1938

*March 18.
*May 17.

L. H. BALLANTYNE (DEFENDANT) .....APPELLANT;

AND

DAME C. S. EDWARDS (PLAINTIFF)....RESPONDENT.

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

Appeal—Jurisdiction—Action in damages by wife against husband—Inscription in law alleging prescription of the action—Judgment appealed from dismissing inscription in law—Whether "final judgment"—Section 2 (b) Supreme Court Act.

In an action for damages by the respondent against her husband, the appellant, the latter inscribed in law on the ground that the action when instituted was prescribed. The judgment of the trial judge, maintaining the inscription in law and dismissing the action, was reversed by the appellate court, which held that under art. 2233 C.C. husband and wife cannot prescribe against one another. Upon a motion by the respondent to quash an appeal to this Court for want of jurisdiction,

Held, that jurisdiction lies in this Court to entertain the appeal. The judgment appealed from is a "final judgment" within the meaning of section 2 (*b*) of the *Supreme Court Act;* the right in controversy under the inscription in law (i.e., the respondent's right to institute the action notwithstanding the lapse of time) is a "substantive right * * * in controversy" in a "judicial proceeding" and, unless reversed on appeal, the decision of the appellate court will be binding on the parties throughout all stages of the litigation and thus finally determines the issue in respect of that right.

MOTION by the respondent to quash an appeal to this Court for want of jurisdiction from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), dismissing an inscription in law by the appellant.

The material facts of the case and the question at issue are stated in the above head-note and in the judgments now reported.

Victor Lynch-Staunton K.C. for motion.

L. H. Ballantyne, (the appellant) *contra.*

The judgment of the Chief Justice and Crocket, Davis and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—By the judgment of the Court of King's Bench (1), now under appeal to this Court, the defendant's inscription in law was dismissed. By that

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis, Kerwin and Hudson JJ.

(1) (1937) Q.R. 64 K.B. 27.

judgment it was decided that the defendant's objection in point of law to the action, on the ground that the action when instituted was prescribed, was incompetent because, under article 2233 C.C., husband and wife cannot prescribe against one another.

The right in controversy under the inscription in law (the right, that is to say, of the plaintiff to institute the action notwithstanding the lapse of time) is a "substantive right * * * in controversy" in a "judicial proceeding" within the meaning of section 2 (*b*) of the *Supreme Court Act*.

Unless reversed on appeal, the decision of the Court of King's Bench (1) will be binding on the parties throughout all stages of the litigation and thus finally determines the issue in respect of that right. The judgment is, therefore, a final judgment within the definition of our statute.

The motion to quash consequently fails and should be dismissed with costs.

The judgment of Rinfret, Cannon and Kerwin JJ. was delivered by

CANNON J.—This is a motion by the respondent to quash an appeal to this Court for want of jurisdiction.

Catherine Sophie Edwards, wife separated from her husband, Linton H. Ballantyne, brought an action against him, claiming damages in the sum of $22,799.28, made up of $2,799.28, said to be costs incurred by her to fight a petition for divorce before the Senate of Canada and $20,000 for libel and slander committed by her husband and his agents concerning the life and habits of the respondent. The defendant inscribed in law against the whole of the action.

Mr. Justice Surveyer, on the 10th June, 1937, dismissed the action on the ground that the right of action was prescribed at the time of the action, under 2267 C.C.

On appeal to the Court of King's Bench (1), the appeal was allowed and the defendant's inscription in law dismissed, Mr. Justice Galipeault and Mr. Justice Saint-Germain dissenting. The Court of King's Bench (1) held that, under art. 2233 of the Civil Code, husband and wife cannot prescribe against each other.

(1) [1937] Q.R. 64 K.B. 27.

1938

BALLANTYNE v. EDWARDS.

Cannon J

Is this judgment appealable as final under section 2 (*b*) of our Act, or, in other words, is it a judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding?

I am of opinion that, as far as the provincial courts are concerned, the question raised by the inscription in law is finally determined. When the case comes back before the Superior Court, if the facts were proven as alleged, the trial judge would be bound in law by the decision of the Court of King's Bench that, under 2233 C.C., prescription could not run against the plaintiff in favour of the defendant.

In *Shaw* v. *St. Louis* (1), Taschereau, J., said:—

> The judgment of the Superior Court * * * was undoubtedly right. As it holds in one of its *considérants,* its hands were tied by the previous judgment of the Court of Queen's Bench.
>
> Though the Roman law says that:—
>
> "it often happens that the appeal court's judgment is the wrong one, and that he who judges the last does not always judge the best."
>
> still it must be conceded that the relative functions of courts of first instance and of appeal cannot be so inverted as to have authorized the Superior Court, in this instance, to reverse the judgment of the Court of Queen's Bench. It had to, unreservedly, submit to it, as it did * * *
>
> It had no alternative.
>
> The maxim "l'interlocutoire ne lie pas le juge" cannot have any application to an interlocutory judgment given by an appeal court and transmitted to the Superior Court for execution. This maxim applies to the very tribunal that rendered the interlocutory judgment, that is to say, if the Superior Court, for instance, renders a purely interlocutory judgment, it may, in certain cases, at the final judgment, not be bound by this interlocutory.
>
> But to extend this doctrine to the judgment of a court of appeal, and make it say "l'interlocutoire de la cour d'appel ne lie pas le tribunal de première instance" seems to me untenable.

At p. 405 of the report, I find the following quotations:—

> Cette maxime, que "l'interlocutoire ne lie pas le juge", qu'il peut toujours s'en écarter, *judex ab interlocutoris discedere potest,* n'est vraie qu'à l'égard des simples jugements interlocutoires qui se bornent à ordonner une mesure d'instruction préjugeant le fond, et qui ne contiennent aucune décision définitive sur tous ou quelques-uns des chefs du débat. Ce sont les seuls qui ne soient pas susceptibles de passer en force de chose jugée. Il convient donc de distinguer entre les divers jugements interlocutoires, et même dans chaque jugement interlocutoire proprement dit, les décisions qui n'ont pour objet qu'une simple mesure d'instruction, et celles au contraire par lesquelles il est statué à certains égards d'une manière définitive. Les décisions de cette dernière espèce

(1) (1883) 8 Can. S.C.R. 385, at 399.

passant, à raison de leur caractère définitif, en force de chose jugée, aussi bien que les jugements ordinaires, qui n'ont aucun caractère interlocutoire. (Larombière, 5 vol., page 212).

Tout jugement n'a pas l'autorité de chose jugée. La présomption de vérité, qui est attachée aux jugéments, implique qu'ils décident une contestation. * * * De là la conséquence que la chose jugée ne résulte que des jugements qui statuent définitivement sur la contestation. Il ne faut pas entendre le principe en ce sens que l'autorité de chose jugée ne soit attribuée qu'au jugement qui met fin au procès. Il peut, dans une même affaire, intervenir *plusieurs jugements définitifs, en ce sens, qu'ils décident définitivement certains points débattus entre les parties.* Tous ces jugements ont l'autorité de chose jugée. * * *

Quand un jugement, interlocutoire en apparence, décide réellement un point contesté entre les parties, il est définitif, et il a, par conséquent, l'autorité de chose jugée. (20 Laurent, Nos. 22, 25 et seq.)

Pigeau says (vol. 1, p. 390):—

Quelquefois le jugement est interlocutoire et définitif en même temps, c'est lorsque les juges se trouvent en état de statuer définitivement sur un chef et ont besoin d'éclaircissement sur un autre.

I, therefore, reach the conclusion that we have before us a "jugement définitif" determining the merits in law of the plea of prescription raised by the defendant. It may also be mentioned that a similar judgment of the Court of King's Bench was appealed to this Court in *Rattray* v. *Larue* (1), under exactly the same circumstances. The judgment of the Court of King's Bench dismissing the "défense en droit" was treated as a final judgment, and this Court took and exercised jurisdiction. It must be said, however, that, there, the question of jurisdiction was not raised by a motion to quash; but this Court could not acquire jurisdiction by the consent of the parties.

I also refer to the authorities quoted in *Ville de St. Jean* v. *Molleur* (2) by Fitzpatrick C.J.

I would, therefore, dismiss the motion with costs.

Motion dismissed with costs.

---

(1) (1887) 15 Can. S.C.R. 102, at 106.

(2) (1908) 40 Can. S.C.R. 139, at 153 to 157.