parties besides the parties to this litigation. Although under the recent statute, 42 Vict. (O.) c. 20, s. 4, the omission to give notice no longer invalidates a sale, but is a mere ground for claiming damages, still the construction which has been placed upon the R. S. O. c. 104, may seriously affect the question of damages. The leave asked, however, is an indulgence, and can only be granted on payment of the costs of the motion, and on the undertaking to set the cause down at the next regular sittings of the Court of Appeal.

Leave to appeal granted on payment of costs.

RUMOHR V. MARX.

Appeal to Divisional Court—Leave to appeal to Divisional Court after time elapsed—Mistake of solicitor's clerk—Rule 522—Time for setting down.

Where a defendant's solicitor had notified the plaintiff's solicitor of his intention to appeal from a judgment to the Divisional Court, and gave instructions to his clerk to set the cause down; but the clerk, by mistake, supposing that the seven days mentioned in Rule 522 were not clear days, suffered the last day to pass without setting the cause down, and on applying the following day to set the cause down found he was too late.

Held, that this was no ground for granting leave to set the cause down after the time had elapsed.

Held also, that the seven days mentioned in Rule 522 are "clear days."

[BOYD, C., PROUDFOOT and FERGUSON, JJ.—Dec. 7.

G. D. Boulton, Q.C., for defendant, moved for leave to set this cause down to be heard before the Divisional Court. He read affidavits showing that the defendant's solicitor had informed the plaintiff's solicitor of his intention to appeal; and that the defendant's solicitor had, within proper time, given his clerk instructions to set the cause down to be heard before the Divisional Court, but that the latter, thinking that the seven days mentioned in Rule 522 were not clear days, had suffered the last day for setting the cause down to pass without doing so, and on applying to the Clerk of Records and Writs on the following day, that official had refused to set the cause down, on the ground that the preceding day was the last day causes could be set down. He contended that the proper construction of Rule 522 did not require the cause to be set down seven "clear days" before the commencement of the Sittings. He referred to Rule 600 of the Court of Appeal, and argued that without such a Rule "at least seven days" does not necessarily mean "clear days."

The CHANCELLOR.—That Rule merely affirms what was previously the judicial construction of the words "at least," as determined in *Beard* v. *Gray* and other cases.

Boulton.—Even if the time had elapsed the Court may, under Rule 462, extend the time.

E. D. Armour, for plaintiff.—The plaintiff has acquired a vested interest in the judgment The mistake of the defendant's solicitor's clerk is no ground for depriving the plaintiff of this right He referred to *Mitchell* v. *Forbes*, 9 Dowl. 527; *The Queen* v. *Justices of Shropshire*, 8 Ad. & E. 173; *Beard* v. *Gray*, 3 Chy. Ch. R. 104; *Hayes* v. *Hayes*, 18 C. L. J. 157; *Borden* v. *Birmingham*, 7 C. D. 24; *Re Ambrose L. T. & C. Co.* 8 C. D. 643.

The CHANCELLOR.—We are all of opinion that no sufficient ground is shown for granting the leave which is asked. We are also of opinion that the proper construction of Rule 522 is that the words "at least seven days" mean clear days. The motion is therefore refused with costs, but without prejudice to any application the defendant may be advised to make for leave to appeal to the Court of Appeal.

Motion refused with costs.

Referred to Hughes v. Boyle, 5 Ont. 395.

HUGHES V. HUGHES.

Appeal—Discontinuance—Costs—Appeal bond—Forfeiture—R. S. O. c. 38, s. 41.

Where an appellant gave notice of discontinuance, and the respondent thereupon, without taking out any order dismissing the appeal, proceeded and taxed his costs, and then applied for and obtained an order for the delivery out of the appeal bond for suit.

Held, that the order for the delivery out of the bond was regular.

Semble also, that no order for the payment of the respondent's costs was necessary as a condition precedent to suing on the bond.

[BOYD, C., PROUDFOOT and FERGUSON, JJ.—Dec. 7.

Donovan, for the plaintiff and his surety in an appeal bond, appealed from the order of Ferguson, J., directing that the appeal bond be delivered out for suit. The plaintiff had given notice of discontinuance of the appeal; the defendants had thereupon, without obtaining any order for costs, procured their costs to be taxed,