[HIGH COURT OF AUSTRALIA.]

E. RYAN & SONS LIMITED . . . . APPELLANTS; DEFENDANTS,

AND

ROUNSEVELL . . . . . RESPONDENT. PLAINTIFF,

H. C. OF A. 1910.

MELBOURNE, *March* 12.

O'Connor J.

Practice—Appeal from Supreme Court of State—Filing notice of appeal in High Court—Extending time—Rules of the High Court 1903, *Part I., Order XLV., r.* 6; *Part II., Section I., r.* 5; *Section V., r.* 1.

On the last day for filing in the High Court a copy of the notice of appeal from the Supreme Court of a State, which was within vacation, when under the Rules of the High Court 1903, Part I., Order XLVIII., r. 5, the offices of the High Court are open until one o'clock, a clerk of the appellants' solicitor attended at the High Court offices at three o'clock in the afternoon, handed to an officer of the High Court a copy of the notice of appeal for filing, and asked what the amount of the fees was. The officer asked the clerk to let the inquiry stand over until the next day. The clerk agreed to do so, and left the copy of the notice of appeal, with the date of filing blank, in the custody of the officer. On the following day the clerk paid the fees, but the officer refused to treat the copy as having been filed on the preceding day and dated the filing as of the later day.

Held, that the copy of the appeal was not filed within the prescribed time.

Rule 1 of Section V. of Part II. of the Rules of the High Court 1903 does not apply in such a case, and, therefore, the High Court cannot under Part I., Order XLV., r. 6, enlarge or abridge the time for filing the copy of the notice of appeal.

SUMMONS. In an action in the Supreme Court of South Australia, brought by William Benjamin Rounsevell against E. Ryan & Sons Ltd., judgment was given by *Homburg* J. on 10th January 1910 for the plaintiff. The defendants, desiring

to appeal to the High Court from this decision, on 31st January served notice of appeal on the plaintiff. On the same day, which was within the vacation, at 3 o'clock in the afternoon a clerk to the defendant's solicitor attended at the office of the High Court in South Australia, which was also the office of the Supreme Court of South Australia, and handed to an officer of the High Court, who was also an officer of the Supreme Court, copies of the notice of appeal for filing in each Court, and asked that officer the amount of the fees payable, apparently being ready to pay them if he knew the proper amount. The officer asked the clerk to let the inquiry as to fees stand over until the next day. The clerk agreed to do so and left the copies of the notice of appeal, with the date of filing blank, in the custody of the officer. On the following day the clerk attended and paid the fees, but the officer refused to treat the papers as having been filed on the 31st January, and insisted on dating the filing as of the 1st February.

The defendants now by summons applied to *O'Connor* J. for an order that the copies of the notice of appeal should be deemed to have been filed in the Supreme Court of South Australia and in the District Registry of the High Court in South Australia on the 31st January, or in the alternative, for extension of the time for filing those copies.

Dr. McInerney, for the appellants.

Starke, for the respondent.

O'CONNOR J. read the following judgment. This is an application for an order that copy notices of appeal shall be deemed to have been filed in the Supreme Court of South Australia and in the District Registry of this Court in South Australia on 31st January last, or in the alternative, for extension of time for filing these notices. The notice of appeal was served on the respondent on 31st January. That was the last day for serving the notice. Filing the notice copy of appeal and affidavit in the State Court and of the notice copy of appeal in the High Court within the prescribed time were as

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necessary to complete the appellants' right of appeal as was serving the notice on the respondent. The 31st January was therefore the last day for taking all these steps, and failure as to any one of them is fatal to the appellants' appeal as of right. The date mentioned was in vacation. By Order XLVIII., rule 5, the High Court offices are directed to be open in vacation until one o'clock. After that hour the officers are not bound to accept documents for filing. At three o'clock on that afternoon an officer of the Court was in fact in the office, and the appellants' solicitor's clerk handed him the document for filing. He asked as to the amount of fees required, apparently being ready to pay the amount there and then if he had known what it was. The Supreme Court clerk, who said he was in a hurry to get away to the Treasury, asked him to leave the papers and let the inquiry as to fees stand until next day, which he agreed to do, leaving the documents, with the date of filing blank, in custody of the clerk. On the following day the latter refused to treat the papers as filed on the 31st, and insisted on dating the filing as of the day on which they were officially received and stamped. If the handing in of these documents under the circumstances stated had taken place before one o'clock on 31st January, I should have been disposed to regard the filing as complete on that date, and to hold that the failure to complete by payment of fees and stamping arose rather from the default of the officer of the Court than of the party, and for that default the party on a well known principle of law should not be allowed to suffer: *Nazer* v. *Wade* (1), and *Evans* v. *Jones* (2). But the officer was not bound to accept the documents for filing at the time of the day on which they were handed in, and the arrangement to keep them until the following day must be regarded as entirely unofficial, and not as the act of the Court or its officers. I am, therefore, bound to take it that the notice was not filed in the High Court within the prescribed time. The question then arises whether I am justified under rule 7 (1) of the Rules of 12th December 1907 in applying to such a case the provisions of Order XLV., rule 6 which enable the Court or a Judge, in matters within the original jurisdiction of the Court, to enlarge or abridge the

(1) 1 B. & S., 728. (2) 2 B. & S., 45.

time limited by the Rules for doing acts and taking steps in proceedings. After fully considering the matter I am of opinion that I am not justified in so doing. The party who holds the judgment of the State Court has a vested right, which cannot be interfered with until the conditions which give the High Court jurisdiction to review it on appeal have been complied with. The provisions of the Rule of December 1907 relied on cannot on the face of them be brought into operation until there is an "appeal," that is to say, until the case has been brought within the cognizance of the High Court by the filing of the notice as required by the Rules. Until it has been brought to the cognizance of the Court there is no "appeal" in the High Court in respect of the State Court judgment. The decision of the Chief Justice of this Court in *Lever Bros.* v. *G. Mowling & Son* (1) is directly in point in that aspect of the case. For these reasons I must dismiss the application, and as the respondent is in no way to blame, the applicants must pay the costs. My order, therefore, is that the application be dismissed with costs.

I certify for counsel.

Summons dismissed with costs.

Solicitors, for the appellants, *McInerney, McInerney & Wingrove* for *W. J. Denny*, Adelaide.

Solicitors, for the respondent, *Moule, Hamilton & Kiddle* for *E. E. Cleland*, Adelaide.

B. L.

(1) 5 C.L.R., 510.