SIMPSON v TURTON (1965) ZR 79 (CA)
COURT OF APPEAL
BLAGDEN CJ
4th June 1965
Flynote
Civil procedure - Appeal - revival of appeal 'deemed to be dismissed' - rule 54 of Court of Appeal Rules construed:
Headnote
An appeal to the Court of Appeal which is 'deemed to be dismissed' under rule 54 of the Court of Appeal Rules for failure to lodge the appeal within the prescribed time may be revived at the discretion of the Court of Appeal.
Cases cited:
(1) *St Leon Village Consolidated School Dist v Ronceray* [1960] CLY 3044; (1960) DLR (2nd) 32.

(2) *R v Norfolk County Council* (1891) 60 L.J.Q.B. 379.

Statute construed:
Court of Appeal Rules (1965, Cap. 12), rr. 53, 54.
Kemp, for the applicant
Hadden, for the respondent
Judgment
Blagden CJ: This is a summons by a defendant who is a would be appellant in a civil action for an order that he be at liberty to file the record of appeal notwithstanding that the time for so doing has expired. The applicant's difficulties in this matter arise from the provisions of rules 53 and 54 of the Court of Appeal Rules (Cap. 12).
These rules are in the following terms:

' 53. Subject to any extension of time and to any order made under rule 75 the appellant shall within thirty days after filing notice of appeal lodge the appeal by filing in the Registry five copies of the record of appeal, paying the prescribed fee and lodging in Court the sum of one hundred pounds as security for the costs of the appeal.
54. (1) If the appeal is not lodged as aforesaid the appeal shall be deemed to have been dismissed. Subject to the provisions of rule 62, the appellant shall pay to the respondent the costs of the abortive appeal.
(2) When an appeal is deemed to have been dismissed under the provisions of sub-rule (1) the Registrar shall forthwith give notice thereof to all parties.'

There is a further sub-rule (3) which is of no relevance here. It is to be noted that rule 54 (1) is expressed in mandatory terms, so that, *prima facie*, where the appeal is not lodged in time 'the appeal shall be deemed to have been dismissed'; and then the giving of the notice required by sub-rule (2) follows as a matter of course.
[1] The problem which is posed is whether - and if so how - an appeal which is deemed to have been dismissed under the provisions of rule 54 can be revived so as to enable the appellant to apply for an extension of time in which to lodge his appeal.
I have come to the conclusion that the appeal can be so revived for the following reasons:
If the Legislature had intended that the consequence of an appellant being late with the lodging of his appeal should be that the appeal should be finally dismissed, nothing would have been easier than to have said so in place of the words 'shall be deemed to have been dismissed'. The inclusion of what I might conveniently describe as a 'deeming process' clearly indicates a different intention on the part of the Legislature.
In my view, when a statute makes use of a deeming process as here, there may be established thereby a conclusive or a rebuttable presumption that the state of affairs is as it is deemed to be. Whether the presumption will be conclusive or rebuttable will depend upon the context in which the words are used, having regard - and this is most important - to the purpose to be served by the statute and the necessity of ensuring that it is so served. *See* the Canadian case of *St Leon Village Consolidated School District v Ronceray* [1960] CLY 3044; (1960) DLR (2nd) 32. *See also per* Cave J in *R v Norfolk County Council*, 1891, 60 L.J.Q.B. 379, at page 380, cited in Volume 2 *Words and Phrases*, at page 48.

My view is fortified by the wording of rule 67 (3). The marginal heading to this rule is 'Amendment and default', and sub-rule (3) is in these terms:

' If the record of appeal is not filed within the prescribed time, or if any copy thereof is not served within the prescribed time and no sufficient ground is shown for the delay, the appeal may be dismissed.'

Here there is no deeming process, but there is also no mandatory dismissal. Mr. Kemp, for the applicant, argued that there was a conflict between this provision and rule 54 (1). I do not think there really is. Rule 54 (1) is dealing with the lodging of the appeal and 67 (3) with filing and service. Rule 67 (3) simply provides that in the circumstances prescribed the appeal may be dismissed. Such a dismissal would be likely to be final, but I put it no higher than that. The jurisdiction to dismiss is discretionary, and I apprehend that it would not be exercised except in a case where final dismissal was justified.
In all the circumstances here I have come to the conclusion that this appeal can and should be revived. All that is required is that the notice deeming it to have been dismissed be set aside and that the applicant be granted an extension of time in which to lodge his appeal. The summons only asks for the latter relief but it has been intimated to me by counsel on both sides that no objection would be taken to my allowing an amendment to the summons so as to get over that difficulty.

BLAGDEN CJ
I accordingly give leave to amend the summons without the need for any supporting affidavit so that the material particulars read as follows:

' Let all parties concerned appear on the hearing of an application on the part of defendant for - (1) an order setting aside the notice dated the 26th day of April, 1965, deeming the appeal dismissed with costs to the respondent in accordance with rule 54 (1) of the Court of Appeal Rules; (2) for an order granting an extension of time of fourteen days in which to file the record of appeal notwithstanding that the time for doing so has expired.'

On that summons, as amended, I make the orders as prayed. The applicant must pay the costs of the application.