[THOMAS, ACTING C.J., CREAN AND SERTSIOS, JJ.]

1930.
June 21.
July 5.

THEMISTOKLES N. DERVIS

v.

CHRISTOFI P. TSERIOTI AND OTHERS (No. 2).

DERVIS
v.
TSERIOTI
(No. 2).

Civil Procedure—Application for leave to appeal to Privy Council—Cyprus (Appeal to Privy Council) Order in Council, 1927, Clauses 3 and 5—Time within which notice of application for leave to appeal must be served on opposite party.

Appellant applied for leave to appeal to the Privy Council from a judgment of the Supreme Court delivered on 24th February, 1930. Appellant's application was served upon respondents on 28th May.

Held, that notice of an application for leave to appeal to the Privy Council must be served upon the opposite party within 30 days from the date of the judgment.

Held further, that an appeal is "brought" when notice of the appeal is served upon the opposite party, and not by the mere filing of the notice in the office of the Court.

Clerides for respondents: The application is out of time. The judgment of the Supreme Court was delivered on 24th February, and the present application was only served on 28th May. Clause 5 of the Order in Council requires that service of notice of the application upon the opposite party must be made within thirty days from the date of the judgment. The meaning of Clause 5 is clear from the use of the term "intended application," which shows that the notice upon the opposite party must be given within the time specified and before the application is actually made.

Triantafyllides for appellant: The notice required to be given in accordance with Clause 5 is not notice of the petition but notice giving the opposite side the gist of the application which will later be made to the Court.

JUDGMENT:—

THOMAS, Acting C.J.: This is an application for leave to appeal to the Privy Council under Clause 3 of the Cyprus (Appeal to Privy Council) Order in Council, 1927. The judgment from which applicant seeks leave to appeal was given on 24th February, and notice of the present application was served upon respondent on 28th May. The respondent contends that under the terms of Clause 5 of the Order notice must be served upon him within thirty days of the date of the judgment. Clause 5 runs as follows:—

"Applications to the Court for leave to appeal shall be made by motion or petition within 30 days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application."

A party desiring to obtain leave to appeal must comply with certain conditions, viz., the application must be made by motion or petition; it must be made within thirty days of the judgment, and notice must be given to the opposite party. The notice to be given to the opposite

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party must be notice of his "intended application." The question arises as to whether the words "intended application" are to be construed as meaning the application made by filing the motion, or the hearing of the application by the Court on a date subsequent to the filing of the motion. "Intended application" means the application which the party proposes to make, and the only application which it is possible for any party to make is a motion which must be made to the Court within thirty days of the judgment. Therefore the notice to be given to the opposite party must be notice of the motion for leave to appeal. If the only notice to be given by the applicant for leave to appeal were notice of the hearing of the application, it would enable a party who desired to appeal to put in a formal motion for leave to appeal within the required time and then take no further step it may be for a year. In such a case when after a lapse of many months the respondent came to be notified of the hearing of the application he would learn for the first time that his adversary was seeking to reverse a judgment in his favour, and he would be completely taken by surprise. In the first place I do not think the grammatical construction of Clause 5 will bear such an interpretation, and secondly such a construction would defeat the main object of the clause which is to ensure that a party who has a judgment in his favour shall receive notice that his adversary is taking steps to reverse the judgment.

For the reasons given above I am of opinion that the notice given by the applicant in these proceedings to the respondent has not been given within the period required by Clause 5 of the Order and that, therefore, the application cannot be entertained.

CREAN, J.: I have had the advantage of reading the judgment of the Acting Chief Justice, and I fully agree with his decision that leave to appeal must be refused in this case.

By Clause 5 of the Cyprus (Appeal to Privy Council) Order in Council, 1927, applications to the Court for leave to appeal must be made within thirty days from the date of judgment.

The appellant herein within the prescribed time lodged in Court his notice of application for leave to appeal but he did not serve the respondent with notice of his intended application until two months later, and, therefore, it is argued by counsel for the intended respondent that the appellant is out of time and that his application should be refused on the ground that Clause 5 of the above Order in Council has not been complied with.

From the argument put to the Court on this point I gather that the appellant considers that he complied with Clause 5 when he filed his notice of application in the office of the Court.

The position makes it necessary to consider when an appeal is brought. It is brought when it is entered in the Court office; or, when notice is served on the respondent?

I am not sure if this point has been raised in this Court before; but there are authorities on the point which the Acting Chief Justice has brought to my notice and which we have considered together, and as we think the point is one of importance I intend to refer briefly to the reported cases on the point.

The first authority is the case of *Ex parte Viney* (1), and it lays down that "notice of appeal must be given within the time prescribed and the entry of the appeal before that time makes no difference." *Ex parte Saffery* (2) is a case that strongly supports the view that an appeal is brought when notice is served on the adversary. Jessel, M.R., remarks in this case:—"The meaning of appealing is giving notice to your adversary of your intention to appeal by serving upon him a notice of appeal. Unless that is done within 21 days (the prescribed time therein) the appeal is too late."

In *Christopher and another v. Croll* (3), the above case of *Ex parte Saffery* was followed and in the course of his judgment Lord Esher, M.R., states that "an appeal is brought when the notice of appeal is served on the respondent." The case of *In re Taylor, Ex parte Bolt* (4) also follows the principle that an appeal is "brought" when the notice of appeal is served within the prescribed time on the respondent.

The above cases seem to me to be very high authority for this Court deciding that an appeal is brought when notice of it is served on the respondent within the time prescribed and that the entry of the appeal in the office of the Court in time, without notice to the respondent, does not amount to bringing an appeal.

Here, the appeal was entered within the time prescribed; but notice was served on the respondent outside that time. Consequently I think that the appellant has not brought his application in accordance with Clause 5 of the above Order in Council in that he did not serve the respondent with notice within thirty days, and in my opinion it ought to be refused.

SERTSIOS, J.: I agree with the judgments that have just been delivered. In my opinion the procedure intended to be carried out by Clause 5 of the Order in Council is that the party applying should within thirty days of the day of the judgment bring to the notice of the respondent the fact that he is taking steps to appeal from the judgment. I agree that if the applicant had only to file a formal notice the opposite party might be taken by surprise, whereas the object of the rule is that any application by way of motion or petition to set aside the judgment shall within thirty days be brought to the knowledge of the party who has the judgment in his favour.

In my opinion this application is out of time and, as such, it should be dismissed with costs.

Application dismissed.

(1) (1877) 4 Ch. D. 794.
(2) (1877) 5 Ch. D.
(3) (1886) 16 Q.B.D.
(4) (1909) 1 K.B. 103.