MAXIMILIAN L. SCHLOMANN (DEFENDANT) ..... APPELLANT;

AND

LESLIE R. DOWKER AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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*May 11.

HENRY SCHLOMANN (DEFENDANT)...APPELLANT;

AND

LESLIE R. DOWKER AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, APPEAL SIDE.

Appeal — Acquiescement—Estoppel—Question of costs—Practice—Motion to quash.

In order to avoid expense the Supreme Court of Canada will, when possible, quash an appeal involving a question of costs only, though there may be jurisdiction to entertain it.

MOTIONS to quash two appeals from judgments of the Court of Queen's Bench for Lower Canada, appeal side, reversing the judgments of the Superior Court, District of Montreal, which had maintained the con-

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

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testations of the appellants to the plaintiffs' demand for a judicial abandonment for the benefit of creditors.

The plaintiffs were unsecured creditors, for $687.04, of a commercial firm doing business at Montreal under the style of "The Lynn Shoe Co.", alleged to be composed of John G. Lynn and the two appellants, and, upon the said firm ceasing to meet liabilities, the plaintiffs made a demand for a judicial abandonment for the benefit of creditors generally upon the members of the said firm. The appellants filed separate contestations of the demand denying that they were partners, and on the trial of the issues joined the Superior Court maintained both contestations and dismissed the demand as unfounded in respect of the contestants. On appeals taken by the plaintiffs these judgments were reversed by the Court of Queen's Bench, and the demand for abandonment declared well founded inasmuch as it had been established by evidence that the contestants were partners in the firm.

The appellants then respectively filed judicial abandonments in each of which it was declared that exception was taken to the judgments rendered by the Court of Queen's Bench, in appeal, that an appeal therefrom to the Supreme Court of Canada was intended to be taken, recourse for which was reserved, but that the abandonments were consented to under such reserves, "in order to avoid a writ of *capias*," and other "penalties, trouble and costs." A curator was at once appointed to the abandonment who proceeded to the distribution of the estate according to law, and subsequently, the appellants filed bonds for security for the appeals to the Supreme Court of Canada.

Atwater Q.C. for the respondents, moved to quash both appeals on the grounds: 1st. That there was a want of jurisdiction under sec. 29, sub-secs. 1 and 4 of the Supreme and Exchequer Courts Act, because the

demand was not of the amount of $2,000; and 2nd. That the appellants had voluntarily acquiesced in and executed the judgments appealed from instead of applying for an extension of time under art. 859 C. P. Q.

Belcourt Q.C. contra. The recourse for the appeal was specially reserved in each case, and in each the effect of the declaration of the existence of a partnership by the judgments appealed from will be to hold the appellants liable for many thousands of dollars of debt over and above the amount of $11,375.90 realised from the abandoned estate. There never has been any *acquiescement* so far as this liability is concerned, and the consent to abandon was made under stress.

THE CHIEF JUSTICE: (Oral).—Assuming that we have jurisdiction in this case (but without actually deciding that question), there cannot be any doubt that there has been *acquiescement* by the appellants in the judgments sought to be appealed from, for they have voluntarily made the abandonment and executed the orders made against them, thus leaving the matter in a position where it is impossible they can get relief against their own deliberate and voluntary acts.

This is not exactly a case such as we have hitherto considered as a proper one for a motion to quash, but we are of opinion that in future this proceeding should be adopted in cases like the present, as it has the advantage of avoiding costs.

The court disposes of this appeal on the grounds alone that the appellants have acquiesced in the judgment of the Court of Queen's Bench and abandoned their estate in conformity therewith and that there is now left nothing but a question of costs in respect of

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which the court always declines to entertain jurisdiction, though not incompetent to do so.

The appeal is quashed with costs of the motion to the respondent.

TASCHEREAU J.—I agree with His Lordship the Chief Justice, and I think that in cases like the present where the appeal can only involve a question of costs the procedure of moving, when possible, to quash the appeal should in future be followed.

GWYNNE J.—On the understanding that there is no *res judicata* in this case as to the question of partnership, I concur in this judgment.

SEDGEWICK J.—I am not quite sure that the abandonment was not made under stress and on account of what might be pressure. I enter a doubtful assent.

GIROUARD J.—I agree with His Lordship the Chief Justice.

Appeal quashed with costs.

Solicitors for the appellants: *Carter & Goldstein.*

Solicitors for the respondents: *Atwater & Duclos.*