CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES AND THE TERRITORIAL COURT OF THE YUKON TERRITORY.

GONZALVE DESAULNIERS *et al* (OPPOSANTS) ..... } APPELLANTS;

1904

*May 5, 6.

*May 16.

AND

LOUIS PAYETTE *et al* (PLAINTIFFS)...RESPONDENTS.

AND

LA COMPAGNIE DE L'OPÉRA COMIQUE DE MONTRÉAL... } DEFENDANTS.

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

Opposition afin de charge—Order for security—Interlocutory judgment—Res judicata—Subsequent final order—Revision of merits on appeal—Practice.

An order requiring opposants *afin de charge* to furnish security that lands seized, if sold in execution subject to the charge, should realize sufficient to satisfy the claim of the execution creditor was held to be interlocutory and non-appealable (33 Can. S.C.R. 340). Subsequently, upon default to furnish such security, the

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* PRESENT :—Sir Elzear Taschereau C.J. and Sedgewick, Girouard Davies and Nesbitt JJ.

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opposition was dismissed. On appeal from the judgment of the Court of King's Bench affirming the order for the dismissal of the opposition ;—

Held, that, under the circumstances, the order dismissing the opposition was the only one which could be properly made, and that the merits of the former order could not be reviewed on appeal from the final judgment.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming an order of the Superior Court, District of Montreal, dismissing the appellants opposition with costs.

The appellants filed an opposition *afin de charge* to the seizure and sale of the property of the defendant under execution at the instance of the respondents and, upon such opposition, an order was made (1) requiring the opposants to furnish security that the lands seized, if sold by the sheriff subject to the charge, should realize sufficient to satisfy the claim of the execution creditor. On an appeal, it was held that this order was merely an interlocutory proceeding and not appealable to the Supreme Court of Canada (2). The opposants failed to furnish the necessary security and, upon the plaintiff's motion, the Superior Court, consequently, dismissed the opposition with costs. The Court of King's Bench, appeal side, affirmed the dismissal of the opposition and the opposants sought an appeal to the Supreme Court of Canada upon the merits of both orders.

Macmaster K.C. and *Lemieux K.C.* for the appellants (*Desaulniers K.C.* with them). The proceedings were irregular and to the prejudice of the opposants. The provisions of the Code of CivilProcedure were disregarded or misapplied in such a manner as to deprive the opposants of their right to have the lands sold subject to their lease-charge. There should have been

(1) Q. R. 12 K. B. 445. (2) 33 Can. S. C. R. 340.

an adjudication upon the validity of the charge before imposing, upon the opposants, the duty of furnishing security. Arts. 724,726 C. P. Q.; art. 2073 C. C.; *Bastien* v. *Desjardins* (1) per Lacoste C.J. The proper procedure would have been according to the provisions of arts. 644 *et seq.*, 731 and 732 C. P. Q. and arts 1663 and 2128 C. C. We refer to *Lachaine* v. *Desjardins* (2); per Mathieu J.; *North British & Mercantile Ins. Co.* v. *Marsan dit Lapierre* (3) per Davidson J.; arts. 716 to 726 C. P. Q. and arts. 2058 and 2065 C. C.

Angers K.C. and *DeLormier K.C.* for the respondents. The opposants had both actual and constructive notice of our priority of registration and have suffered no wrong. The present appeal can be asserted only from the last judgment. The interlocutory order became *chose jugée* and it is impossible, now, to raise objections to it. 2 Boncet, des Jugements, 151; *Toussignant* v. *County of Nicolet* (4); *North British & Mercantile Insurance Co.* v. *Marsan dit Lapierre* (3).

Art. 726 C. P. Q. does not apply to this proceeding; it is ruled by arts. 3 and 651 C. P. Q. On matters of procedure the decisions of the provincial courts ought not to be disturbed. The charge could not be admitted and security asked for at the same time.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This appeal must, in my opinion, be dismissed.

The judgment of 30th September, 1902, ordering the appellants to give security, having been affirmed by the Court of Appeal, the Superior Court, upon the appellants' faillure to give the security so ordered, when the case came up *de novo* upon the respondents'

(1) Q. R. 11 K. B. 428.
(2) 1 Q. P. R. 15.
(3) 1 Q. P. R. 30.
(4) 32 Can. S. C. R. 353.

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motion to consequently dismiss the appellants' opposition, was bound to grant the said motion as it did on the 19th of May, 1903. And, likewise, when the case came up again before the Court of Appeal, that court could not but hold, as it did by the judgment now appealed from, that the Superior Court had committed no error when it had simply acted in accordance with the judgment rendered upon the first appeal.

Now, if the Court of Appeal has rendered the judgment that it had in law to give, the appellants' attempt to shew error in that judgment necessarily fails, and if there is no error in it they cannot expect us to reverse it. They seem to be under the impression that, because the first judgment ordering them to give security, was not appealable to this court, *Desaulniers* v. *Payette* (1), they can now ask us, upon this appeal from the last judgment, to review that first judgment. But that cannot be. As we have often said, an interlocutory judgment that cannot be appealed from is *res judicata*. But it is not merely because a judgment is *res judicata* that it is appealable, as the appellants would contend.

The policy of the statute is, as a general rule, to allow but one appeal in each case, and that only from the final judgment (2). The rules of the Code of Civil procedure, upon appeals from the Superior Court to the Court of King's Bench, have no application to appeals from the Court of King's Bench to this court. The judgment in this case ordering security to be given was not a final judgment and we could not entertain that appeal therefrom that was brought by the appellants. The last one, now appealed from, dismissing appellants' opposition upon their refusal to give such security, is a final judgment and we have jurisdiction over this appeal therefrom, but we must

(1) 33 Can. S. C. R. 340.

(2) R. S. C. c. 135, s. 24*e*.

dismiss the appeal because the judgment is the only one that the court *a quo* could, in law, possibly give. *Shaw* v. *St. Louis* (1). *The Ontario and Quebec Railway Co.* v. *Marcheterre* (2).

Appeal dismissed with costs.

Solicitor for the appellants: *Gonzalve Desaulniers.*

Solicitors for the respondents: *DeLorimier & Godin.*