

WALTER J. SCAMMELL AND CHAS. } APPELLANTS;
E. SCAMMELL (PLAINTIFFS)..... }

1889
*Oct. 28.

AND

STEPHEN K. F. JAMES (DEFENDANT)...RESPONDENT.
ON APPEAL FROM THE SUPREME COURT OF NEW
BRUNSWICK.

*Appeal—Security for costs—Right to benefit of—Interest of third party—
Practice—Discretion of court below—Jurisdiction.*

S. brought an action against J. and issued a writ of *capias*. Bail was given and special bail entered in due course but the bail-piece was not filed, nor judgment entered against J., for some months after. On application to a judge in chambers an order was made for the discharge of the bail on account of delay in entering up judgment, and the full court refused to set aside such order. An appeal was brought to the Supreme Court of Canada entitled in the suit against J., from the judgment of the full court, and the bond for security for costs was given to J.

Held,—That as the bail, the only parties really interested in the appeal, were not before the court and not entitled to the benefit of the bond, the appeal must be quashed for want of proper security.

Held also, that the appeal would not lie as the matter was simply one of practice, in the discretion of the court below.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to rescind an order made by a judge in chambers ordering an *exoneretur* to be entered on the bail-piece and the bail discharged.

An action by Scammell Bros. against James was commenced by writ of *capias* and defendant appeared, gave bail, and entered special bail in due course. The condition of the bail bond was that the judgment should be satisfied or the defendant would not leave or be absent from the Province within six months after judgment without leave of the court or a judge. No defence was offered to the action, and judgment was

*PRESENT—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

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signed but not for some months after the entry of special bail. Application was made to a judge in chambers to have the bail discharged for delay in entering up judgment which was granted. The plaintiffs moved the full court to have the judge's order rescinded, which was refused, and an appeal was brought to the Supreme Court of Canada. Such appeal was brought as in the original suit against J. and the bond for security for costs was given to J.

McLeod Q.C. and *C. A. Palmer* for the appellants cited, on the question of jurisdiction, *Kandick v. Morrison* (1), *Gladwin v. Cummings* (2), *Jones v. Tuck* (3), and offered, if necessary, to procure another bond in favor of the bail.

Jack for the respondent was not called on.

Sir W. J. RITCHIE C.J.—The majority of the court are of opinion that the case is not appealable. As for myself I cannot get over the difficulty as to the bond. We have no evidence that the bail knew anything of the proceedings in this appeal or took any part in them. The factum is signed by counsel for the respondent and all the proceedings are in his name. The parties really interested are not before us and have no security for costs.

STRONG J.—I think the want of security is fatal to this appeal. The bail have never had a word of notice. The respondent is the defendant in the original action, the bond is given to him and he is the only person who can avail himself of it. The factum, too, is signed by the counsel for the respondent. The proceeding, therefore, is one in which the real parties are not before us. As to substituting a proper bond in favor of the bail for the one given, that is out of the question, as the time for giving security has elapsed.

(1) 2 Can. S. C. R. 12.

(2) Cassels's Dig. 245.

(3) 11 Can. S. C. R. 197.

I also doubt whether the judgment appealed from is a final judgment. I am inclined to consider it a mere matter of practice in which the decision of the court below should be binding. We have in this court to deal with different systems of practice with which the judges of the court below are much more familiar than we can possibly be. In refusing to consider such matters we simply obey the provision of the statute requiring us to follow the practice of the Privy Council when no rule is laid down by the statute itself.

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TASCHEREAU J. concurred.

GWYNNE J.—I am not prepared to hold that this is not a final judgment. I think it is conclusive, and as to the bond I should be glad if it could be rectified. If the bail knew of it, and accepted it, and came here to argue it, I do not see why we might not hear them.

PATTERSON J.—I agree with what has been said as to our not having jurisdiction and cannot see that this is an appealable case. An appeal only lies from a final judgment, which is defined as “any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.” I do not see how we can read these words “or other judicial proceeding” so as to include a collateral matter in some other action. There may be no other remedy, but the court below must have control of its own practice and have full power to deal with such cases as these (1).

Appeal quashed with costs.

Solicitor for appellants: *C. A. Palmer.*

Solicitor for respondent: *H. G. Betts.*

(1) See *Blakey v. Latham*, 43 Ch. D. 23.