1922
October 14.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

GEORGE McCULLOUGH *et al*.....PLAINTIFFS
(Respondents)

AND

SS. *SAMUEL MARSHALL* AND OWNERS.....} DEFENDANTS;

AND

HYMAN I. ELIASOPH.....CLAIMANT
(Appellant)

Appeal—Motion to dismiss for want of prosecution—Jurisdiction of Court in absence of specific rule—Common Law.

Held: That there is no distinction in principle to be drawn between the inherent authority of the Court to order the dismissal of a case on appeal for want of prosecution and the dismissal on similar grounds of a case at first instance.

2. That it is a fundamental principle in the administration of justice that right and justice ought not to be deferred at the will of any party to an action.

MOTION to dismiss for want of prosecution.

5th October, 1922.

Motion heard before the Honourable Mr. Justice Audette at Montreal.

H. E. Walker, K.C. for respondents.

T. M. Tansey, for appellant.

W. R. L. *Shanks*, K.C. appeared for the purchaser, The Steel Co. of Canada.

The facts and issues of law raised are stated in the reasons for judgment.

AUDETTE J. now (this 14th October, 1922) delivered judgment.

This is an appeal, lodged by the claimant, Hyman I. Eliasoph, from the judgment of the local judge of the Quebec Admiralty District, pronounced on the 8th day of July, 1921, in respect of, and in so far only as that judgment deals with the fees and costs taxed in favour of:

1. The plaintiffs' solicitors;
2. The local judge;
3. The district registrar, and
4. The priority denied Hyman I. Eliasoph's claim.

The three first subjects of this appeal are exclusively questions of costs upon which the district taxing master has passed and whose finding has been confirmed on appeal to the local judge. The judgment in that respect would appear to deal exclusively with the quantum of the costs and not with their rank in the distribution of the proceeds of the sale of the vessel nor as to whether or not costs were rightly or wrongly allowed, and therefore such judgment becomes an interlocutory judgment or order, and leave was accordingly asked for and obtained to prosecute such appeal and security to the amount of $100 was duly given, as provided by the rules, in such interlocutory matters.

The fourth subject would appear to deal with the merit of the claim, since Eliasoph claims a priority which is denied him by the judgment appealed from. As suggested by counsel for the respondent, in such a case the rules of court provide for security to the amount of $200—instead of the $100 given herein.

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The matter now comes before this court, on appeal, on three motions—one, on behalf of the plaintiffs-respondents to dismiss the appeal for want of prosecution; the second, on behalf of the appellant, made subsequently to the first motion and as a sequence thereto, for an order fixing a date for the hearing of the appeal; and a third one also (made during the hearing of the two first motions) by the appellant for leave "to amend the Notice of Appeal, in order to include therein notice of said appeal to the Local Judge in Admiralty and to the Registrar . . . and that he be now permitted to serve such notice or amended notice thereof on the solicitors for the said Local Judge and Registrar, or on themselves and the other parties herein, etc."

The questions raised respecting the three first subjects deal exclusively with a question of costs and as such involve a question of discretion since under rule 132 "the judge may in any case make such order as to costs as to him shall seem fit."

"No appeal lies from an order as to costs only, when such costs are in the discretion of the judge, except with leave." (Hals., 23, p. 132) which was given herein. "But (Hals., 23, p. 133) in all matters coming within the discretion of the judge in chambers, the Court of Appeal does not interfere unless the discretion has been exercised on a wrong principle or there has been some miscarriage."

A matter involving merely a question of costs should not be entertained. *Chicoutimi Pulp Co.* v. *Price* (1).

(1) [1907] 39 S.C.R. 81.

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In *re Smith* v. *the St. John City Railway Co.* (1), it was further held that it is only when some fundamental principle of justice has been ignored or some other gross error appears that the Appellate Court will interfere with appeals upon questions of costs only. The latter case is made very much more apposite from the fact that the question of costs therein mentioned was one resulting from the consolidation of cases. The judgment appealed from seems to cast the blame for this alleged welter of costs to the number of motions lodged by the present appellant himself and it would follow that if he had asked for consolidation, at the proper stage, much of what he now finds fault with would have been avoided.

In *re Beaudette* v. *SS. Ethel Q.* (2) confirmed on appeal to the Supreme Court of Canada (unreported) Anglin J. said: "It is the invariable practice of this Court to refuse to entertain appeals of which the sole object is a reversal or modification of a disposition made of costs, however manifest it may be that such disposition was based upon an erroneous conception of the merits of the proceeding before the Court."

The fourth question involved is one with respect to the priority claimed by the said Eliasoph and which is clearly dealt with by the Local Judge.

Then there is the application to allow to give notice of the appeal to the Local Judge and the Registrar; a motion originating during the argument of the other application above mentioned.

Having for the purpose of clear understanding set forth the matters involved upon the merits of this appeal from a perusal of the record and from what was said on the argument of those three motions, I now come to the determination of these applications.

(1) [1898] 28 S.C.R. 603. (2) [1916] 16 Ex. C.R. 280.

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The judgment appealed from bears date the 8th July, 1921. The first document or notice of motion by way of appeal served upon the plaintiffs alone (see Rule 159) was filed on appeal to the Exchequer Court, in this registry, on the 10th September, 1921, and thereunder attached was a copy of the motion paper of an application to the local judge for leave to appeal and extension of time if necessary.

On the 2nd September, 1921, an order was made by the Local Judge, granting leave to appeal and extending the delay in so far as the same may be necessary, to the 10th September, 1921.

The notice of motion by way of appeal, filed on the 10th September, 1921, and served exclusively upon the plaintiffs, gave notice for the hearing of the appeal on the 19th September, 1921. (See Rule 166).

No one appeared before this Court, on appeal, on the 19th September, 1921, either on behalf of the appellant or the respondent. See Annual Practice, 1922, at pp. 1109-1110. Would it not seem that the appeal should have been then either enlarged or set down for another day instead of leaving it lapse?

Therefore, from the 10th September, 1921, no proceedings of any kind were had or taken until the 8th June, 1922 (save and except the filing of the record on the 18th January, 1922) when a notice of motion was filed by the plaintiffs-respondents, of which service had been made on the appellant on the sixth—stating that the motion would be presented before this Court on the 27th June, 1922.

Then, on the 15th June, 1922, the claimant-appellant issued a summons returnable on the 27th June, 1922, asking for an order fixing the date for the hearing of this appeal.

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These matters stood adjourned from the 27th June to the 4th July, 1922 (through no fault of any of the parties herein) when the two first mentioned motions were made before me. Realizing then that the appeal involved both the Judge's as well as the Registrar's fees and that no notice of any kind of this appeal from the taxation of these bills had been given them, I therefore refused to proceed with the hearing without enquiring whether or not these two parties intended to be represented on the appeal, feeling in duty bound to do so, not only as a matter of courtesy but of justice to these two interested parties who had had no notice of such appeal—notwithstanding that Rule 160 provides that "the notice of appeal shall be served upon all parties directly affected by the appeal."

These two parties had a right to expect their fees would not be dealt with in their absence and without giving them an opportunity to show cause, if they saw fit. Would not the want of service of the notice of appeal upon these two parties render thereby the appeal null and void in respect at least of these two parties?

The appellant's counsel denied, at Bar, the jurisdiction of the Court to hear a motion for dismissal of the appeal for want of prosecution; because there was no specific rule of court to that effect. However, Rule 228 enacts that in all cases not provided for by the Rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed. See Roscoe's Admiralty Practice, 4th Ed., p. 508; Coote Admiralty Practice, 2nd Ed., 151-155; Williams & Bruce, 3rd Ed., 538.

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At common law, courts of first instance have undoubted authority and jurisdiction to dismiss for want of prosecution actions instituted therein; and there is no distinction in principle to be drawn between the dismissal of a case on appeal for want of prosecution and the dismissal of one at first instance. Right and justice ought not to be deferred at the will of any litigant in any court. That is a fundamental principle in the administration of justice. See C.P.Q. Art. 1239.

All rules in all our Courts which deal specifically with the question of dismissal would seem to so deal with the matter with the specific object of fixing a delay within which peremption is acquired. And in the absence of the fixing of such delay the Court is nevertheless seized with the jurisdiction to deal with the subject matter and its judicial discretion is limited to the question of diligence or want of diligence in prosecuting an appeal within reasonable time.

A party unsuccessful in an action cannot unreasonably interfere with the judgment the adverse party has obtained against him and unduly deprive him of the benefit of such judgment in his favour by the mere lodging of an appeal which he does not prosecute, and in the present case this want of diligence of prosecuting the appeal affects not only the parties to the appeal, but also all parties entitled to receive monies and be collocated upon from the proceeds of the sale of the vessel.

Had the appellant been in earnest in his appeal, he had the opportunity to manifest it within almost a year from the date of judgment. The record from the Court below was only transmitted to this Court in January, 1922, which again would go to show intentional and unreasonable delay.

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I have therefore come to the conclusion that the present appeal does not appear to me, from all that was said on the argument of these applications and the perusal of the record, to be meritorious. The appellant has failed in many material instances, namely, *inter alia;* 1. The want of giving notice of appeal to all interested parties; 2. The want of attending on the day fixed by his notice of appeal; and 3, the want of diligence in prosecuting the appeal which, coupled with all the other reasons, compel me to arrive at the conclusion to grant with costs the motion to dismiss the appeal for want of prosecution in respect of the issues between the appellant and the plaintiffs-respondents, the Judge and the Registrar—the three first issues above mentioned. The appellant has shown unreasonable delay in prosecuting his appeal and has been derelict in respect of the matters above mentioned. He has already delayed for over one year the distribution of the proceeds of the sale of the vessels; he cannot with impunity thus impede the expeditious administration of justice.

The application, made at the end of the argument of these matters, for leave to amend the notice of appeal in order to include therein notice of appeal to the Local Judge and the Registrar is therefore dismissed with costs.

The application, on behalf of the claimant-appellant to fix a date for the hearing of these appeals is also dismissed with costs, but in so far only as in respect of the three above mentioned issues, with leave to the claimant-appellant to apply with due speed, upon notice to all interested parties, to fix a date for the hearing of the appeal upon his claim.

Judgment accordingly.