

FULL COURT

BEFORE:

The Chief Justice (Sir Walter Campbell)

Mr. Justice Sheahan

Mr. Justice Shepherdson

BRISBANE, 22 SEPTEMBER 1982

RODNEY GEORGE COTTLE

v.

KEVIN JOHN HENTZSCHEL

Ex parte: RODNEY GEORGE COTTLE

JUDGMENT

THE CHIEF JUSTICE: The respondent was charged with an offence against section 30 of the Dental Act 1971-1973, namely that between 24 October 1980 and 18 September 1981 at a place in Queensland not then being a person registered under the Dental Act or a medical practitioner and not then being a person to whom the provisions of section 30(8) of the Dental Act applied practised dentistry contrary to the Acts in such case made and provided. The matter came on for hearing before a magistrate at Brisbane on 3 March 1982, and after hearing evidence, on 4 March 1982 he dismissed the complaint. An affidavit was filed on behalf of the

applicant in support of an order nisi to review the decision, and such affidavit was filed in the Registry of the Supreme Court on 31 March 1982. Also on that day an entry was made, presumably by the solicitors for the applicant, in the judges' chamber book on a page dated "Tuesday, 6th April". That entry was as follows:

"O.S.C. 10/82

RODNEY GEORGE COTTEL -v- KEVIN JOHN HENTZSCHEL

Application for Order to Review

pursuant to Section 209 of the

'Justices Act'

O'Shea Corser & Wadley

Solicitors for the Appellant

31/3/82"

Counsel for the applicant appeared before a master on 6 April 1982, read the affidavit filed on 31 March 1982, and the master that day granted an order nisi to review returnable before the Full Court.

The respondent has taken a preliminary objection to this appeal on the ground that the appeal is out of time. Counsel for the respondent referred to section 209 of the Justices Acts, to the fact that the decision was given by the magistrate on 4 March 1982 and to the fact that the application for the order to review was made on 6 April 1982. Section 209 of the Justices Acts provides that when any person who feels aggrieved by any conviction or order of justices "shows by affidavit to a judge of the Supreme Court sitting in Court or chambers a prima facie case of error or mistake in law or fact on the part of such justices or justice ... the judge may ... upon application made within 28 days from the making of such conviction or order ... an order (hereinafter called an 'Order to Review') ..."

In this case no question arises as to the sufficiency of the material placed before the master in support of the order nisi to review. The question for our determination is whether the entry in the chamber book being made within the time but for a hearing date outside the time is sufficient compliance with section 209. It is not as though there is no authority on this point. In *Goondiwindi Land and Investment Company Pty. Ltd. v. Cory* 1953 Q.W.N. 47 the application was not entered in the chamber book within 28 days of the making of the magistrate's order, although an affidavit in support of that application was filed within the 28 days. The application came on for hearing about six or seven days beyond the expiration of the 28-day period, and Mr. Justice Philp held that it was out of time and refused an order to review. The applicant renewed his application to the Full Court pursuant to section 210 of the Justices Acts. Macrossan C.J., with whose reasons and decision Mack and Hanger JJ. agreed, delivered short reasons for judgment. His Honour said:

"It is admitted that the matter was not entered into the chamber book before the expiration of twenty-eight days of the making of the order by the stipendiary magistrate which was sought to be attacked and the fact that an affidavit had been filed within twenty-eight days on behalf of the intending appellant does not operate to cure that objection."

That decision of this Court is authority for the proposition, if one be needed, that the mere filing of the affidavit within the time does not mean that an application was made within that period and in accordance with section 209. That decision of this Court was considered by Mr. Justice Townley in *Hunt v. Karydas, Ex parte Hunt* 1954 Q.J.P.R. 156. In that case the applicant had filed the required affidavit for an order to review within the 28 days and had set the matter down in the chamber book within the 28 days also, but had set it down for hearing in that book on a date later than 28 days. This case, of course, is really precisely in point. His Honour, after considering

the Goondiwindi Land and Investment Company case to which I have referred, said:

"I am afraid that I cannot read this judgment - as is suggested for the applicant - as deciding that the application would have been made in time if the entry in the chamber book had been made within the 28 days for hearing on a day after the expiration of that period."

His Honour also considered certain other authorities, held that the application was not made in time and therefore refused it.

I agree with the views expressed by Mr. Justice Townley in that case. I think it unnecessary for me to refer to any of the other authorities that have been cited to us by counsel in argument other than to a passage from the reasons for judgment of Mr. Justice Gibbs, with whose reasons on this point Stanley and Wanstall, Justices, agreed, in *Donkin and Donkin Ex parte Donkin* (1963) Queensland Reports, 36 at p. 43. The passage is, "A judge may only grant the order to review if an application has been made within 28 days" In my opinion the entering of the matter in the chamber book within 28 days for hearing, to be heard on a date after the expiration of that period, does not amount to the making of an application to a judge.

Some mention was made in argument about the provisions of Rules of Court dealing with the chamber book, and I simply refer to Order 87 rule 27 of the Rules of the Supreme Court which provides that matters of this sort "shall unless the court or a judge otherwise orders, be set down not later than 4 o'clock in the afternoon on the day preceding the day on which such matter is to be heard in a book or paper which shall be kept for that purpose in the registry". Rules of Court setting forth the legal arrangements for the ensuing year are made annually and, for example, in the Rule of Court containing legal arrangements for 1982, Rule 1 provides that all applications such as this shall be filed and notice thereof

(including adjournments) shall be entered in the chamber book or master's chamber book before 4 p.m. on the day preceding the day on which the matters are to be heard. The Rule also provides that the registrar shall send to the associate or master's clerk a list of matters entered in the chamber book together with all affidavits and papers connected therewith, and provides that all affidavits and papers in support of such application must be filed before 9.30 a.m. on the day set down for the hearing. Those Rules relating to the entering of applications in the chamber book for hearing are, of course, directory in nature and I cannot see that they advance any further the submission that the entering of a matter in a chamber book simpliciter is the making of an application.

The day set down for the hearing of this application was 6 April 1982. No application was made to a judge or master prior to 6 April 1982. In short, no application was made to a judge or master within the period of 28 days required by section 209. Because of the reasons which I have given, I would uphold the preliminary objection and refuse the application.

MR. JUSTICE SHEAHAN: I agree.

MR. JUSTICE SHEPHERDSON: I agree. I would only like to add that under Order 65 rule 4 applications for orders nisi may be made without summons and it cannot be suggested the filing of the affidavit is the making of the application.

THE CHIEF JUSTICE: The order of the Court is that the application is refused with costs.
