LOUIS ADOLPHE LORD (PETITIONER)...APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC (APPEAL SIDE).

1900
*Mar. 8.
1901
*Feb. 19

Appeal—Expiration of time limit—Forfeiture of right—Condition precedent—Ouster of jurisdiction—Objection taken by court—Waiver—Arts. 1020, 1209, 1220 *C. P. Q.*

The provisions of articles 1020 and 1209 of the Code of Civil Procedure of the Province of Quebec, limiting the time for inscription and prosecution of appeals to the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the court to hear the appeal and they may therefore be waived by the respondent. *Cimon* v. *The Queen* (23 Can. S. C. R. 62) referred to (1).

Art. 1220 *C. P. Q.* applies to appeals in cases of Petition of Right.

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick and King JJ.

(1) Compare *Park Iron Gate Co.* v. *Coates* (L. R. 5 C. P. 634). REPORTER.

1900

LORD v. THE QUEEN.

APPEAL from a judgment of the Court of Queen's Bench, Province of Quebec (appeal side), whereby the court, *ex mero motû*, dismissed the petitioner's appeal from the judgment of the Superior Court, District of Quebec, by which his Petition of Right had been dismissed with costs.

In a suit of *Marchand* v. *The Attorney-General of Quebec*, alleged to be identical with that of the present appellant, the Petition of Right had been dismissed by the Superior Court, prior to the dismissal of appellant's petition, and, at that time, an appeal in the case of *Marchand* v. *The Attorney-General of Quebec* was pending in the Court of Queen's Bench at Quebec. It was accordingly agreed between the Government of Quebec and the petitioner that they should await the decision on the appeal in *Marchand* v. *The Attorney-General of Quebec*, and that, in the meantime, proceedings should be stayed in the present cause. Subsequently judgment was rendered upon the appeal in *Marchand* v. *The Attorney-General of Quebec*, reversing the Superior Court judgment, but not until after the expiration of the delay limited for the prosecution of appeals by articles 1020 and 1209 of the Code of Civil Procedure.

An order of the Lieutenant-Governor-in-Council was passed, reciting the facts above mentioned and that, in consequence, the petitioner had abstained from the prosecution of an appeal in his suit and that, owing to legal questions involved, the most expedient manner to obtain a proper decision was to permit the petitioner to take an appeal from the judgment of the Superior Court and to waive the delay expired for instituting said appeal and that, in thus renouncing said delay, it was expressly understood that Her Majesty, represented by the Government of the Province of Quebec, did not in any manner admit that the said Petition of Right was well founded, or petitioner entitled to

1900

LORD
v.
THE
QUEEN.

recover any sum from Her Majesty, or that his action was identical with that of Marchand against the Government, or that the evidence in the two cases was identical, or that the judgment of the Superior Court was in any way erroneous.

The Court of Queen's Bench, *ex mero motû*, held this order-in-council to be *ultra vires*, and that as the delay for proceeding with the appeal had expired prior to the inscription in appeal the court was without jurisdiction to entertain it and could not acquire any such jurisdiction in consequence of consent of the parties.

Robitaille Q.C. for the appellant.

Fitzpatrick Q.C. and *Cannon Q C.* for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of Queen's Bench dismissing an appeal from a judgment of the Superior Court for want of jurisdiction.

On the 3rd of June, 1890, judgment was rendered by the Superior Court in a Petition of Right against the Crown in which the appellant was petitioner.

There had previously, and on the 20th March, 1886, been rendered a judgment of the Superior Court in a case also instituted by Petition of Right of *Marchand* v. *The Attorney General*, dismissing the petition in that case. In this cause of *Marchand* v. *The Attorney General* an appeal was taken to the Court of Queen's Bench which was allowed in part. Whilst the appeal in *Marchand* v. *The Attorney General* was pending it was agreed between the present appellant and the Crown that an appeal which the appellant proposed to take from the judgment of the Superior Court should be suspended pending the appeal in *Marchand* v. *The Attorney General*.

1901

LORD
v.
THE
QUEEN.

The Chief Justice.

The appellant some time afterwards applied to the Lieutenant Governor in Council for redress for the grievances of which he had complained in his Petition of Right. Thereupon an order in council was passed whereby, after reciting the proceedings in the case of *Marchand* v. *The Attorney General*, as well as those in the appellant's own Petition of Right, the Crown waived the appellant's delay in instituting an appeal in the present cause and consented that the appellant should be permitted to appeal from the judgment of the Superior Court against him, and that so far as Her Majesty was concerned the appellant should be permitted to institute an appeal from the judgment against him with the same effect as if he had done so within the delay allowed by law.

Thereupon the appellant did forthwith institute an appeal to the Court of Queen's Bench. On this appeal coming on to be heard the Crown, abiding by the order in council, did not insist on the forfeiture of the right of appeal by reason of the delays and took no objection to the jurisdiction of the court. The court however *ex mero motu* raised the point of jurisdiction and holding that it was not competent to entertain an appeal after the expiration of the delays prescribed by law, dismissed the appeal for want of jurisdiction.

The judgment of the court is in these words:

Considérant que l'appel n'a pas été pris dans les délais fixés par la loi;

Considérant partant que cette cour est sans juridiction. En conséquence elle se déclare incompétente et renvoie l'appel avec dépens.

This judgment was accompanied by notes prepared by the learned Chief Justice of the Queen's Bench in which it was explained that this court did not consider it was competent for the Crown to renounce to the delays as it had done by the order in council, since the articles of the Code of Procedure were enact-

ments of public order, and pointing out that this decision was founded on the jurisprudence now prevailing in the French Court of Cassation.

The articles of the Code of Procedure bearing on the question in this appeal are the following:

Article 1020. The inscription in appeal from the judgment of the court of original jurisdiction or from that of the Court of Review, cannot be filed except within thirty days from the rendering of the judgment appealed against.

Article 1209. Proceedings in appeal must be brought within six months from the date of the judgment, saving the cases provided for by articles 924, 1006, 1010 and 1020. This delay is binding even upon minors, women under martial authority, persons interdicted or of unsound mind, and upon persons absent from the province when those have been duly brought into the suit.

Article 1220. Unless the court otherwise orders, the respondent may, within eight days next after the period allowed to appear, set up by motion any exception resulting from: * * *

3°. Non-existence or forfeiture of the right of appeal.

The articles of the French Code of Procedure providing for delays in appealing are as follows:

Article 443 C. P. francais. Le délai pour interjeter appel sera de deux mois.

Article 444. Ces délais emporteront déchéance; ils courront contre toutes parties, sauf le recours contre qui de droit; mais ils courront contre le mineur non émancipé que de jour où le jugement aura été signifié tant au tuteur, qu'au subrogé tuteur, encore que ce dernier n'ait pas été en cause.

There can, I think, be no doubt but that article 1220 applies to appeals in Petitions of Right as well as to appeals in actions between ordinary suitors.

Had there been no authority on the question presented I should have thought it clear that there was no want of jurisdiction in the Court of Queen's Bench to entertain this appeal. The delay imposed is like all other delays in procedure, imposed principally for the benefit of the party, though in a sense it may be said that public policy, which requires the prompt despatch of causes, has also influenced the legislature.

1901

LORD
v.
THE
QUEEN.

The Chief Justice.

However this may be it has always been considered competent to the parties conventionally to enlarge the delays for appearing, pleading, the hearing of causes and such like proceedings though these are prescribed for the same purpose as the limit of the time for appealing. Indeed public policy which favours the compromise of litigation requires that this should be so. But beyond this, in matters of much greater importance than procedure and in which the rights of the parties are involved, they are permitted to enlarge the delays fixed by the law. Thus prescription, even acquired, can be renounced. Again the defence of *res judicata* may be waived by agreement of the parties. And in many other cases it is competent to the parties to renounce their strict rights. I am at a loss, therefore, to see why any difference should be made as regards the time for appealing.

The Court of Queen's Bench appear from the notes of the learned Chief Justice to have been influenced by a decision of the Court of Cassation pronounced in 1849 which is said now to be followed in France. Up to the date of this decision the Court of Cassation itself and the highest authorities amongst the authors, especially Merlin, who discusses the question fully, were the other way.

Should we then be bound by this single decision of the French Court of Cassation?

Notwithstanding the very high authority of the court and the great learning of its judges, the decision is not even binding on the court itself but may be repudiated as an authority at any time. I need not say it has no direct authority as regards Canadian courts. Moreover the wording of Article 444 of the French Code of Procedure is expressed in stronger terms than is the article of the Quebec Code.

1901

LORD
v.
THE QUEEN.

The Chief Justice.

Further it appears to me that Article 1220 of the Quebec Code, requiring exceptions to the right to appeal, founded on forfeiture to be taken within eight days after the time to appear, has an important bearing on the question involved.

Therefore on the authorities preceding the *arrêt* of 1849, referred to in the judgment of Chief Justice Lacoste, I would, if there was nothing more in the case, have come to the conclusion that it was competent to the Crown to waive the delay.

There is however an authority in this court which is binding on us. I refer to the case of *Cimon* v. *The Queen* (1) cited in the appellant's factum. In that case the objection was taken that the appeal to the Court of Queen's Bench, which had there admitted the appeal, was taken too late. The Queen's Bench had there largely increased the amount awarded to the respondent by the Superior Court, and this court by a majority allowed the appeal and restored the first judgment. Mr. Justice Fournier, one of the minority here, in his judgment fully discusses the point and decides it adversely to the objection to the competence of the Queen's Bench, and this opinion was acquiesced in by the majority.

I should have said that the Crown appeared by counsel on the hearing of this appeal and declined to take any part in the argument.

The appeal must be allowed and the case remitted to the Court of Queen's Bench to be there heard on the merits.

Appeal allowed with costs.

Solicitors for appellant: *Robitaille & Roy.*

Solicitor for respondent: *L. J. Cannon.*

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(1) 23 Can. S. C. R. 62.