1907 *March 12. *April 2.

ROBINSON, LITTLE AND COMPANY ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF THE DEFENDANT McGILLIVRAY (PLAINTIFFS) .... APPELLANTS;

AND

M. McGILLIVRAY AND J. W. SCOTT & SON.................. DEFENDANTS;

AND

J. W. SCOTT & SON (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal — Amount in controversy — Creditor's action — Transfer of cheque—Preference.

An action was brought by creditors, on behalf of themselves and all other creditors, of an insolvent to set aside the transfer of a cheque for $1,172.27 made by the insolvent to S. & Son as being a preference and therefore void. At the trial the action was dismissed and this judgment was affirmed by the Divisional Court (12 Ont. L.R. 91) and by the Court of Appeal (13 Ont. L.R. 232). On appeal to the Supreme Court of Canada:

Held, Girouard J. dissenting, that the only matter in controversy was the property in the sum represented by the cheque and such sum being more than $1,000 the appeal would lie.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment of a divisional court(2) which maintained the judgment at the trial dismissing plaintiffs' action.

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*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

(1) 13 Ont. L.R. 232; sub nom. *Robinson* v. *McGillivray.*

(2) 12 Ont. L.R. 91.

The plaintiffs had judgment against the insolvent McGillivray for over $1,000 which had, however, been reduced by payment to less than that amount. They sued on behalf of all creditors for a declaration that a transfer by McGillivray to the respondents Scott & Son of a cheque for $1,172.27, as being preferential and void and to recover the proceeds thereof for distribution among all the creditors. The action having been dismissed, plaintiffs took an appeal to the Supreme Court.

Shepley K.C. for the respondents moved to quash. We move to quash on the grounds that, in this case, there can be no right of appeal without special leave and such leave was refused by the court appealed from, and there being no pecuniary demand involved. If, however, there can be said to be some pecuniary amount involved, then the appellants' interest is below $1,000 and there can be no appeal *de plano*. The appellants' suit could be put an end to by paying less than $1,000, the limitation in cases of appeals from Ontario. In any case, the respondents, (defendants) are likewise creditors of the estate in question and thus would be entitled to about one-half of any amount that might be involved in the subject matter in controversy, the amount of the cheque sought to be brought back into the estate, consequently, any issue on this appeal must involve less than the appealable amount. It does not fall within section 48(*c*) of the "Supreme Court Act." We rely upon *Talbot* v. *Guilmartin*(1); *Donohue* v. *Donohue*(2); *Clément* v. *La Banque Nationale*(3); *Lachance* v. *La*

(1) 30 Can. S.C.R. 482. (2) 33 Can. S.C.R. 134.
(3) 33 Can. S.C.R. 343.

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Société de Prêts et de Placements(1); *The Canadian Breweries Co.* v. *Gariépy*(2); *Driffill* v. *Ough*(3); *Commercial Bank* v. *Wilson*(4). The case of *Coté* v. *The James Richardson Co.*(5) must be distinguished from this case, because there was in that case a third party claiming all the property in dispute which exceeds \$3,000 in value. The case of *The City of Ottawa* v. *Hunter*(6) is similar to the present.

Chrysler K.C. contra. The original amount of the appellants' claim was over \$1,000, although it has been reduced since the action was instituted by payment of \$100 on account, and the amount in controversy upon the appeal must govern jurisdiction. The balance of the debt claimed carried interest, and, this interest being added, would bring the amount to a sum in excess of \$1,000 at the time of the appeal in the court below. The suit is on behalf of all creditors and all claims, exclusive of that of the defendants, being added would considerably increase the amount. *The City of Ottawa* v. *Hunter*(6) is not incompatible with our position and *Lachance* v. *La Société de Prêts et de Placements*(1) was a case from the Province of Quebec where the appellant sued only for his personal claim and where the conditions governing appeals to this court are regulated by the amount of the demand and not by the sum in controversy on the appeal.

(1) 26 Can. S.C.R. 200.
(2) 38 Can. S.C.R. 236.
(3) 13 Ont. L.R. 8.
(4) 3 E. & A. (U.C.) 257.
(5) 37 Can. S.C.R. 41.
(6) 31 Can. S.C.R. 7.

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THE CHIEF JUSTICE.—The appellant, a creditor of the defendant McGillivray for the sum of $900, brought a suit on behalf of himself and all other creditors against the respondents to have it declared that a transfer of a cheque for the sum of $1,172.27, made by McGillivray to Scott, was preferential and void and to recover for purposes of distribution among all the creditors the proceeds of such cheque.

The action was dismissed by the High Court and this appeal is from the judgment of the Court of Appeal for Ontario which confirmed the judgment of the High Court.

A preliminary question of jurisdiction is raised.

What is the matter in controversy between the parties upon which the right to appeal depends? (Section 48, sub-section *c*, "Supreme Court Act"). Undoubtedly the cheque the proceeds of which it is sought by the action to bring into the estate for distribution. In this proceeding that is the only issue. If the appellant succeeds here, the result will be in so far as the judgment of this court is concerned to set aside the transfer as fraudulent and void, and condemn the defendants to pay over the proceeds of the cheque for distribution among all the creditors in whose interest the suit is brought. There is no controversy as to the amount of plaintiff's claim, he sues as one of a class. In *Canadian Breweries Co.* v. *Gariépy*(1), to which reference was made at the argument, there was no pecuniary amount in controversy. All that the *tierce-opposant* asked for and that which he was denied by the judgment appealed from was the permission of the court to come in and by a subsequent proceeding contest a judgment previously

(1) 38 Can. S.C.R. 236.

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rendered. The only question in issue was his right to institute a proceeding which was denied him by the judgment appealed from. There was no matter in controversy which could be appreciated in money and if that appeal had been allowed the result of our judgment would have been not a condemnation to pay a sum of money but a mere declaration that in the circumstances the opposant had an interest sufficient in that proceeding to justify the filing by him of *"an opposition to judgment."*

My brother Idington deals in his notes with the case of *Coté* v. *The James Richardson Co.*(1).

Motion to quash dismissed with costs.

GIROUARD J. (dissenting).—I think the motion to quash should be granted. I cannot distinguish this case from *The Canadian Breweries Co.* v. *Gariépy*(2), decided this term. Relying upon that case, and also upon the decisions of this court quoted in my dissenting judgment in the case of *Coté* v. *The James Richardson Co.*(1), I respectfully dissent from the judgment of the majority.

DAVIES J. concurred in the judgment of the Chief Justice.

IDINGTON J.—This is a motion by the respondents for an order quashing the appeal herein.

The action was brought by the appellant on behalf of themselves and all other creditors of defendant McGillivray to have it declared that the transfer by McGillivray to the respondent Scott of a certain

(1) 38 Can. S.C.R. 41. (2) 38 Can. S.C.R. 236.

cheque was as against the creditors of McGillivray preferential and void and to recover for purposes of distribution amongst the creditors of defendant McGillivray the proceeds of the said cheque.

The action was tried before the Hon. Chief Justice Falconbridge on the 7th November, 1905, and dismissed. An appeal was taken to the Divisional Court of the High Court of Justice for Ontario and by that court dismissed. The later appeal from such dismissal was taken to the Court of Appeal for Ontario and also dismissed. It is from this dismissal by the Court of Appeal that the plaintiff, now appellant here, proposes an appeal to this court. The questions raised on this motion are whether or not such an appeal will lie as of right. It is said and not denied that the judgment got by the appellant against the debtor McGillivray was for a sum exceeding $1,000, but since the recovery of that judgment, $100 has been paid thereon reducing the amount now due below the sum $1,000. It is shewn that the cheque in question was for an amount exceeding $1,000. It appears that McGillivray's total liabilities are much in excess of the sum of $1,000.

The question raised is shortly, whether or not the amount of the judgment against the debtor or the amount of the security sought to be recovered and made applicable to pay said judgment debt, and all other debts of the said McGillivray, is to be looked at as the test of the amount of the matter in controversy in appeal within the "Supreme Court Act," R.S.C. [1906] ch. 139, section 48, sub-section (*c*).

It seems difficult if not impossible to reconcile all the decisions upon the jurisdiction of this court.

It is exceedingly desirable that any decision in

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regard thereto should proceed upon the broad ground of whether or not the particular case for sonsideration comes within the purview of the Act conferring jurisdiction rather than by refining upon the possible meanings that may be attributable to a few words in the Act to be considered.

The words, when isolated, may be susceptible of many diverse meanings. Some of these meanings may be found quite inapt when viewed in light of the general scope and purpose of the Act in which they are found.

In the judgment of this court in the case of *Coté* v. *The James Richardson Co.*(1), at p. 49, the following language was used:

> It is not necessary that the amount in controversy should be a sum of money. The statute was intended to cover also the value of the thing demanded, *the object being to give this court jurisdiction to hear and decide appeals in cases where the issues* involved a consideration of sufficient value to justify the appeal.

If we apply this broad ground of the purview of the Act and this language to the consideration of the questions raised by this motion, can there be any doubt that the principles upon which the decision in *Coté* v. *The James Richardson Co.*(1) proceeded and that decision, must lead to holding that the Court has jurisdiction to hear the appeal now presented.

In substance *Coté* v. *The James Richarson Co.*(1) was only what in Ontario would be called an interpleader.

The creditor there, if successful ultimately, would have had to share the fruits of his victory with other creditors.

(1) 38 Can. S.C.R. 41.

The claimant of the goods in that case had succeeded in the court below.

The creditor, contesting that, came here with a judgment insufficient in amount, if that amount were to govern the right of appeal, so as to give it as of right.

We held the value of the goods attached, which all hung upon the same title, must decide the matter in controversy.

It was more difficult to reach that conclusion in a case like that coming from Quebec, than it would have been in an interpleader case coming from Ontario.

The provisions of the Act relative to the appeals from Quebec rendered it so, and the many decisions (hard to reconcile) upon those provisions, rendered it still more so.

What we have here in question is the title of the respondent as against creditors to a cheque which was liable to seizure to satisfy the claims of creditors of the payee, if respondent's title was void as against them.

Had the cheque been seized by the sheriff, as the wood in *Coté* v. *The James Richardson Co.*(1) by the bailiff, the cases could not have been by any possibility distinguished, so as to enable us to refuse to hear the appeal of the creditor.

The procedure by which the attack on the title is made certainly cannot in reason and justice make any difference.

But when we consider what the nature of the action here in question is, and the judgment we would

(1) 38 Can. S.C.R. 41.

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be bound to render if the appeal should succeed, can there be any doubt in the matter?

The appellant sues on behalf of himself and all other creditors, and if he succeed in his proposed appeal, the judgment here must be that the respondent *account for the full amount* of the cheque to answer the claims of the creditors.

These claims it appears as stated above exceed in the aggregate the amount in controversy necessary to give jurisdiction.

It is no answer to this to say that the appellant may as *dominus litis* drop his appeal for any reason he see fit, as he could have dropped his action for any reason he might have seen fit.

Even in this light of the amount involved the appellant suing so as to represent an aggregate sum, over $1,000, has much to support him.

I would prefer, however, to test and to rest the right of appeal upon the value of the property in question.

It will, if adhered to, work out much more satisfactorily than the test suggested by respondent as a test of jurisdiction in a large class of cases possible to arise in Ontario and those provinces and territories which have the same system of law and have adopted the same sort of legislation as Ontario, for the realization of the rights of creditors in many ways as against those seeking to defeat creditors or the majority of creditors.

It would seem anomalous to have appellant deprived of right of appeal in this case and right of appeal allowed an assignee representing all creditors though the security in question were the same.

In this connection the Act respecting assignments and preferences by insolvent persons R.S.O., 1897, ch. 147, must be borne in mind.

The mode of attacking an alleged fraudulent assignment adopted in this case is not perhaps so usual as that of a creditor who cannot after an assignment under said Act, persuade his fellow creditors to venture to make the attack, but is given, no matter how small his claim, the right under conditions to attack in the name of the assignee what may be fraudulent on a large scale when that is tested by the value of the property in question.

It seems to me that the decision in *Coté* v. *The James Richardson Co.*(1) should not be lightly frittered away.

The case of *The Canadian Breweries Co.* v. *Gariépy*(2) was clearly distinguished and though in view of the ultimate results which the appellant sought there to reach might seem in reason and justice a proper case to be placed on the same footing as *Coté* v. *The James Richardson Co.*(1) it would have been legislating rather than adjudicating to have so applied the latter.

The status of an appellant in relation to any possible right to be acquired over a thing by pursuing it in litigation as a means of testing the amount in controversy, is not only in principle distinguishable but by a long line of authorities in this court, distinguished from the test afforded by the possible fruits he may hope to reach by such pursuit.

The motion should be dismissed with costs.

DUFF J. concurred with the Chief Justice.

(1) 38 Can. S.C.R. 41.

(2) 38 Can. S.C.R. 236.

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Motion dismissed with costs.

Solicitors for the appellants: *Gibbons, Harper & Gibbons.*

Solicitors for the respondents: *Blewett & Bray.*