JOSEPH HONORÉ CHEVALIER.....APPELLANT;

AND

DAME MARIE A. CUVILLIER *et al*.....RESPONDENTS.

1879

*Nov. 12.

*Dec. 13.

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

Appeal.—Final judgment.—Judicial proceeding.—42 *Vic.*, *c.* 39, *Secs.* 3 *and* 9.

In an action instituted in the Superior Court of the Province of *Quebec* by the appellant against *M. A. C.* and nine other defendants, the respondents, three of the defendants, severally demurred to the appellant's action, except as regards two lots of land, in which they acknowledged the appellant had an undivided share. The Superior Court sustained the demurrer, and, on appeal, the Court of Queen's Bench for *Lower Canada* (appeal side) affirmed the judgment. The appellant thereupon appealed to the Supreme Court, and moved to quash the appeal on the ground that the Supreme Court had no jurisdiction.

Held,—That as the judgment of the Court of Queen's Bench (the high-

*Present:—Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, J. J.

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est court of last resort having jurisdiction in the Province) finally determined and put an end to the appeal, which was a judicial proceeding within the meaning of sec. 9 of *The Supreme Court Amendment Act of* 1879, such judgment was one from which an appeal would lie to the Supreme Court of *Canada*; and though an appeal cannot be taken from a court of first instance directly to the Supreme Court until there is a final judgment, yet, whenever a Provincial Court of appeal has jurisdiction, this Court can entertain an appeal from its judgment finally disposing of the appeal, the case being in other respects a proper subject of appeal.

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (Appeal side), maintaining the judgment of the Superior Court of the said Province in an action instituted by the appellant against the respondents and others.

By his action, the appellant claimed an account of the *tutelle*, gestion and administration of the property of the late *Marie Francoise Marguerite Cuvillier*, and also demanded that a *partage* be made of all the real estate described in the declaration, in which he claimed to be entitled to an undivided share. The respondents severally demurred to the appellant's action, except as regards two lots of land and in which they acknowledge the appellant has an undivided share.

The Superior Court maintained the demurrers and dismissed the appellant's action, *quoad* the respondents, except as to the two lots in question.

The appellant then appealed to the Court of Queen's Bench, which affirmed the first judgment.

From this judgment the appellant appealed to the Supreme Court of *Canada* and the respondents moved to quash the appeal, upon the ground that the Supreme Court had no jurisdiction.

Mr. *Monk* for respondents:

The judgment appealed from is not a final judgment within the meaning of sec. 3, c. 39, 42 *Vic.* It only decides

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a part of the case, and would not certainly be appealable to the Privy Council. See *Simard* v. *Townshend* (1); and *Lacroix* v. *Moreau* (2). If the judgment of the court below is reversed, the parties will have to go before the Superior Court, and when a final judgment is obtained on the merits of the case, the whole case will come up again. The legislature did not contemplate that there should be two appeals in the same case.

Mr. *Doutre*, Q. C., for appellant:

My learned friend has failed to show that any remedy would be left to the appellant if this judgment is allowed to stand.

The same provisions as to the right of appeal are to be found in our code, and I was allowed to go to the Court of Queen's Bench, because this judgment was considered a final judgment. As the case now stands my action is dismissed as regards the greater amount I claim, and I am left a remedy for a small amount; suppose I succeed in the Superior Court for this small amount, how can I then appeal from the judgment dismissing my action for the greater, for I would not be supposed to appeal from a judgment in my favor. Under the 9th section of 42 *Vic.*, c. 39, this is a *final* judgment in a judicial proceeding.

Mr. *Monk*, in reply.

The judgment of the court was delivered by

STRONG, J.:

This was a motion to quash an appeal upon the ground that this court has no jurisdiction. The original action was instituted in the Superior Court of the Province of Quebec against ten defendants, three of whom demurred to the declaration. The Superior Court sustained the demurrers. The Plaintiff (the appellant in

(1) 6 L. C. R. 147. (2) 15 L. C. R. 485.

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this court) then appealed to the Court of Queen's Bench, which affirmed the first judgment. From this judgment of the Court of Queen's Bench, the present appeal is taken.

The objection to the appeal is that the judgment appealed against is not a final judgment within the meaning of sec. 9 of *The Supreme Court Amendment Act of* 1879. In support of this contention it is argued that no appeal lies unless there has been a final disposition of the action by the court of first instance, for which sec. 3 of the act first quoted is relied on. That section is in these words, "An appeal shall lie from final judgments only, in actions, suits, causes, matters and other judicial proceedings originally instituted in the Superior Court of the Province of *Quebec*." It must be remarked, that this section does not say that there shall be no appeal unless there has been a final judgment of the Superior Court. The argument of the Counsel for the respondent proceeded on that assumption however. There can be no appeal directly from the Superior Court of the Province of *Quebec*, for sec. 5 of the act of 1879 expressly provides that no appeal shall lie to this Court except from the highest Court of last resort having jurisdiction in the Province. This, as applied to the Province of *Quebec*, means, of course, the Court of Queen's Bench on its appellate side. Then, the appeal is not from the judgment of the Superior Court, but from that of the Court of Queen's Bench; and what we have to determine on this motion is, whether the judgment of the Court of Queen's Bench was a final judgment. The interpretation clause (sec. 9 already referred to) shews plainly that it was, for it enacts that the words "final judgment" shall mean any judgment, rule, order or decision whereby the action, suit, cause, matter, *or other judicial proceeding*, is finally determined and put an end to. Then the judgment of the Court of Queen's Bench

finally determined and put an end to the appeal, and the appeal was a judicial proceeding within the meaning of this section. The result is, that though an appeal cannot be taken from a Court of first instance directly to this Court until there is a final judgment, yet, wherever a Provincial Court of Appeal has jurisdiction, this Court can entertain an appeal from its judgment finally disposing of the appeal, the case being in other respects a proper subject of appeal. Any other construction of the Act would take a large class of cases subject to appeal to the intermediate Courts out of the provisions of this Act. The present case affords an instance of this, for if the appellant is bound to await the termination of the suit in the Superior Court, his right of appeal *de plano* from the judgment of the Queen's Bench will be gone, and he will only be able to seek a revision of that judgment here by the order of a judge or of the court made by way of granting him an indulgence.

I am of opinion that the motion should be refused.

Motion refused with costs.

Solicitors for appellant: *Doutre, Branchaud & McCord.*

Solicitors for respondents: *Barnard & Monk.*