WILLIAM PRICE, *et al.* (DEFENDANTS) ..... } APPELLANTS;

AND

ALEXANDER FRASER, *et al.* (PLAINTIFFS) ..... } RESPONDENTS.

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*Oct. 16.

*Nov. 16.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Practice—Proceeding in name of deceased party—Amendment—Jurisdiction—Interference with discretion on appeal.

Between the hearing of a case and the rendering of the judgment in the trial court, the defendant died. His solicitor by inadvertence inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend the inscription by substituting their names *ès qualité*. The Court of Review allowed the plaintiffs' motion as to costs only, permitted the amendment and subsequently reversed the trial court judgment on the merits. The Court of King's Bench (appeal side), reversed the judgment of the Court of Review on the ground that it had no jurisdiction to allow the amendment and hear the case on the merits, and that, consequently, all the orders and judgments given were nullities.

Held, reversing the judgment appealed from, (Q. R. 10 K. B. 511), the Chief Justice and Taschereau J. dissenting, that the Court of Review had jurisdiction to allow the amendment and that, as there had been no abuse of discretion and no parties prejudiced, the Court of King's Bench should not to have interfered.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment of the Court of Review and restoring the judgment of the

*PRESENT:—Sir Henry Strong C J. and Taschereau, Gwynne, Girouard and Davies JJ.

(1) Q. R. 10 K. B. 511.

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Superior Court, District of Rimouski, which maintained the plaintiffs' action with costs.

The circumstances under which the questions on this appeal arose are stated in the judgments reported.

Stuart K.C. for the appellants.

Pouliot K.C. and *Orde* for the respondents.

THE CHIEF JUSTICE dissented from the judgment allowing the appeal.

TASCHEREAU J. (différant). — Je débouterais cet appel.

Les autorités invoquées par les appelants sur la procédure et les règles à suivre lorsqu'une des parties décède dans le cours de l'instance, n'ont pas d'application. Ce n'est pas dans le cours de l'instance qu'Evan John Price, le défendeur originaire, est décédé. L'appel est une instance nouvelle, une action judiciaire en réformation du jugement de première instance, comme le dit Poncet, et tout autant que l'ajournement devant les premiers juges, l'œuvre directe de la partie, comme le dit Boncenne, 5 vol. page 216. Voir Bioche, Procéd. v. Actions, No. 116. C'est un acte attributif de juridiction, et non un acte de simple procédure dans une instance pendante. C'est pour cela que les réprésentants d'un défunt n'ont pas à reprendre l'instance pour initier un appel ou inscrire en révision ; ils inscrivent en appel ou en révision comme s'ils prenaient une nouvelle action. C'est pour cela qu'un procureur autre que celui qui a occupé en première instance, peut, sans la formalité d'une substitution, instituer l'appel ou inscrire en révision. C'est pour cela que suivant la jurisprudence constante de cette cour un statut donnant ou restreignant le droit d'appel ne s'applique

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pas aux causes pendantes : *Hyde* v. *Lindsay* (1) ; quoiqu'un statut amendant la procédure s'y applique. *Schwob* v. *The Town of Farnham* (2).

Je ne vois vraiment dans l'espèce qu'une question de fait. Le défunt Evan John Price a-t-il jamais inscrit en révision du jugement de la cour supérieure ? Impossible, il me semble, de répondre oui. Il n'existait plus lorsque la cour supérieure a rendu son jugement. Et il n'a pu faire par procureurs c qu'il ne pouvait faire en personne. Il ne peut pas y avoir de mandat d'outre-tombe, de mandataire sans mandant. La loi ne connaît pas plus les procureurs des trépassés que de ceux qui ne sont pas nés. Le document prétendant inscrire en révision au nom d'Evan John Price, après sa mort, est nul, d'une nullité de *non esse*. Il n'y a pas eu dans le délai voulu d'inscription. La cour de révision n'avait donc pas juridiction ; elle n'a jamais été saisie de la cause. Elle a elle-même décidé qu'elle n'a pas juridiction si le dépôt requis par l'art. 1196 n'a pas été fait dans les huit jours qui suivent la date du jugement. *Ringuette* v. *Ringuette* (3) ; *Leferrière* v. *The Mutual Fire Ins. Co. of Berthier* (4). Il doit en être de même il me semble, si l'inscription n'a pas été faite dans le délai voulu. Et c'est, de fait, ce que cette même cour a décidé dans *Jamieson* v. *Rousseau* (5), où l'inscription fut rayée parce qu'elle n'avait été produite que le surlendemain du dépôt. Ici, il n'y en a pas eu du tout aux yeux de la loi.

Maintenant, la prétendue inscription faite au nom d'un défunt, pouvait-elle être validée par la cour de révision, en substituant au nom du défunt celui de ses exécuteurs testamentaires ? La cour d'appel a décidé que non (6), et je suis d'avis qu'elle a

(1) 29 Can. S. C. R. 99.
(2) 31 Can. S. C. R. 471.
(3) Q. R. 5 S. C. 33.
(4) 24 L. C. Jur. 206.
(5) 1 Que. P. R. 268.
(6) Q. R. 10 K. B. 511.

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eu raison. Il n'est pas possible de valider ce qui n'a jamais existé. Si l'inscription était nulle d'une nullité de *non esse*, et je ne puis voir rien de plus nul qu'un acte fait au nom d'un défunt, elle n'a pu conférer juridiction à la cour de révision. Or, si cette cour n'avait pas juridiction sur la cause, elle n'a pu donner la permission d'amender l'inscription. Elle n'a pu dire, *ut ex tunc*, qu'Evan John Price était représenté par ses exécuteurs lorsque l'inscription n'a pas été en fait produite par eux. Une action prise au nom d'une personne défunte ne pourrait être amendée en lui substituant ses héritiers comme demandeurs. Et, sous la forme d'un amendement, c'est la substitution d'une nouvelle inscription au nom des exécuteurs à celle intérieurement faite au nom du défunt que la cour de révision a permise. Ou plutôt, c'est de fait une inscription en revision plus de deux mois après le jugement de première instance qu'elle a autorisée, lorsqu'il n'y en avait pas eu dans le délai requis. Et cette permission d'amender a été accordée sur la demande de tiers non parties à l'instance. Quand la motion des exécuteurs pour permission d'amender l'inscription a été faite, le décès du défendeur avait été dénoncé au dossier. Or comment, sans reprendre l'instance, ont-ils pu subséquemment être admis à faire une motion dans la cause sans même produire le testament du défunt qui les appointe ? C'est ce que je ne puis comprendre. Dans la cause de *Haggarty* v. *Morris* (1) il y avait eu une reprise d'instance, et c'est parce que cette reprise d'instance avait été accordée, le rapport ne dit pas si elle avait été contestée ou non, que la cour a refusé de rejeter l'appel. Je ne vois là rien de contraire à la décision de la même cour six mois auparavant, dans la cause de *Kerby* v. *Ross* (2) qui est entièrement conforme au jugement dont est appel.

(1) 19 L. C. Jur. 103.

(2) 18 L. C. Jur. 148.

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Une autre décision qui me semble militer bien fortement contre le pouvoir d'amender l'inscription en question est celle dans la cause de *McPherson* v. *Barthe* (1) où il a été jugé:

Qu'une inscription pour révision, inscrivant pour révision *du jugement rendu en cette cause, par la cour supérieure*, lorsque le jugement a été rendu *par la cour de circuit* sera déchargée sur motion à cet effet, et le dossier renvoyé à la cour de première instance, et qu'une motion pour amender l'inscription sera rejetée.

Cette décision n'a pu être basée que sur le motif qu'une inscription défectueuse ne peut conférer juridiction, et que conséquemment la cour n'avait pas le pouvoir d'amender.

Les appelants paraissent croire que la solution de la question devrait être influencée par le fait qu'ils ont maintenant perdu leur droit d'appel à la Cour du Banc de la Reine. C'est là une erreur. D'abord, s'ils ont perdu leur droit d'appel, c'est parce qu'ils l'ont bien voulu. Ils avaient six mois pour ce faire, et il n'y en avait pas deux depuis le jugement, lorsque les intimés ont fait motion pour rejeter l'inscription Et d'ailleurs, ce fait ne peut affecter notre décision, qui doit être la même qu'elle aurait dû être en cour de révision lorsque la motion des appelants pour amender a été faite. La cour d'appel a dit aux appelants que cet appel *ad misericordiam* ne pouvait prévaloir. Elle leur a dit que c'est exclusivement à la cour des commissaires que l'article 1253 du Code donne le pouvoir de juger suivant l'équité et en bonne conscience. Et je crois qu'elle a eu raison. Les appelants oublient que leurs adversaires ont aussi des droits. Si l'inscription en révision est nulle, ceux-ci ont un droit acquis au jugement de la cour supérieure. Et les en priver serait une injustice.

(1) 5 R. L. 259.

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The judgment of the majority of the Court was delivered by:

GIROUARD J.—No vested rights are at stake in this appeal. Rights arising out of a pending suit cannot be considered as vested till they are finally settled and adjusted by the highest tribunal having jurisdiction in the matter. This appeal involved only a question of procedure very injuriously affecting one of the parties, and on several occasions we declared that we would not hesitate to interfere in cases of this character. *Eastern Townships Bank* v. *Swan* (1); *Lambe* v. *Armstrong* (2). To do otherwise would be to hold that, without a clear statutory enactment, courts of justice may serve to destroy substantial rights they are summoned to define and enforce.

The action was instituted by the respondents against the late Senator Price to recover lands upon which abutted certain wharves, and also damages. The Superior Court maintained the action in part. The case was inscribed in revision, but unfortunately Mr. Price having died pending the *delibéré*, his counsel inscribed on the fourth day of December, 1899, not in the name of his executors, but in the name of the deceased defendant. The plaintiffs did not move at once, or at the next term of the court, to reject the inscription; they appeared and nearly two months after the service of the inscription, when the case was ready to be heard on the merits, on the 26th January, 1900, they served a motion to reject the inscription. The following day, the attorney for the executors of Mr. Price moved to amend by substituting their names, their counsel producing his affidavit that he had been fully instructed by them to inscribe, had received from them the deposit of money required by law, and that it was by inadvertence and error on his part that

(1) 29 Can. S. C. R. 193. (2) 27 S. C. R. 309.

the inscription was not properly made. The two motions were heard at the same time, and on the 3rd of February following, the motion to amend was granted unanimously without costs (Casault C.J., Caron and Andrews JJ.), and the motion to reject the inscription was granted as to costs only. A few months later, the same judges, after having heard the parties, gave judgment on the merits, reversed the judgment of the Superior Court and dismissed the action against Mr. Price with costs.

An appeal was taken by the plaintiffs to the Court of Appeal who held (Bossé J. dissenting) (1), that the Court of Review had no jurisdiction to amend the inscription in revision and to hear the case on the merits, and that all the judgments in review were null and void; and as a necessary consequence the judgment of the Superior Court against Mr. Price was allowed to stand as final. It must be added that when the motion to reject the inscription was made that judgment could have been appealed to the Court of Appeal, but that it was too late to do so when the Court of Appeal pronounced its decision.

No opinion of the judges upon the point of procedure has been transmitted to us, although very full notes upon the merits are given. Probably the learned judges thought that they were the best judges of the procedure of their own court.

The appellants were not, however, without judicial authority when they offered their motion to amend. They had no less than four decisions of the Court of Appeal in support of the course they adopted and that was undoubtedly the reason why the learned judges in review took only four days to deliberate upon the point.

In September, 1874, in *Haggarty* v. *Morris* (2), the Court of Appeal held that the defect of issuing a writ

(1) Q. R. 10 K. B. 511. (2) 19 L. C. Jur. 103.

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of appeal in the name of a dead party is not absolute and can be covered up by the allowance of a *reprise d'instance*, and that it is not competent to the respondent to move afterwards to quash the same. Article 1154 of the Code of Procedure then in force declared that proceedings in appeal *may be brought* by the legal representatives of a deceased party to a suit.

In 1883, in *Clement* v. *Francis* (1), Dorion C.J. speaking for the full court, said :

> That the court in a previous case had already allowed the tutor to file the authorisation obtained but not produced (that is the authorisation of the family council to appeal), and he thought that the appellant (a curator) was also entitled to delay to obtain this authorisation.

A similar *arrêt* was again rendered by the same court in 1889, in *Laforce* v. *La Ville de Sorel* (2). Articles 306 and 343 of the Civil Code enact that a tutor or curator cannot appeal without such authorisation, and it is a well known principle that prohibitive laws import nullity. (Art. 14 C. C.)

Against this jurisprudence apparently settled by the highest authority in the province, there is one solitary precedent rendered previously, March 1874 ; I refer to *Kerby* v. *Ross* (3), where the majority of the Court of Appeal held that an appeal in the name of a dead person is absolutely null and cannot be corrected by allowing a *reprise d'instance*. Two of the learned judges (four in all), seem to have soon changed their views, for six months afterwards they concurred in *Haggarty* v. *Morris* (4), above referred to. Moreover, Mr. Justice J. T. Taschereau dissented, being of the opinion that Art. 1154 of the Code of Procedure was merely facultative. This opinion finally prevailed, and the jurisprudence seems to be well settled, for nearly thirty years, by numerous decisions quoted above, that a defective appeal, such as in the above cases, is not so

(1) 6 Legal News 325.
(2) M. L. R. 6 Q. B. 109.
(3) 18 L. C. Jur. 148.
(4) 19 L. C. Jur. 103.

absolutely null and void that it cannot be remedied by subsequent proceeding or conduct, and especially by an amendment. See also *Les Curé et Marguilliers de l'Œuvre et Fabrique de Ste. Anne de Varennes* v. *Choquet* (1); *Sawyer* v. *The County of Missisquoi* (2); *Varin* v. *Guérin* (3); *Barrette* v. *Lallier* (4).

The appellants had reason to rely upon that jurisprudence and the judges in review could not very well refuse to follow it. The present case is even more favourable than that of the tutor or curator which is governed by a prohibitive enactment. In this instance the law is merely permissive. Art 1193 of of the new code, reproducing Art. 1154 of the old one says:

> Proceedings in review may be brought by the legal representatives, etc.

I am not prepared to say that this article is imperative and *à peine de nullité*, especially as our code does not so enact, and for a very obvious reason; unquestionably an inscription in review may validly be taken in the name of a dead person, for instance, if his death is unknown to his attorney. Whether considered as a mere revision before the same court or an appeal (Arts. 40, 52 and 72), this case involves merely a point of practice which is left to the discretion of the court which deals with it. I am inclined to regard the jurisprudence of Quebec as not only just and reasonable but also sound in law. I certainly do not feel disposed to punish a party who has respected it by the forfeiture of his substantial rights.

Under the new Code of Procedure, which governs this case, the power of a court to amend has been greatly enlarged; it is almost unlimited. See articles 513 to 523. The commissioners, charged with its con-

(1) M. L. R. 1 Q. B. 333.
(2) Q. R. 1 S. C. 207; 217.
(3) Q. R. 3 S. C. 30.
(4) Q. R. 3 S. C. 489.

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fection, observe that all the provisions contained in the above articles are in conformity with the new principle they lay down in relation to exceptions to the form, namely, that formal defects do not entail nullity unless they are not remedied. They express the opinion that article 522 furnishes the only exception upon the power to amend, viz., the nature of the action cannot be changed. I find, however, another wise limitation in article 520, viz., the opposite party must not be led into error. With these two exceptions, the power to amend is much larger than in France; it is practically as liberal as in England, the State of New York and the Province of Ontario. The commissioners have even indicated the Codes and Judicature Acts in force in these states as the source of several articles of our new code. The cardinal rule seems to prevail in the courts of these countries that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form or by too rigid an adherence to technical rules of practice. No appellate court should undertake to reverse the action of the court below, unless it affirmatively appears that there was a plain abuse of discretion—that the appellant was put to serious disadvantage or materially prejudiced thereby, or that some statutory provision or established rule of practice was violated. Ency. of Plead. & Prac. (2 ed.) vo. Amendments, p. 464 I cannot see why these rules should not also guide the courts of Quebec under the new code. Can it be contended that the present case falls within any of the above exceptions?

To apply the limitations imposed by our own code, can it be said that the respondents have been led into error, or that the nature of their demand has been changed by the amendment? Nothing of the kind. Their rights, as set up in the issue between the parties, can be investigated as fully and effectively as if Mr.

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Price was still alive and a party in the cause. They are not prejudiced in the least, and the Court of Appeal had no right to interfere.

The appeal is therefore allowed with costs before this court and the Court of Appeal, and it is further ordered that the case be remitted to the Court of Appeal to be adjudicated upon the merits.

Appeal allowed with costs.

Solicitors for the appellants: *Caron, Pentland, Stuart & Brodie.*

Solicitors for the respondent: *Pouliot & Drapeau.*