1904

*May 6.

*May 16.

OVIDE DUFRESNE AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

THOMAS E. FEE AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

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

Appeal—Jurisdiction—Amount in controversy on appeal—Retraxit.

The judgment appealed from condemned the defendants to pay $775.40, balance of the amount demanded less $1,524.60 which had been realized on a conservatory sale of a cargo of lumber made by consent of the parties pending the suit and for which credit was given to the defendants.

Held, that as the amount recovered was different from that demanded, and the amount of the original demand exceeded $2,000, there was jurisdiction in the Supreme Court of Canada to entertain an appeal. *Joyce* v. *Hart* (1 Can. S. C. R. 321); *Levi* v. *Reed* (6 Can. S. C. R. 482); *Laberge* v. *The Equitable Life Assurance Society* (24 Can. S. C. R. 59), and *Kunkel* v. *Brown* (99 Fed. Rep. 593) refer-

*PRESENT;—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

red to. *Cowen* v. *Evans* (22 Can. S. C. R. 328); *Cowen* v. *Evans*; *Mitchell* v. *Trenholme*; *Mills* v. *Limoges*; *Montreal Street Railway Co.* v. *Carrière* (22 Can. S. C. R. 331, 333, 334 and 335, *note*); *Lachance* v. *Société de Prêt et des Placements* (26 Can. S. C. R. 200), and *Beauchemin* v. *Armstrong* (34 Can. S. C. R. 285) distinguished.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montreal, and maintaining the plaintiffs' action for a balance of $775.40, after deduction, from the amount of the *demande*, of $1,524.60 which had been realised upon a conservatory sale pending suit.

The action was for $2,300, the price of a cargo of lumber shipped by the plaintiffs to the defendants and delivered at the St. Gabriel Lock, in Montreal, on barges, but which the defendants refused to receive under their contract. After the action had been instituted, by the consent of the parties and to save expense, the plaintiffs sold the lumber in dispute for $1,524.60 and gave credit for that amount on account of the sum claimed by the action. The Superior Court dismissed the action with costs, but, on appeal by the plaintiffs, that decision was reversed by the judgment now appealed from and judgment was ordered to be entered in favour of the plaintiffs, after deduction of the $1,524.60, for the balance of the amount claimed with costs.

Buchan K.C. for the motion. The amount remitted for cash received on the conservatory sale constituted a retraxit leaving only the balance of the original demand in controversy between the parties, a sum less than that required to give this court jurisdiction to hear an appeal. *Lachance* v. *La Société de Prêts et de Placements* (1); *Cowen* v. *Evans* (2); *Beauchemin* v.

(1) 26 Can. S. C. R. 200. (2) 22 Can S. C. R. 328.

1904

DUFRESNE v. FEE.

Armstrong (1). The circumstances take this case out of the technical rule, because the plaintiffs and defendants acquiesced in the conservatory sale and the credit given and, consequently, the amount of the *demande* was actually reduced before the trial.

Bisaillon K.C. contra. The consent was made "without prejudice to any of the rights of either of the parties" as a conservatory measure; no retraxit was filed; no reduction of the *demande* was effected, and, in the trial court, the plaintiffs' action was dismissed. There is, in effect, no modification of the amount in dispute, no difference between what the plaintiffs demanded by the action originally and what they have recovered. This case is governed by the decisions since the amendment of the Supreme Court Act in 1891, including *Coghlin* v. *La Fonderie de Joliette* (2), and *The Citizens Light and Power Co* v. *The Town of Saint Louis* (3). The cases in point are collected under the heading "Controversy Involved" in Coutlee's Digest, pp. 48 to 69.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is a case where the amount demanded by the declaration and the amount recovered are different. Now, the amount demanded was over $2,000. And the fact that the amount recovered and now in controversy upon the appeal is less than the appealable amount, cannot, under the amendment of 1891 to section 29 of the Supreme Court Act, affect our jurisdiction. *Joyce* v. *Hart* (4); *Levi* v. *Reed* (5); *Laberge* v. *The Equitable Assurance Society* (6); *Kunkil* v. *Brown* (7).

(1) 34 Can. S. C. R. 285.
(2) 34 Can. S. C. R. 153.
(3) 34 Can. S. C. R. 495.
(4) 1 Can. S. C. R. 321.
(5) 6 Can. S. C. R. 482.
(6) 24 Can. S. C. R. 59.
(7) 99 Fed. Rep. 593.

1904

DUFRESNE v. FEE.

The Chief Justice.

The cases of *Cowen* v. *Evans* (1); *Cowen* v. *Evans*; *Michell* v. *Trenholme*; *Mills* v. *Limoges*; *The Montreal Street Railway Co.* v. *Carrière* (2), relied upon by the respondents, in support of their motion, were governed by the law as it stood before that amendment. In *Lachance* v. *La Société de Prêts et de Placements* (3), the appeal was quashed because the appellants' interest did not amount to $2,000, and it was not a case where there was a difference between the amount claimed and the amount recovered.

The case of *Beauchemin* v. *Armstrong* (4) also invoked by the respondents, is clearly not in point. There, subsection 4 of section 29 did not apply because it was not a case where there was a difference between the amount demanded and the amount recovered, costs not forming part of the amount so as to affect our jurisdiction where the right to appeal is dependent upon the amount in dispute under that subsection.

The motion to quash is dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellants: *Bisaillon & Brossard*,

Solicitor for the respondents: *J. S. Buchan.*

---

(1) 22 Can. S. C. R. 328.
(2) 22 Can. S. C. R. 331, 333, 334 and 335 (*note*).
(3) 26 Can. S. C. R. 200.
(4) 34 Can. S. C. R. 285.