ORIGINAL CIVIL.

Before Mr. Justice Scott.

1885 *April 7.*

HORMUSJI CURSETJI ASHBURNER (PLAINTIFF) *v.* BOMONJI CURSETJI ASHBURNER AND OTHERS (DEFENDANTS).*

Practice—Final report of Commissioner for taking Accounts—Motion to vary report—Limitation—Rules of Court, Chap. 6, Rule 6 (ed. 1867).

Held that under the rule which requires that a motion to vary the report of the Commissioner for taking Accounts (Rules of Court, Chap. 6, Rule 6 (ed, 1867)) shall be made within twenty days after the filing of the report, the Court has a discretion to extend the time for making such motion.

Motion by the defendants to extend the time within which to move to vary the Commissioner's report.

This suit had been referred to the Commissioner for taking Accounts. He made his final report, which was filed on the 25th February, 1885. The defendants filed exceptions to the report on the 16th March, 1885, but did not move to vary or discharge it within twenty days from the date of its being filed, as required by Rule 6 of Chapter VI of the Rules of Court (ed. 1867)[1].

The case accordingly appeared on the Court list on the 23rd March "for further directions and costs on Commissioner's general report." The defendants then gave notice to the plaintiff that they were not prepared to go on, and would move for an extension of time. The motion came on before Scott, J., on the 26th March, 1885, and was adjourned in order that the defend-

* No. 478 of 1879.

(1) Rule 6.—When any report of the Commissioner for taking Accounts or local investigations hereafter made in pursuance of any order of the Court shall have been signed by him, the same shall be forthwith transmitted by him to the Prothonotary, and the report shall thenceforth be binding on all the parties to the proceedings, unless discharged or varied, either at chambers or in open Court, according to the nature of the case, upon application by summons or motion, within twenty days after the filing thereof, or such further time as a Judge or the Court shall allow. No person shall be allowed to appear in support of the report, or take any proceeding in the suit founded upon it, until the fee for filing it shall have been paid to the Prothonotary. The present practice, according to which the Commissioner by issuing a warrant to sign report gives notice of his being about to sign it, shall be continued,

ants might file affidavits showing the cause of their delay in making the application. The motion now came on for hearing.

Macpherson for the defendants.—I ask that the time allowed by the rule be extended. Up to the last moment negotiations were going on for the settlement of the case, and the defendants allowed the time to expire. The circumstances are such as to justify an extension of time if the Court has power to extend it. The case appeared on the list for hearing much sooner than was expected, and the defendants were taken by surprise. I submit that the Court has power to extend the time, although the twenty days prescribed by the rule have expired. There is no reported case upon the point. I submit that an application under the last clause of section 368 of the Civil Procedure Code (XIV of 1882) is analogous. There it is clear that an application may be made to the Court after the prescribed time has expired.

Inverarity for the plaintiff, *contra*.—This application cannot be granted. The time limited by rule for moving to vary it, has expired. We contend that, if an extension of time is required, an application to extend the time should be made before the prescribed time has elapsed. The application is now too late. No application having been made within the prescribed time, the report has now become binding, and cannot be varied. Two questions arise: first, has the Court power now to extend the time? Second, assuming that it has power, do the facts of this case justify such extension? I will deal with the second question first. It is plain, from the affidavits, that the time was permitted to expire without any motion to vary the report being made, or any motion to extend the time for doing so—not because the defendants were misled by the expectation that the negotiations for a compromise of the suit would be successful, but because they mistook the meaning of the rule (counsel commented on the affidavits). Such a mistake is no ground for granting this application—*Craig* v. *Phillips*[1]; *In re Mansel*[2].

But, even assuming the facts were otherwise, we contend the Court has no power, under the rule, now to extend the time—

(1) 7 Ch. Div. 249. (2) 7 Ch. Div. 711.

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Whistler v. *Handcock*[1]; *Wallis* v. *Hepburn*[2]; *King* v. *Davenport*[3]. At the end of twenty days the report is binding, and we are entitled to procure the necessary certificate from the Prothonotary and come to the Court to have the report confirmed. Section 368 of the Civil Procedure Code is not analogous, for from the very nature of the case the application, there provided for and permitted, could not be made until after the expiration of the appointed time. There is nothing in the rule applicable to this case analogous to the words of that section. Section 549 of the Code is more analogous, and it has been held that an application under that section must be made within the prescribed time—*Haidri Bâi* v. *The East Indian Railway Company*[4].

Macpherson in reply.—Section 368 of the Code is analogous. The words there are "the suit shall abate unless, &c." In the rule the words are "the report shall be binding, unless discharged or varied." It is binding, unless the Court in its discretion, and upon sufficient cause shall vary it, either within the time appointed or beyond it. The Court is master of its own discretion, and will not force a report upon the defendants if it thinks they were under an erroneous impression.

As to the argument that a mistake by the parties as to the meaning of the rule is no ground for granting this application, that is begging the question. We say they did not mistake its meaning and that on its true construction the Court has power to grant this application.

SCOTT, J.—I am of opinion, in the first place, that I have a discretion under this rule to give further time to the defendants, although they did not apply to discharge or vary the report within the twenty days. The circumstances must be, of course, strong to justify a departure from the rule, which is, that the report is binding on all the parties, unless an application is made to discharge or vary it within twenty days of its filing, or within such further time as the Judge shall allow. In the present case three causes are offered of the irregularity: one by

(1) 3 Q. B. D., 84 (2) 3 Q. B. D., 84, note.
(3) 4 Q. B. D., 402. (4) I. L. R., 1 All., 687.

Mr. Inverarity, that the parties were ignorant of the law, which would be no excuse: two by Mr. Macpherson, that the defendants were led beyond the time by negotiations for a settlement, and that they could not bring the matter on without copies of the notes of evidence, which even yet have not been obtained. Now I have re-read the affidavits, and still think the chance of settlement was uppermost in the minds of the parties, and caused the delay, and not any mistake in the law. They did not, when the negotiations fell through, take the right course in filing exceptions. They ought to have applied to discharge or vary the report. But still they took an active course to protect their interests, and could not bring on the matter, as the notes of evidence had not been furnished. I am very loth to deprive parties of their appeal by reason of an irregularity which was caused by a desire on both sides to stop further litigation. These limitations to the time of such applications, like all such limitations of rights, must, where the language is ambiguous, be construed in favour of the right to proceed (I. L. R., 1 Bom., 19-22, *per* Westropp, C. J.) The language of the Act is doubtful as to whether the application to extend the time must be made within the twenty days. I, therefore, decide in favour of the right to proceed.

The question remains, whether the facts justify me in sanctioning any extension. On the whole, I think Mr. Macpherson has made out a case for the application of the discretion given me by the rule. I, therefore, postpone the matter till after the May vacation.

Attorneys for the plaintiff.—Messrs. *Nanu* and *Hormasji*.

Attorneys for the defendants.—Messrs. *Ardesir* and *Hormasji*.