1903.
May 18 and June 1.

EMALISHAMY *v.* EGO APPU.

D. C., Galle, 6,222.

Petition of appeal—Appealable time—Date of judgment—Subsequent entry of decree—Civil Procedure Code, ss. 5, 188, 754—Leave to appeal.

The period of ten days fixed by section 754 of the Civil Procedure Code for appealing runs from the date of the judgment pronounced by the Court.

The petition of appeal must be presented to the Court of the first instance within that period. The entering up of the decree is a ministerial act of the Court, and under section 188 the decree, although entered at a later date than the date on which the judgment has been pronounced, must bear the same date as the judgment and be in conformity with the judgment.

In the event of there being great delay in preparing and signing the decree, whereby the appellant was prevented from filing his petition within the time fixed by section 754, the Supreme Court can always give leave to appeal notwithstanding lapse of time.

THIS was an application to the Supreme Court made by the first and second defendants for a direction to the District Judge of Galle to accept the petition of appeal tendered by them on the 6th day of June, 1902, or, in the alternative, for leave to appeal, notwithstanding lapse of time, against the judgment pronounced on 22nd May, 1902. The application was considered on 18th May, 1903, by a Full Bench consisting of Layard, C.J., Middleton, J., and Grenier, A.J.

H. Jayawardene appeared for the applicants. The appealable time should be calculated from the day on which the drecee was

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entered, and not from the day on which the judgment was pronounced. For certain purposes the decree must bear the same date as the judgment, but the decree may be entered on a different date.

Cur. adv. vult.

1st June, 1903. MIDDLETON, J.—

This was an application by the defendants that this Court would direct the District Judge to accept the petition of appeal presented by them and forward the same to the Supreme Court, or, in the alternative, that the defendants be allowed to appeal notwithstanding lapse of time.

The judgment in the action was pronounced on the 22nd May, 1902, and on the 26th May the first defendant went to the District Court to file an appeal, but found that the decree was not yet entered.

On the 6th June he tendered his petition of appeal, calculating his limit of ten days, under section 750 of the Civil Procedure Code. from 26th May, and for him it was contended by counsel that he was in time within the meaning of the words of that section.

The words of the section are " within a period of ten days..... from the date when the decree or order appealed against was pronounced."

Under section 188 the decree, although entered at a later date than the judgment has been pronounced, must bear the same date as the judgment and should be in conformity with the judgment, and it is against the formal decree that an appeal is in practice directed, as the decree contains the operative effect of the judgment.

Taking into consideration the meaning of the word " decree " as it is used in section 188, it is clear to me that the word " decree " in the fourth line of the 2nd paragraph of section 754 has been transposed by the Legislature for the word " judgment," inasmuch as a " decree " in its technical sense, under section 188, is not pronounced but entered, being in effect the formal exposition of the Court's judgment.

I think, therefore, that the defendant could not be deemed to be within time in presenting an appeal on the 6th June on the basis that a decree which was entered on the 26th May, upon a judgment pronounced on the 22nd May, was in effect a decree pronounced on the 26th May.

In dismissing the defendant's application we relegate him to his alternative remedy.

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LAYARD, C.J.—

The question to be decided here is whether the period of ten days fixed by section 754 of the Civil Procedure Code is to run from the date the judgment and decree bear; or from the date on which it is alleged the decree was drawn up and entered.

It is pointed out by applicant's counsel that " judgment " and " decree " are separately defined in section 5 of that Code, and it is also stated by him that this Court has held that until a decree is entered no apepal will lie against a final judgment of the lower Court.

It is true that " judgment " and " decree " have separate meanings assigned to them by section 5 of the Code; the Legislature has, however, in assigning those meanings, been careful to say that those meanings are to apply merely when there is nothing in the context repugnant thereto.

It appears to me, therefore, that we are entitled to examine the provisions of sections 754 carefully to see whether there is anything in the subject or context repugnant to assigning to the word " decree " the meaning it would ordinarily have under section 5. In the 1st paragraph of that section the word " decree " has been clearly used in its ordinary meaning and as defined by section 5, whilst in the 2nd paragraph it has been used in a different sense, for that paragraph provides for the appeal being presented within a fixed period from the date when the decree was pronounced. The Code nowhere provides for the pronouncing of a decree, and, as a matter of practice, it is admitted that a decree is never pronounced. What is pronounced is the judgment (see section 188); the decree merely, according to the Code, embodies the order which has been made in the judgment. It has to bear the same date as the judgment and to specify in precise words the order which is made by the judgment, and it has to be signed by the Judge.

The Code never contemplated that the decree should be pronounced, neither does it make provision by which this Court could ascertain when the decree was actually signed by the Judge, for it nowhere provides for the Judge, when signing the decree, affixing to it the date when he attached his signature to the decree.

If we were to read the section as suggested by appellant's counsel, the period fixed by it would never begin to run, because a decree, as a matter of fact, is never pronounced, and no provision has been made for its being pronounced. A judgment, on the other hand, has by the Code to be pronounced in open Court, and section 184 is careful to provide that it shall be pronounced either on the day of trial or some future day,

of which the parties or their proctors shall have due notice, so that it may not be delivered behind the back of any one interested in the case. On the other hand, the entering up of the decree is a ministerial act of the Court, and no provision is made for giving notice to the parties interested of the drawing up and signing of the decree by the Judge.

It is no hardship to hold that the period must run from the date of the pronouncing of the judgment, because a person who desires to appeal can always ask the Judge to enter up the decree promptly for the purpose of allowing him time to prepare his petition of appeal, and has always the right to apply to this Court for leave to appeal notwithstanding the lapse of time; and this Court, in the event of his establishing to its satisfaction that there was great dilatoriness on the part of the Court of first instance in preparing and signing the necessary decree, by which the appellant was prevented in filing his petition of appeal within the period fixed by section 754, can always allow the appeal.

In my opinion the proper construction to be placed on section 754 is that the petition of appeal must be presented to the Court of first instance by the appellant or his proctor within the period fixed by that section, and that the period so fixed is to begin to run from the date when the judgment was pronounced by that Court. The appeal in this case is therefore out of time, not having been lodged within ten days from the date when the judgment was pronounced by the District Judge.

I agree with my brother Middleton that the appellant's application for a direction by this Court to the District Judge to accept his petition of appeal must be dismissed, but that he may be allowed to proceed with his application for leave to appeal notwithstanding the lapse of time.

GRENIER, A.P.J.—

I agree with the rest of the Court that the appealable time must date from the day the judgment is pronounced, and not from the day on which the decree is signed. I may add that as a matter of practice the decree is seldom or never drawn up on the same day that the judgment is delivered, although it has to bear the same date as the latter. The judgment indicates, what the form and character of the decree will be in, I may safely say, almost every case. For instance, when a judgment is pronounced in favour of a plaintiff, the words usually employed are: "Let judgment be entered for plaintiff as claimed with costs." The drawing up of the decree thereafter is, as my lord

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has pointed out, simply a ministerial act. The decree itself is never pronounced, as it is signed by the Judge after the judgment is pronounced. The decree is sometimes, as a fact, not presented for signature to the District Judge for several days after the judgment has been pronounced. I do not see any practical difficulty in regard to a decree not being signed promptly and on the same day the judgment is pronounced, because when an appead is filed the decree, if not drawn up, or unsigned at the time, may at once be perfected and sent up to the Appeal Court. I hardly think that any appellant really desires to ascertain what the exact terms of a decree are before filing his petition of appeal. The judgment will always give him the necessary information for the purpose, and the appeal is always against the judgment and decree.