

to extend the time for appealing from the order, and to the power of the Court, upon appeal, to rescind or vary the order. Upon application to Middleton, J., the time for appealing was extended (1 O. W. N. 877); and the Divisional Court entertained the appeal and made the order now in appeal. That Court might have refused to entertain the appeal, either on the ground that the plaintiff, by acting under the order to the extent to which he had done, had waived his right to appeal, or that by his delay the plaintiff had forfeited all right to an extension of time.

These objections were matters for the consideration of the Divisional Court, but, notwithstanding them, it decided, in the exercise of its discretion, that the appeal should be heard.

It is not correct to say that the action was out of Court. The result of the various decisions, some of which, however, do not seem to be quite in accord with the general trend, appears to be that in a case like the present the action was not, by reason of the lapse of time for performing the condition, out of Court for all purposes. It was out of Court to the extent of disabling the plaintiff from taking any step in the action other than towards procuring an extension of time for performance of the condition, or, failing that, for an extension of time for appealing from the order. The order was not in any sense a dismissal of the action upon the merits, though the effect would be the same in case of non-compliance with the condition.

Then as to the order made by the Divisional Court. It was made in virtue of its discretionary power. It is no more than doing what is authorised by Con. Rule 353, and the defendants do not suffer serious prejudice.

The slip which led to the money being tendered forty minutes after the time appointed by the order, as varied by the trial Judge's direction, seems not to have been due to intentional neglect.

The order appealed from should be allowed to stand, with such extension of time as may be necessary to enable the plaintiff now to pay the costs, say within twenty-four hours from the issue of the certificate of this Court.

The costs of the appeal must be borne by the defendants.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A., dissented, being of opinion that the Divisional Court had no power to make the order appealed against.