

HANNAH VAUGHAN & CLARENCE AUBREY VAUGHAN, EXCEUTRIX, ETC., OF HENRY VAUGHAN, DE- CEASED (DEFENDANTS).....	}	APPELLANTS;	1890 <u>*Nov. 4.</u>
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AND

EDWARD C. RICHARDSON AND JAMES W. BARNARD, JUNIOR, (PLAINTIFFS).	}	RESPONDENTS.
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ON APPEAL FROM TRE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Jurisdiction—R. S. C. c. 135 s. 41—Judgment on motion for non-suit or new trial—Notice of appeal—Extension of time for giving—Application after time has expired—Effect of order on.

The Supreme Court of Canada has no jurisdiction to hear an appeal "from a judgment on a motion for a new trial on the ground that the judge has not ruled according to law," unless the notice required by s. 41 of the Supreme Court Act has been given. An order made by a judge of the court appealed from giving defendants "leave to appeal to the Supreme Court of Canada leaving it to plaintiffs to dispute the right of appeal in the Supreme Court," even if considered as an enlargement of the time for giving notice, will not give the court jurisdiction if no notice is given pursuant to such enlargement.

The time for giving notice under s. 41 can be extended as well after as before the twenty days have elapsed.

Held per Strong J.—In s. 42 of the act, providing that under special circumstances the court appealed from or a judge thereof may "allow an appeal" although the time limited therefor by previous sections has expired, the expression "allow an appeal" means only that the court or judge may settle the case and approve the security.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to set aside a verdict of the plaintiffs and order a non-suit or new trial.

This was an action originally brought against one Henry Vaughan which was tried at a circuit court in New Brunswick, and resulted in a verdict for the plaintiffs. The defendant moved to have the verdict set

PRESENT :—Sir W.J. Ritchie C.J. and Strong, Fournier, Taschereau and Patterson JJ.

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aside and a non-suit or new trial ordered. In May, 1889, judgment was pronounced refusing the motion. The defendant had died in October, 1888, and probate of his will was granted in the same month, but no suggestion of his death being entered upon the record the judgment on defendant's motion was ordered to be entered as of a date prior to October, 1888. The solicitor for the defendant did not obtain authority from the executors to appeal from the judgment on his motion in time to give notice of appeal within twenty days from the time that judgment was pronounced. When the authority was obtained he applied to a judge of the Supreme Court of New Brunswick, not for an extension of the time to give notice, but for leave to appeal, and the following order was made :—

“ I do order that the defendants have leave to appeal to the Supreme Court of Canada in this cause leaving it to the plaintiffs to dispute the right of appeal in the Supreme Court of Canada.”

No notice of appeal was given under this order though some time before it was made a notice was given in the name of the original defendant.

The cause was inscribed for hearing before the Supreme Court of Canada, and the plaintiffs having given notice of their intention to do so, moved to have the appeal quashed for want of notice under sections 41 of the Supreme Court Act (1).

Weldon Q.C. and *Hazen* supported the motion.

C. A. Palmer contra.

Sir W. C. RITCHIE C. J.—I am sorry that I cannot agree with the view of my brother Patterson. This is a question of our jurisdiction under the statute, and we have always been very particular before hearing an appeal to satisfy ourselves that we have a right to hear it. In this case I think the jurisdiction is entirely

wanting, for notwithstanding all my brother Patterson says, in respect to the order being in effect an extension of the time, and even supposing that it is so, the very ingredient is wanting to give us jurisdiction, namely, the notice itself. Can we say that an appeal will lie in this case in direct opposition to the statute which expressly declares that no such appeal shall lie unless the notice provided for is given? We are without jurisdiction for want of notice, not for want of the time being extended. The extension that should have been asked for was an extension of the time to give the notice, not of time to appeal.

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I do not agree with the Supreme Court of New Brunswick that notice cannot be given under section 41 of the act after the twenty days' have expired, for this court has held the contrary; but in all cases it is necessary that the notice shall be given. It must be given in a case such as this within twenty days from the time that judgment is pronounced, for we have held that in common law cases the time runs from the pronouncing of the judgment. A different rule prevails in equity causes where the minutes have to be settled before judgment can be entered.

This judgment was pronounced in May, 1889; the original defendant died and his will was proved in October, 1888; no suggestion of his death was entered for some months after which was not the fault of the attorney, but of his clients, who had ample time to consider as to whether they should wish to appeal or not in case judgment was given against them, but who took no steps for two months after it was pronounced. From the first of June, 1889, they had an opportunity to apply to extend the time but did not do so. When the application was made Mr. Justice Tuck made the following order:—

I do order that the said defendants have leave to appeal to the Supreme Court of Canada in this cause, leaving it to the plaintiffs to dispute the rights of appeal in the Supreme Court of Canada.

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Ritchie C.J.

I read that order differently from the way it was read by my brother Patterson ; I read it that Judge Tuck gave leave to appeal and left it to this court to say whether due notice was given and the appeal thereby perfected or not, and left it entirely open to the respondents to show that the necessary steps had not been taken, that is, that notice had not been given under section 41 nor the time extended for giving it.

I therefore think we have no jurisdiction to entertain this appeal. I should have preferred to allow the matter to stand over to enable the appellant to make an application to the court below to extend the time he paying the costs of the motion, but the majority of the court think that the appeal must be quashed and doing so will work no particular injury to the appellants who will not be prevented thereby from still making the application.

STRONG J.—I agree in what has been said by the Chief Justice. It is incumbent on the appellants to bring themselves within the provisions of section 41 of the statute, and nothing done by a judge of the court below can preclude the respondent from objecting that notice was not given, as required by that section, within twenty days after the decision appealed from or such further time as the court or a judge may allow. Mr Palmer has not insisted, and could not upon the affidavits before us have insisted, that the provision referred to has been complied with. Not only was no notice given within the prescribed time of twenty days, but even if we were to consider the allowance of the security to operate as an enlargement of time (which, however, I am of opinion it was not) no notice of appeal was given pursuant to such enlargement.

I am clearly of opinion that this objection is open in this court inasmuch as it is a matter for us to deal with as affecting our jurisdiction, and nothing that has

been done by the court below can preclude us from entertaining it.

The 42nd section of the act authorises the court below under special circumstances, to "allow an appeal" though the time limited by the other provisions of the act has expired. I understand the expression "allow an appeal" simply to mean the settlement of the case and the approval of the security.

The appeal must be quashed, but as there is, according to decisions in this court and analogous English authorities, power to extend the time after the twenty days have elapsed, it would, if I may say so, seem to me not unreasonable that it should be done in this case; and I venture to express the hope that the court in New Brunswick, or a judge thereof, will see their way clear to granting an extension.

FOURNIER J. concurred in the judgment quashing the appeal.

TASCHEREAU J.—It seems to me that the interpretation given to sec. 42 by my brother Patterson, though there is much force in it, would involve the repeal of that part of section 41 which says that notice shall be given. It appears by the order of the judge in the court below, and it is admitted, that no notice was given, and I cannot agree that section 42 does away with the necessity.

So far as appears before us from the order of the court below I think there is no jurisdiction, and I cannot see that under the circumstances the appellants are deserving of a great deal of consideration. In my opinion the only thing that we can do is to quash the appeal with costs.

PATTERSON J.—It seems to me that the time has been extended in effect by the court below, and that the appeal is properly before this court. The objection

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made is a technical one which I do not think should prevail. The circumstances of the case were very peculiar. Judgment was pronounced two years after the argument of the rule. The defendant had then been dead for six or seven months, and the plaintiffs could not avail themselves of their judgment, there being no defendant, except by obtaining leave to enter judgment *nunc pro tunc*. If the time for giving notice were to count from the nominal time of entering the judgment there could have been no appeal. There is no question of surprise. Two notices of appeal were, in fact, given, but were ineffective because the executors had not been made parties to the record. By sec. 41 of the Supreme and Exchequer Court Act the court appealed from, or a judge thereof, may extend the time for giving notice. Here we have the judge's order approving of the security containing these words: "I do order that the defendants have leave to appeal to the Supreme Court of Canada in this cause." I take that to be a sufficient extension of the time; no form of order is prescribed. It is true, the judge adds, "leaving it to the plaintiffs to dispute the right of appeal in the Supreme Court of Canada," but this, if not entirely nugatory as I think it is, may serve to allow this court to say that the appeal is before it. Section 42 gives power to allow an appeal under special circumstances after the time limited by the statute. It may not, in strictness, apply to this case, but the circumstances are certainly special, and would call for the exercise of the power under section 42, if it applied. I am not sure that it would not apply, but I think that there has been a sufficient extension under section 41.

Appeal quashed with costs.

Solicitor for appellants: *C. A. Palmer.*

Solicitors for respondents: *Hazen & Straton.*