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LADY DAVIS (DAME ELEANOR CURRAN) (DEFENDANT) ..... APPELLANT;

*Feb. 2.
*Mar. 1.

AND

THE ROYAL TRUST COMPANY AND OTHERS (PLAINTIFFS) ..... RESPONDENTS;

AND

LADY DAVIS (DAME HENRIETTE M. MEYER (MISE-EN-CAUSE).

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

Appeal—Jurisdiction—Interlocutory judgment—Exception to the form——Final judgment—Supreme Court Act, R.S.C., 1927, c. 35, ss. 2 (e), 36.

In an action brought by the plaintiffs as testamentary executors or trustees, a judgment dismissing a preliminary exception to the form, alleging that their appointment by judges of the Superior Court was void for want of jurisdiction, is not a "final judgment" within the meaning of sections 2 (*e*) and 36 of the *Supreme Court Act*.

Such a judgment is only provisional and has not determined, in whole or in part, any substantive right in controversy, as the decision is still open to revision by the final judgment of the trial court. *Willson* v. *Shawinigan Carbide Company* (37 Can. S.C.R. 355) foll.

Distinction must be made between a judgment rendered upon a preliminary exception to the form and a judgment maintaining demurrers, in whole or in part: if the demurrer be to the whole action and if it be maintained, the action is dismissed and *cadit questio;* in all other cases, the allegations struck out upon demurrer disappear from the record and no evidence whatever can be adduced in respect thereof at the trial; the trial judge is therefore powerless, and any attempt by him to remedy the situation by the final judgment would be ineffective and inoperative. Therefore, a judgment on a demurrer, striking out material allegations of pleadings, is a "final judgment." *Dominion Textile Company* v. *Skaife* ([1926] S.C.R. 310) disc.

MOTION to quash an appeal, for want of jurisdiction, from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of P. Cousineau J., in the Superior Court and dismissing an exception to the form presented by the appellant.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) (1931) Q.R. 52 K.B. 59.

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

Aimé Geoffrion K.C. for the motion.

W. F. Chipman K.C. and *W. K. McKeown K.C. contra.*

The judgment of the court was delivered by

RINFRET J.—On October 28, 1897, the late Sir Mortimer Davis entered into a marriage contract with the *mise-en-cause,* Dame Henriette Marie Meyer, under the sixth clause of which he gave to her and to

his child or children * * * by way of donation *inter vivos* and irrevocably * * * the sum of one hundred thousand dollars, payable at his death,

in the manner and subject to the conditions therein provided.

By the seventh clause of the marriage contract, the future husband stipulated

the right to name trustees either during his lifetime by notarial acts or by his last will and testament: to whom such payments may be made for the administration and management thereof.

The eighth clause of the marriage contract defined the powers of the trustees and provided for the disposition of the trust under certain conditions.

The ninth clause of the marriage contract reads in part as follows:

Unless otherwise provided by the instrument appointing the trustees, there shall be always three trustees.

Should the future husband neglect to appoint them during his lifetime or by will, they shall be appointed on petition by any interested party by a judge of the Superior Court in the district of Montreal on the advice of a family council: two being chosen by the relatives and friends of the future husband and one by the relatives of the future wife.

The respondents were respectively appointed trustees of the donation by judges of the Superior Court of Montreal. By their action, they demand judgment for the balance of the $25,000 claimed to be unpaid under the donation, and for a further sum representing the alleged present value of the 750 shares of American Tobacco Company of Canada, assigned and transferred to the future wife by the marriage contract to secure the fulfilment of the future husband's obligations.

In the writ of summons, the respondents describe themselves as follows:

* * * all three acting in their quality of trustees and duly appointed under the provisions of the contract of marriage between the late Sir Mortimer Davis and Miss Henriette Marie Meyer, passed before W. de M. Marler, notary, on the 20th day of October, 1897.

The action was directed against the testamentary executors and trustees of the late Sir Mortimer Davis, described in the writ of summons as follows:

The Right Honourable Lord Shaughnessy (William James Shaughnessy), of the city and district of Montreal, Alexander M. Reaper, of the city and district of Montreal, and Lady Davis (Dame Eleanor Curran), of the city and district of Montreal, widow of the late Sir Mortimer Barnet Davis, Knight, all three in their quality of testamentary executors and trustees of the late Sir Mortimer Barnet Davis.

The appellant filed a preliminary exception in the nature of an exception to the form and urged that, no trustees having been appointed by the late Sir Mortimer Davis, the appointment of the respondents made since his death by the judges of the Superior Court were void for want of jurisdiction. Accordingly, he demanded the dismissal of the respondents' action.

Judgment was rendered by Cousineau J., holding that the respondents were qualified to bring the action, and dismissing the exception to the form.

All three co-executors respectfully excepted to the judgment and made express reservation of all rights of redress by way of appeal or otherwise. The appellant alone, and without the concurrence of her co-executors, inscribed in appeal before the Court of King's Bench. That court confirmed the judgment of the Superior Court. Bond J., was for dismissing the appeal upon the ground that the appellant had no right to appeal alone. Hall J., was for confirming for the reasons given in the Superior Court. Rivard J., adopted the reasoning of both of his colleagues. Howard and Létourneau JJ. did not prepare any notes.

The appellant then gave notice of appeal to the Supreme Court of Canada, and the respondents now move to quash the appeal for want of jurisdiction.

Two points are raised by the respondents in support of the motion to quash.

1. The judgment appealed from is not a final judgment;
2. The appellant cannot appeal without the concurrence of her co-executors.

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Article 174 of the Code of Civil Procedure of the province of Quebec provides that

the defendant may invoke any of the following grounds, by way of exception to the form, whenever they cause a prejudice:

* * *

3. Absence of quality in the plaintiff or in the defendant.

The respondents sued in their quality of trustees under the marriage contract.

The appellant and her co-executors availed themselves of the provision of the Code of Civil Procedure above quoted and, by way of exception to the form, they invoked the absence, in the respondents, of the quality assumed by them in bringing the suit. The respondents now claim that the judgment dismissing that exception is not a final judgment within the meaning of section 36 of the *Supreme Court Act* (c. 35, R.S.C., 1927).

Under the *Supreme Court Act*, "final judgment" means any 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 (Section 2 (*e*)).

In that definition, the word on which we desire to lay emphasis is the word "determines." In order that a judgment may come under the definition, it must have, "in whole or in part," determined or put an end to the issue raised and in respect to which the judgment was rendered.

Now, it is a fundamental principle in the province of Quebec that, as a general rule, interlocutories do not determine the issue raised and that they are open to revision by the final judgment.

On this point, the decision in *Willson* v. *Shawinigan Carbide Company* (1) is conclusive.

The action in that case was brought by the company for a declaration that certain letters patent of invention should be declared invalid, to have a contract in respect thereto resiliated, and for the return of the consideration paid by the company to the defendant under the contract. The defendant, by declinatory exception, objected to the jurisdiction of the Superior Court to hear or adjudicate upon the plaintiff's demand, on several grounds which it is unnecessary to state here. In the Superior Court, Taschereau J. maintained the declinatory exception and dismissed the action with costs. On appeal, the Court of King's Bench

(1) (1906) 37 Can. S.C.R. 535.

dismissed the exception and ordered that the case should be proceeded with in the Superior Court and disposed of on the merits. The respondents moved to quash a further appeal by the plaintiff to the Supreme Court of Canada, alleging that the judgment complained of was not a final judgment within the meaning of the *Supreme Court Act*.

The motion to quash was granted on the ground that the objection as to the jurisdiction of the Superior Court might be raised, on a subsequent appeal from the judgment on the merits.

In the course of delivering his judgment, Girouard J. said:

> The reason for this ruling is that an appeal on the merits opens all the interlocutories, especially if a reservation or an exception be filed immediately after the rendering of the interlocutories. Such has been the well settled practice and jurisprudence of the province of Quebec. *Renaud* v. *Tourangeau* (1); *Jones* v. *Gough* (2); *Goldring* v. *La Banque d'Hochelaga* (3); *Benning* v. *Grange* (4); *Archer* v. *Lortie* (5); *Metras* v. *Trudeau* (6).

This court expressed the same views on several occasions and especially in *Molson* v. *Barnard* (7); *Hamel* v. *Hamel* (8); *Griffith* v. *Harwood* (9).

The only difference between that case and the present one is that, there, the exception was declinatory, while here it is an exception to the form.

The amendments to the *Supreme Court Act* do not alter the argument relied on in that case on the particular point we are now dealing with.

In the case of *Metras* v. *Trudeau* (10), referred to by Girouard J., the holding of the Court of Queen's Bench, composed of Sir A. A. Dorion C.J., and Monk, Tessier, Cross and Baby JJ., was:

> Que l'appel du jugement final de la Cour Supérieure soulève de nouveau tous les jugements interlocutoires rendus dans la cause, et que le défaut par un défendeur d'exciper ou d'appeler d'un jugement interlocutoire renvoyant son exception à la forme, ne l'empêche pas de discuter ce jugement sur l'appel du jugement final, l'interlocutoire n'étant pas *chose jugée* sur les questions soulevées par son exception à la forme.

The rule thus laid down was invariably followed since then by the Court of King's Bench in Quebec. *Bayard* v.

(1) (1867) 5 Moo. P.C. n.s. 5.
(2) (1865) 3 Moo. P.C. n.s. 1.
(3) (1880) 5 App. Cas. 371.
(4) (1868) 13 L.C.J. 153.
(5) (1877) 3 Q.L.R. 159.
(6) (1885) M.L.R. 1 Q.B. 347.
(7) (1890) 18 Can. S.C.R. 622.
(8) (1896) 26 Can. S.C.R. 17.
(9) (1900) 30 Can. S.C.R. 315.
(10) (1885) M.L.R. 1 Q.B. 347.

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Dinelle (1); *Perrault* v. *Grand Trunk Ry.* (2); *Longpré* v. *Dumoulin* (3); *Levine* v. *Serling* (4); *Compagnie des Champs d'or Rigaud-Vaudreuil* v. *Bolduc* (5).

In *Canadian Car & Foundry* v. *Bird* (6), Brodeur J. said at page 262:

> Dans cette province (de Québec), l'interlocutoire ne lie pas le juge * * * Lors du jugement final, ces interlocutoires peuvent être modifiés et renversés.

It follows that the judgment *a quo* is only provisional and has not determined, in whole or in part, any substantive right of the appellants in the controversy.

It may be, now that the Court of King's Bench has pronounced upon the point concerning the absence of quality of the respondents, that the Superior Court and the Court of King's Bench itself will be inclined to follow the ruling already made, when the question comes again for decision on the merits of the case. This will not be, however, because of lack of power to decide otherwise. It will be rather the effect of the application to the particular instance of the maxim *Stare decisis*. But we entertain no doubt that if the appellant ever comes before a higher court upon the merits, she will be at liberty to take up the point again and have it revised, should the judgment of the Court of King's Bench be erroneous (7).

More particularly is this true of this case, for the contention that the plaintiffs-respondents are not the true creditors of the debt and are not qualified to recover it is obviously a ground open to the appellant on the merits. (*Levine* v. *Serling* (8); *City of Montreal West* v. *Hough* (9).

At the hearing, the appellant relied mainly on the judgment of this court in *Dominion Textile Company* v. *Skaife* (10), in which the court unanimously reversed the decision of the Registrar refusing to affirm jurisdiction upon the defendant's appeal from a judgment of the Superior Court striking out a part of the defence on a demurrer.

(1) (1898) Q.R. 7 K.B. 480.
(2) (1905) Q.R. 14 K.B. 245.
(3) (1917) 24 R. de J. 1.
(4) (1911) Q.R. 23 K.B. 289.
(5) (1915) Q.R. 25 K.B. 97.
(6) (1922) 64 Can. S.C.R. 257.
(7) (1906) 37 Can. S.C.R. 535, at 539.
(8) [1914] A.C. 659.
(9) [1931] S.C.R. 113.
(10) [1926] S.C.R. 310.

Judgments maintaining demurrers, in whole or in part, are not analogous. If the demurrer be to the whole action and if it be maintained, the action is dismissed and *cadit questio*. In all other cases, the allegations struck out upon demurrer disappear from the record and no evidence whatever can be adduced in respect thereof at the trial. The trial judge is therefore powerless, and any attempt by him to remedy the situation by the final judgment would be ineffective and inoperative. The result is that judgments on demurrers striking out part of the allegations stand in a class by themselves and must be treated as final judgments.

The judgment in *Ville de St. Jean* v. *Molleur* (1), proceeds on that principle. The point is brought out forcibly by Fitzpatrick C.J., delivering the decision of the court. The learned Chief Justice first recalled the difference between a "jugement définitif" and the "jugement provisoire, jugement préliminaire et jugement interlocutoire," all of which come under the general classification of "jugements avant faire droit." He then points out that, in that case,

> There was one conclusion only; but there were several counts, each putting forward an independent title to the relief claimed; and the effect of the judgment appealed from was, as regards the counts in respect of which the demurrer was allowed, precisely the same as if the action had gone to trial and judgment had been given. The controversy regarding the matters raised by them is as effectually and conclusively disposed of. And it is this quality of conclusiveness which determines the character of a judgment as a final judgment, not its relation in point of time to other proceedings. When, by a judgment, a distinct and separate ground of action is, to use Lord Halsbury's words, "finally disposed of," it is, in the ordinary use of the words, a final judgment with respect to that ground of action.

It will thus be seen that, in *La Ville de St. Jean* v. *Molleur* (1), this court held a judgment on demurrer striking out material allegations of the declaration to be a "final judgment with respect to that ground of action"; and it is for that reason that jurisdiction was entertained. The same principle underlies the judgment in *Dominion Textile Co.* v. *Skaife* (2), and all other similar judgments upon demurrers.

Our conclusion is that the judgment appealed from on the appellant's exception to the form was not a final judgment within the meaning of the *Supreme Court Act*

(1) (1908) 40 Can. S.C.R. 139. (2) [1926] S.C.R. 310.

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and that this court has no jurisdiction to entertain the appeal from that judgment.

Having come to that conclusion upon that part of the appeal, it would not be competent for us to express any opinion upon the remaining question.

The motion to quash should be granted with costs.

Motion granted with costs.