CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1906
Nov. 5.

IN THE MATTER OF AN ARBITRATION BETWEEN COLES AND RAVENSHEAR.

Practice—Appeal—Time for Appealing—Mistake as to Effect of Rule—Order in Matter not being an Action—Appeal brought too late—Special Leave to Appeal—Discretion of Court—Order LVIII., *r.* 15.

Where, through a mistake of counsel as to the effect of Order LVIII., r. 15, an appeal was not brought until after the expiration of the time thereby allowed for appealing:—

Held, upon the authority of *In re Helsby*, [1894] 1 Q. B. 742, and *International Financial Society* v. *City of Moscow Gas Co.*, (1877) 7 Ch. D. 241, that there was no sufficient ground for granting special leave to appeal under the before-mentioned rule.

APPLICATION under Order LVIII., r. 15, for special leave to appeal from an order of a Divisional Court.

A reference having taken place under an arbitration clause in a building agreement, the referee by his award found certain

C. A. 1906

COLES AND RAVENSHEAR, *In re.*

facts, and awarded that certain sums should be paid by the building owner to the builder. On an application by the building owner, the Divisional Court, on August 6 last, set aside the award on the ground that it appeared, from what had taken place on the reference, that the parties had not intended to leave questions of law for final determination by the referee as arbitrator, and that from the facts as found by the award it was clear that the referee had awarded to the builder sums to which he was not legally entitled.

In the course of a discussion, which took place immediately after the decision of the Divisional Court, between the solicitor for the builder and the leading counsel who had appeared for him, as to whether there should be an appeal, the counsel, through a mistake as to the effect of the rule on the subject (Order LVIII., r. 15) as applicable to the present case, intimated an opinion that, the order of the Divisional Court being a final order, the period within which an appeal must be brought under the rule was three months, which opinion was confirmed by his junior. Acting on this opinion the solicitor did not cause notice of appeal to be given till October 30. By Order LVIII., r. 15, "no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of fourteen days."

C. A. Russell, K.C., for the appellant. The Court clearly has a discretion in the matter. The notice of appeal was not given in time through a mere slip of counsel as to the effect of the rule, and the respondent has not thereby sustained any damage which is not capable of being compensated by costs. It is submitted that, under these circumstances, the justice of the case requires that special leave to appeal should be given upon such terms as the Court may think just. [He cited *In re New Callao* (1); *In re Blyth and Young* (2); *Cusack* v. *London and North Western Ry. Co.* (3); *In re Manchester Economic Building Society* (4); *McAndrew* v. *Barker* (1); *Tildesley* v. *Harper* (2); *Cropper* v. *Smith.* (3)]

(1) (1882) 22 Ch. D. 484.
(2) (1880) 13 Ch. D. 416.
(3) [1891] 1 Q. B. 347.
(4) (1883) 24 Ch. D. 488.

C. A. 1906

COLES AND RAVENSHEAR, *In re.*

W. R. Warren (*Rawlinson, K.C.*, with him), for the respondent. There having been no appeal against the order within the time limited by the rules, the party who was successful in the Court below has prima facie a vested right under the order. The mere fact of a mistake having been made as to the effect of a perfectly plain provision of the rules cannot of itself afford a sufficient ground for giving special leave to appeal. [He cited *International Financial Society* v. *City of Moscow Gas Co.* (4); *In re Helsby* (5); *Collins* v. *Vestry of Paddington* (6); *Esdaile* v. *Payne.* (7)]

C. A. Russell, K.C., in reply.

COLLINS M.R. This is an application to extend the time for appealing to this Court; and no doubt the Court has jurisdiction to give special leave to appeal under Order LVIII., r. 15, which provides that "no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of fourteen days, and no other appeal shall, except by such leave, be brought after the expiration of three months." In this case the reason why the appeal was not brought within the fourteen days was that counsel, while discussing the question of appealing, after the decision of the Court below, and, as I understand, within the precincts of the Court, expressed an off-hand opinion that by the terms of the rule the appeal need not be brought within the fourteen days, which opinion thus given was afterwards confirmed by the junior counsel, and, on the strength of this opinion so expressed, the notice of appeal was not given till after the expiration of that period. The result appears to be that, unless that slip can be cured, the case cannot be heard in this Court on the merits, which is said to be an injustice to the appellant, though

(1) (1878) 7 Ch. D. 701.
(2) (1878) 10 Ch. D. 393.
(3) (1884) 26 Ch. D. 700, at pp. 710, 711.
(4) 7 Ch. D. 241.
(5) [1894] 1 Q. B. 742.
(6) (1880) 5 Q. B. D. 368.
(7) (1889) 40 Ch. D. 520.

C. A. 1906

COLES AND RAVENSHEAR, *In re.*

Collins M.R.

it must be remembered that the case has been fully heard on the merits in the Court below, and the presumption in this Court must, until the contrary is shewn, be that the decision of that Court was correct. The question is whether under these circumstances we ought to grant an extension of time. I confess that, if the case were free from authority, and I felt myself at liberty to follow my own judgment in the matter, I should unhesitatingly allow the time to be extended. Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case. In the case of *In re Manchester Economic Building Society* (1), Bowen L.J., in giving judgment to the same effect as Brett M.R. and Cotton L.J., laid down what seems to me to be the sound general rule on this subject, and that which I should desire to follow. He said, with regard to the circumstances under which the discretion of the Court to grant leave to appeal should be exercised: "The rules leave the matter at large. Of course it is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood, but which had better not be defined in a case except so far as may be necessary for the decision of that case—otherwise there is the great danger, as it seems to me, of crystallizing into a rigid definition that judicial power and discretion which the Legislature and the Rules of the Court have for the best of all reasons left undetermined and unfettered. If the appellant is asking for what is evidently unjust, it is clear that he ought not to have it; if he is asking for what may lead to injustice, he ought not to have it except on the terms which would prevent any injustice possibly being done, and, for that reason, if any of the respondents here had shewn that injustice was likely to arise in their particular case, I think terms ought to have been imposed; but, if the person who is asking for leave to appeal after twenty-one days is

(1) 24 Ch. D. 488

C. A. 1906

COLES AND RAVENSHEAR, *In re.*

Collins M.R.

only asking for what is just, why should not he have it?" Therefore, where there has been a perfectly bona fide mistake, and no damage has thereby been done to the opposite party which cannot be sufficiently compensated by costs, I should, if the matter were at large, be of opinion that special leave to appeal should be granted. But in this case I do not feel myself at large in the matter; for, though the current of authority on the subject has not been uniform, there are certainly one or two, if not more, authorities, applicable to the present case, which appear to me to be practically binding upon us in this Court, and which compel me to arrive at a different conclusion from that to which I might in the absence of authority have come. The last case on the subject appears to be *In re Helsby*. (1) In that case, with reference to r. 130 of the Bankruptcy Rules, 1886, which provided that, "subject to the powers of the Court of Appeal to extend the time under special circumstances, no appeal to the Court of Appeal from any order of the Court shall be brought after the expiration of twenty-one days," Lord Halsbury L.C. said: "The rule gives the Court power 'under special circumstances' to extend the time for appealing. Here there are, in my opinion, no special circumstances. A mistake was made by the clerk of the appellants' solicitors. If that is a 'special circumstance,' then in every case in which a blunder has been made about the time for appealing, the time ought to be extended. I do not think that is the meaning of the rule. The notice of appeal was served too late, and I can see no ground for extending the time." Lopes L.J. adopted the opinion of the Lord Chancellor on the subject; and Davey L.J. said: "Upon the question whether the time ought to be extended, speaking for myself, I am inclined to adopt the view of the late James L.J., that a party has a vested right in an order of the Court in his favour, and ought not to be deprived of an advantage given to him by the rules, 'unless there has been on his part some conduct raising an equity against him,' or in a case of 'inevitable accident.' I cannot see that a mistake made by the solicitor of the party who is applying for an extension of the time is a sufficient ground for extending it." The only difference that I

(1) [1894] 1 Q. B. 742.

C. A. 1906

COLES AND RAVEN-SHEAR, *In re.*

Collins M.R.

can see between that case and the present is that there the mistake was that of a solicitor's clerk, whereas here it was that of counsel. That does not appear to me to make any difference in point of principle. It is to be observed that that case was decided several years after the case in which Bowen L.J. made the observations to which I have referred, and it is also in conformity with the view of James L.J. in *International Financial Society* v. *City of Moscow Gas Co.* (1) In the face of these decisions I find it difficult to apply to the present case any other rule than that adopted in those cases, although there may be authorities containing expressions which appear to tend in favour of the view which I should have preferred to adopt. Under these circumstances I think that the application must be dismissed.

COZENS-HARDY L.J. I regret that I feel obliged to arrive at the same conclusion. If the matter had been free from authority, I should have preferred, in a case where there has been an honest mistake by the legal adviser of a party, and nothing has taken place since the order appealed against which would make it unjust for the Court to interfere, or for which costs would not be an adequate compensation, to hold that the Court would be justified in giving special leave to appeal under Order LVIII., r. 15. The course of the authorities on the subject has been far from uniform. The current at one time ran very strongly in favour of the rigid application of the rule as to time. Then there was a turn of the tide. In the case of *Cusack* v. *London and North Western Ry. Co.* (2), decided by Lord Esher M.R., Bowen L.J. and Fry L.J., in which an application to extend the time for entering an appeal from a judgment of a county court was granted, Lord Esher M.R. pointed out that the view once taken in *Collins* v. *Vestry of Paddington* (3) had been departed from and could not then be supported, and said: "I think we must say that there is a discretion in such a case as the present which the Court cannot exercise loosely, but which should be exercised on a consideration of the circumstances of each case as it arises." Bowen L.J.

(1) 7 Ch. D. 241. (2) [1891] 1 Q. B. 347.
(3) 5 Q. B. D. 368.

C. A. 1906

COLES AND RAVEN-SHEAR, *In re.*

Cozens-Hardy L.J.

said: "There have been a number of cases since *Collins* v. *Vestry of Paddington* (1) in which the Court of Appeal has discussed that case. The conclusion arrived at has been that no rule fettering discretion should be laid down, and that the Court is not bound to act on any such rule. The case belonged to a period in which stricter views on this point were held; but since that time eminent judges, who were inclined at one time to lay down a severe rule upon the lines of which the discretion should be exercised, one and all came round to the now generally received opinion, that in such a matter no hard and fast line can be laid down, but that each case must be considered solely on its merits." That case followed the case of *In re Manchester Economic Building Society* (2), in which Brett M.R., as he then was, Cotton L.J. and Bowen L.J. had taken substantially the same view. It appears to me that those cases are really inconsistent with the earlier authorities. But then we come to the last case on the subject, *In re Helsby*. (3) It is true that in that case the later authorities to which I have referred do not appear to have been cited; but I do not feel it possible to distinguish the facts of that case from those of the present, and it appears to me to indicate a further change to some extent in the current of authority on the subject. I do not think that it would be right for us, in the face of that authority, to do that which would otherwise have been in accordance with my own view, namely, allow this application on terms as to costs.

FARWELL L.J. I agree in the conclusion at which the other members of the Court have arrived, but I must confess that I do not share the regret expressed by them. Whether counsel, in giving the opinion which he did, had the terms of the rule before him, or, as appears to me more probable, spoke merely on his recollection of those terms, I do not know; but it cannot, I think, be disputed that the terms of Order LVIII., r. 15, are perfectly clear, and really afford no room for any misconstruction of them in the present case. I agree that it is undesirable, generally speaking, to fetter a discretion given under the Rules

(1) 5 Q. B. D. 368. (2) 24 Ch. D. 488.
(3) [1894] 1 Q. B. 742.

C. A. 1906

COLES AND RAVENSHEAR, *In re.*

Farwell L.J

by hard and fast lines; but applications for special leave to appeal in circumstances similar to those of the present case are very numerous; and I must say that, in my opinion, it is better that a practice with regard to the exercise of discretion under such circumstances, which has grown up on the authority of eminent judges, should not be departed from, even although the result may be that some appeals, which might possibly be successful if heard, are never heard. The litigant in such a case has not been deprived of a hearing. His case has been heard in the Court below; and I think that, when, having failed to give notice of appeal in due time, he comes to this Court for special leave to appeal, he ought, as laid down by Cotton L.J. in *In re Manchester Economic Building Society* (1), to shew some special circumstance which entitles him to such indulgence. The learned Lord Justice said in that case: "This, I think, may be laid down, that, when the Rules and the Act of Parliament say that an appeal is to be within a certain time unless special leave shall be given by the Court of Appeal to appeal after that time, the Court does not grant leave unless there is something which, in the opinion of the Court, entitles the person who applies for extension of time to be relieved against the bar established by the Orders and the Act of Parliament. It has been called an equity, but that is not a proper term; it is something which entitles him to ask for the indulgence of the Court, to ask to be relieved from the legal bar that there is in the Orders and Act of Parliament." A mere slip or blunder on the part of a litigant's legal adviser cannot, in my view, entitle him to anything at all. That would have been my view apart from any authority, but I find very high authority for it in the judgment of James L.J. in *International Financial Society* v. *City of Moscow Gas Co.* (2) He there said: "The limitation of the time to appeal is a right given to the person in whose favour a judge has decided. I think we ought not to enlarge that time unless under some very special circumstance indeed, that is to say, if there has been any misleading through any conduct of the other side, as was mentioned in the analogous case of vacating

(1) 24 Ch. D. 488, at p. 499. (2) 7 Ch. D. 241.

C. A. 1906

COLES AND RAVENSHEAR, *In re.*

Farwell L.J.

inrolment which came before Lord Cottenham, and afterwards before Lord Chelmsford, in which it was laid down that the right of the suitor was ex debito justitiæ to keep his inrolment of the decree if it was made in due time, unless in very special cases. For instance, where there was anything like misleading on the part of the other side, or where some mistake had been made in the office itself, and a party was misled by an officer of the Court, or again, where some sudden accident which could not have been foreseen—some sudden death, or something of that kind, which accounted for the delay; in such cases leave might be given. But, simply where a man says, 'I looked at the order, and I bona fide came to the conclusion that I had up to a particular day, and I determined to take the last day I could,' then he has taken upon himself to calculate the last day, and, if he has made a mistake in calculating the last day, he must abide by the consequences of that mistake." Baggallay L.J. in the same case said: "This Court has before expressed an opinion that the mere fact of a misunderstanding by the parties concerned of the provisions of the Rules is not such a special circumstance as to induce the Court to give that special leave which is required to extend the time"; and Thesiger L.J. agreed. Again, there was an expression of the same opinion by three judges in the case of *In re Helsby* (1), to which the Master of the Rolls has referred. So that we have the opinion of six judges to the effect that a mistake as to the meaning of the rules is not a sufficient ground for granting special leave to appeal. Under these circumstances, it seems to me impossible for us to say that such a mistake, even on the part of eminent counsel, is a sufficient ground for granting this application.

Application dismissed.

Solicitors for applicant: *Law & Worssam, for Bond & Pearce, Plymouth.*

Solicitor for respondent: *James Morley.*

(1) [1894] 1 Q. B. 742.

E. L.