree exists in a form in which it can be copied. The exclusion of the "time necessary to obtain a copy of the decree," if that expression is treated as meaning only the time requisite,

after the decree has come into existence, for obtaining a copy, would be of no use to the appellant, since he is already barred. It would be useless to say you can exclude the two or three days necessary to obtain a copy.

[GARTH, C.J.—If the appellant had applied for a copy while the twenty days were running he would not be barred.]

But the Act does not make any such provision, and such an application could not make a longer time "requisite for obtaining a copy," it would shorten the time, and why should the appellant be required to ask for a copy of that which does not exist? Is not that a mere useless form?

Until a decree is drawn up the Legislature does not expect the parties to make up their minds whether they will appeal. But, if the construction suggested is adopted, parties cannot have their memorandum of appeal ready by the end of the twenty days, and must file it in order to comply with the Act, although the appeal will not be received by the Registrar, inasmuch as the appellant cannot annex thereto a copy of the decree. That happened in this case. We presented our memorandum of appeal within the twenty days, but without a copy of the decree, because it was not then draw up.

Besides, the judgment may be ambiguous and the minutes of decree may have to be spoken to, and why should an appeal be prepared, which may be unnecessary, if the ambiguity is removed? Or the decree may be probably wrong, and the party in whose favour it is may not care to draw it up.

I submit that the Legislature intended the period to be a reasonable period after the decree is finally settled and drawn up to enable parties to judge whether they will appeal, and did not intend the period to be shortened by such accidents as the earlier or later drawing up of the decree, accidents depending upon the press of work in the Court offices. Still less did it intend that the party in whose favour the decree passes should be able, by delaying the drawing up of the decree, to deprive his antagonist of part or the whole of the time allowed him for consideration whether he should appeal. Why should the Legislature, which intends to protect parties against harassing appeals, protect a party who has not thought fit to have a decree in his favour drawn up?

1884

RAMEY
v.
BROUGHTON.

The Advocate-General (Mr. *Paul*) for the defendant.

The judgment of the Court was delivered by

GARTH, C.J. (CUNNINGHAM, J., concurring).—This was an application made by Mr. *Phillips* on behalf of the plaintiff (the appellant), for a review of our judgment on an appeal from the Original Side.

The appeal came on for hearing on the 22nd of February last; and an objection was taken by the respondent that the appeal was barred by limitation. We thought that the objection was well founded, and dismissed the appeal.

Mr. *Phillips* then applied for a review upon the grounds: 1*st*, that the appellant's counsel were taken by surprise, and were not prepared to argue the point of limitation; and, 2*ndly*, that we had made a mistake in supposing that the appeal was barred, and that the point of limitation had not been properly understood or argued at the hearing.

We consider that, strictly speaking, Mr. Phillips ought not to have been allowed to argue the second point at all; because it was fully argued at the hearing, and there was no sufficient reason for our allowing it to be re-argued. But as the question is undoubtedly an important one, and we were most anxious that no available argument should be excluded, we have allowed Mr. Phillips to go fully into both points; and we only now observe that in strictness he had no right to be heard upon it, in order that the fact of our hearing him may not be construed into a precedent.

Now, for the purpose of understanding the points that have been raised, it is necessary that the proceedings in appeal, and the dates when they occurred, should be properly noted.

The judgment of the Court below was given against the plaintiff on the 16th of August 1883. On the 5th of September (which was twenty days after the judgment) the plaintiff's attorney applied to the officer of the Court to file his appeal. He was told that it could not be filed without a copy of the decree (see s. 541 of the Civil Procedure Code), but as the decree itself had not been then signed by the Judge, the appellant could not have obtained a copy even if he had asked for it.

On the 6th, however, the following day, the decree was

signed; and on the 8th a notice to that effect was given to the plaintiff's attorney. On the 12th the plaintiff's attorney bespoke a copy of the decree, and he obtained it on the next day, the 13th.

On the 15th he applied again to file his appeal; but the officer refused to admit it, on the ground that it was not in time.

No step was then taken by the appellant to get the appeal admitted until the 6th of December, when an application was made to Mr. Justice Pigot upon affidavit for the admission of the appeal; and the appeal was admitted.

On the 13th of December the defendant obtained a rule, upon affidavits, calling upon the plaintiff to show cause why the appeal should not be taken off the file.

On the 7th of January cause was shown against the rule, and it was discharged upon the ground that the Appeal Court was sitting; but without prejudice to any application to the Appeal Court to take the appeal off the file.

No application was made for that purpose; and on Friday, the 22nd of February, the appeal came on for hearing before this Bench. This happened to be the last day on which my brother Cunningham and myself were to sit together, as on the following Monday I was to sit with Mr. Justice Wilson. We had, therefore, given notice that no long case would be taken on the Friday; and when this appeal was called on about 1 o'clock on Friday, Mr. *Pugh*, who was one of the appellant's counsel, said that, as it was a long case, and he thought it would not have been taken, he was not prepared to argue it.

The Advocate-General, who appeared for the respondent, said that, in his opinion, it would be a short case; for that he had a preliminary objection on the ground of limitation, which he thought would dispose of it.

Under these circumstances, we determined to hear it. But as Mr. *Pugh* said he was not then prepared to argue the point of limitation, we postponed the hearing until after the mid-day adjournment, in order that he might have time to prepare himself.

Upon our return to the Court at a quarter to three, Mr. *Pugh* was not present, nor was Mr. *Phillips*; but Mr. *Amir Ali*,

1884

RAMEY v. BROUGHTON.

who was the third counsel in the case, appeared and objected that no notice had been given to the appellant that the respondent was going to rely upon the point of limitation, and that no application had been made to rescind Mr. Justice Pigot's order admitting the appeal.

We explained that the point of limitation arose upon the appeal itself, quite apart from any order admitting the appeal; and that under s. 4 of the Limitation Act we were not at liberty to hear the appeal, unless the appellant could satisfy us that he had filed it in proper time; or that under s. 5 he had sufficient cause for not presenting it within the prescribed period.

But we told Mr. *Amir Ali* that, in order to satisfy us upon that point, he was at liberty to use all the affidavits which were used before Mr. Justice Pigot, either on the 6th or the 13th of December. Accordingly, upon those affidavits, the point of limitation was fully argued by Mr. *Amir Ali* on the one side, and the Advocate-General on the other; and in the result we dismissed the appeal upon the ground that it was barred.

Mr. *Phillips* has now contended on the application for review that he and his friends were taken by surprise, and ought not to have been called upon to go into the case. But the question whether the case should be taken was entirely a matter for the discretion of the Court; and as we had reason to believe, from what was stated by the Advocate-General, that the case would not be a long one, we thought it right to call it on.

The appeal had been in the paper for upwards of six weeks; there were three counsel engaged in it, and, of course, they ought to have been aware that the point of limitation was not only open to the respondent but that it was one which the Court, whether it were taken by the respondent or not, was bound by law to entertain.

Upon the proceedings it appeared that the appeal had not been filed within twenty days from the date of the judgment, so that *primâ facie* it was barred; and the fact that it had been admitted by order of the Judge did not dispose of the point of limitation. The officer of the Court is not allowed to file any appeals which appear to be out of time, except by order of the Court; but the Court, if any thing like a *primâ facie* case for the admission is made

out by the appellant, is of course quite right to admit it, in order that the point of limitation may be argued at the hearing. Unless the appeal is admitted, the appellant of course is precluded from raising the point.

But the order for admission has no greater effect than that. We are constantly in the habit, on the Appellate Side, of making these orders *ex parte*; but it also constantly happens that when the point is argued at the hearing, we hold the appeal to be barred.

The counsel, therefore, for the appellant ought to have been fully prepared to argue the point in this case. Mr. *Amir Ali* had all the affidavits before him for that purpose; and it was not suggested that he had any material facts to add to those which were disclosed in his affidavits.

We think, therefore, that there is no ground for Mr. *Phillips'* first contention, that the case ought not to have been heard, or that he and his friends were taken by surprise.

But then, secondly, Mr. *Phillips* contended that the appeal was not barred; and the point of limitation was not properly argued or understood at the hearing.

It was in this respect we considered that Mr. *Phillips* had no right to address us. We have always held in this Court that a review is not admissible merely for the purpose of having a point argued again upon the same materials by some other counsel. If that were permitted there would be no finality in any judgment. But we permitted it, as we have already said, on this occasion, from an anxiety, that upon a point of so much importance and of such general application no argument should be excluded.

Mr. *Phillips* contended, as I understood him, that where the decree, as in this case, was not drawn up and signed until after twenty days had expired from the delivery of the judgment, the twenty days ought to count from the time when the decree was made. But this is directly contrary to the express language of the law.

By the 151st article of the schedule to the Limitation Act the twenty *days are to be reckoned from the date of the decree*; and by the 20th section of the Civil Procedure Code. *the decree is to bear*

1884

RAMEY v. BROUGHTON.

date the day on which the judgment is pronounced, so that the appeal must clearly be filed within twenty days from the day on which the judgment is pronounced.

But then it was said (and this is really the only arguable point) that, although the appeal was not brought to the office to be filed until ten days after the proper time, the additional ten days were requisite for enabling the appellant to get a copy of the decree.

If this had been so, the appellant would no doubt have brought himself within s. 12; but the facts were against him.

The appeal, as we have seen, was first brought to the office on the 5th of September, and on the 20th day after the judgment was pronounced. It could not be received then, because the appellant had no copy of the decree; and no copy of the decree could then be had, because the decree itself was not signed.

I quite agree, therefore, that upon the facts disclosed on the affidavits, the appellant was entitled to as many additional days after the 5th of September as were requisite to enable him to get a copy of the decree.

But the decree was signed on the 6th of September, and it is sworn—and I see no reason to doubt the fact—that a copy of the decree was sent to the appellant's attorney on the 8th; whether he received that notice or not, the decree was ready, and it was his business to go to the office and get the copy. It clearly was not the duty of the office or of the respondent to give him any notice. He was bound himself to ascertain at the office when the decree was ready, and to bespeak a copy.

Instead of doing this, he allowed five days to expire before he applied for a copy. He applied for it on the 12th, and obtained it on the 13th; and even then he did not apply to file his appeal until the 15th.

There are then at least five or six days unaccounted for, which were clearly not requisite for obtaining a copy of the decree. He might easily, if he had used due diligence, have filed his appeal on the 9th or 10th; and he does not apply to file it till the 15th.

We held here not long ago on the Appellate Side of the Court, after consulting some of the other Judges, that where an appellant was too late by a single day—and for that day's delay there was no sufficient excuse—the appeal was barred. Section 4 of the Limitation Act leaves us no discretion in this respect; and unless the appellant can satisfy the Court *that he had sufficient cause* for not presenting the appeal in proper time, we have no right to hear it.

I quite think that, where an appellant has any real difficulty in obtaining a copy of the decree, and uses due diligence to obtain it, every reasonable allowance should be made in his favor; and I confess I think there are strong reasons in favor of altering the law of limitation, so as to make the twenty days allowed for an appeal count from the signing of the decree, and not from the day when the judgment is pronounced.

As the law now stands, all we can do is to be liberal in allowing the appellant (under s. 12) a requisite time for obtaining a copy of the decree; and this I should in all cases be quite prepared to do.

But here, there is no pretence for saying that the delay which occurred in obtaining a copy of the decree was not due to the plaintiff himself. In addition to the information which the affidavits disclose, and which shows that the appellant might have obtained a copy of the decree five or six days earlier, if he had only used due diligence, we have obtained from the office the following facts, which make it clear the delay in getting the decree itself settled and signed was also due to the appellant.

The draft decree was prepared in the office on the 18th of August. It was sent to both parties for approval on the 21st. The defendant approved it on the 28th, but the plaintiff has never returned it (either approved or otherwise) up to the present time.

In consequence of the plaintiff's not returning it, the usual notice was issued to him to come and settle it on the 28th of August. He did not appear in pursuance of that notice; and consequently it was settled and passed in his absence on the 30th of August. It was given out to be engrossed on the 31st. It

1884

RAMEY v. BROUGHTON.

was engrossed and examined on the 4th of September; and it was signed by the Judge on the 6th of September.

But for the plaintiff's own delay, therefore, the decree would have been prepared and signed much earlier, and a copy might have been obtained by him in ample time to file his appeal within the twenty days.

But apart from those reasons, which in my opinion are conclusive, there is also another point which I consider fatal to the plaintiff's case.

If an appeal is not preferred in due time, the officer of the Court, as I have already said, has no right to receive it without an order from a Judge, and the appellant must come as early as he can to the Court to make his application. This has always been the rule on the Appellate Side of the Court; and I do not see why it should not also be the rule in appeals from the Original Side. The provisions of the Limitation Act apply equally to both sides of the Court.

The 15th of September last was immediately before the vacation. But there was not the least reason why the appellant should not have applied to the Vacation Judge; and at any rate he should have applied immediately upon the Court re-opening in November.

Instead of this he waits for nearly three months, and does not make his application till the 6th of December; and he gives no excuse for this delay, except that his counsel, Mr. *Phillips*, was not at Calcutta, which, of course, is no excuse at all.

The facts of the case appear to me to disclose very serious negligence on the part of the plaintiff's attorney; and if there was any good ground for the appeal on the merits, the attorney would certainly seem answerable to the plaintiff for the consequences of that negligence.

I am clearly of opinion that the appellant is barred; and that there is no ground whatever for a review.

Application dismissed.

Attorney for plaintiff: Baboo *N. L. Bose.*

Attorney for the defendant: Messrs. *Sanderson & Co.*