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*Oct. 6, 8.
*Nov. 5.

THE HONOURABLE ARTHUR TURCOTTE (DEFENDANT)............ APPELLANT;

AND

DAME JUSTINE DELPHINE DANSEREAU (PLAINTIFF)........... RESPONDENT.

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

Appeal — Jurisdiction — Judicial proceeding—Opposition to judgment—Arts. 484-493 *C. C. P.—R. S. C. c.* 135, *s.* 29—*Appealable amount —*54 *&* 55 *V. c.* 25, *s.* 3, *s.s.* 4—*Retrospective legislation.*

An opposition filed under the provisions of articles 484 and 487 of the Code of Civil Procedure of Lower Canada for the purpose of vacating a judgment entered by default, is a "judicial proceeding" within the meaning of sec. 29 of "The Supreme and Exchequer Courts Act," and where the appeal depends upon the amount in controversy, there is an appeal to the Supreme Court of Canada if the amount of principal and interest due at the time of the filing of the opposition under the judgment sought to be annulled is of the sum or value of $2,000.

MOTION to quash an appeal from the decision of the Court of Queen's Bench for Lower Canada (appeal side), District of Quebec, affirming the judgment of the Superior Court, District of Three Rivers, which dismissed the appellant's opposition to a default judgment entered against him in favour of the respondent.

*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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The plaintiff sued the defendant on 19th September, 1888, for $1,997.92, the claim being made up of the amount of two promissory notes with interest thereon from their respective dates of maturity to the date of action, and by the conclusions of her declaration further asked interest upon the sum so claimed from that date till payment and for costs. The defendant did not appear to the action and upon the 19th of October, 1889, the plaintiff caused a judgment by default to be entered against the defendant for $1,997.92 with interest on $1,500 (amount of the notes,) from the date of the action and on $497.92, (the interest accrued thereon,) from the 21st of September, 1888, (date of service,) until paid, and for costs.

On the 25th of April, 1892, the defendant filed an opposition to the judgment so entered asking to have it annulled and further setting up exceptions and pleas to the action. The plaintiff's opposition was dismissed with costs by the judgment of the Superior Court rendered on the 16th of November, 1892, which was affirmed by the decision of the Court of Queen's Bench now appealed from on the 5th of May, 1896. At the time of the filing of the opposition interest to the amount of $421.85 had accrued upon the judgment then attacked, making together with the judgment a total sum of $2,419.77 then exigible thereunder besides costs.

The respondent moved to quash the appeal on the grounds, that the matter in controversy did not amount to the sum or value of $2,000, and that the Supreme Court of Canada had no jurisdiction to entertain the appeal.

Lajoie for the motion. The opposition is a defence or plea to the action and forms part of the proceedings upon the original suit, and is subject to the provisions concerning ordinary contestations (1) and consequently

(1) C. C. P. art. 490.

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the amount claimed in the declaration being less than $2,000 no appeal lies (1). Even considered as an opposition, it has been filed in a suit where the dispute is less than $2,000, and there is no appeal. *Gendron* v. *McDougall* (2). Interest cannot be added to raise the sum in dispute to the amount necessary to give the right of appeal. *Dufresne* v. *Guévremont* (3). The opposition and the judgment dismissing it were both in 1892, subsequent to the Act 54 & 55 Vic. ch. 25, and are subject to its provisions, as well as those of art. 2511, R. S. Q., which are the same in all respects. Wade Retroactive Laws, p. 218; *Williams* v. *Irvine* (4); *Couture* v. *Bouchard* (5).

Languedoc Q.C. for the appellant. In this case the plaintiff sued on promissory notes with interest calculated to date of action, but by law interest was still accruing from day to day (6); *Boswell* v. *Kilborne* (7); and was prayed for accordingly in the declaration. The judgment in 1889 granted precisely what had been prayed for; the condemnation and the prayer are identical, and consequently the Act 54 & 55 Vic. ch. 25 cannot apply, for there is no difference between the amount prayed for and the amount demanded. This Act does not operate retrospectively, as it affects an existing right; *The Attorney General* v. *Sillem* (8), *Taylor* v. *The Queen* (9); so the sum recovered by the judgment must be looked at to determine the right of appeal. *Macfarlane* v. *Leclaire* (10); *Bank of New South Wales* v. *Owston* (11); *Allan et al* v. *Pratt* (12);

(1) 54 & 55 Vic. ch. 25, sec. 3, sub sec. 4.
(2) Cass. Dig. 2 ed. p. 429.
(3) 26 Can. S. C. R. 216.
(4) 22 Can. S. C. R. 108.
(5) 21 Can. S. C. R. 281.
(6) C. S. L. C. ch. 64, sec. 7; 53 Vic. (D.) ch. 33, secs. 9 and 57; C. C. arts. 2318 and 2346.
(7) 12 Moo. P. C. 467.
(8) 10 H. L. Cas. 704; 33 L. J. Ex. 209.
(9) 1 Can. S. C. R. 65.
(10) 15 Moo. P. C. 181.
(11) 4 App. Cas. 270.
(12) 13 App. Cas. 780.

Ayotte v. *Boucher* (1); *Monette* v. *Lefebvre* (2); *Dawson* v. *Dumont* (3); *The Patapsco* (4).

The opposition filed by the appellant in 1892 is, under the Supreme Court Act a judicial proceeding which marks the date at which his interest must be considered. He could not then have settled without tendering interest if he had wished to do so. He contested the judgment as he then found it with interest accrued due on the principal and disputed the whole condemnation, in all exceeding the appealable amount. The opposition may technically be considered as a plea to the action, but it is one that challenged the case at a stage and in a condition when the amount of the demand of the plaintiff depended upon the whole judgment and exceeded the appealable amount.

THE CHIEF JUSTICE.—By her declaration, dated the 19th of September, 1888, the plaintiff claimed from the defendant the sum of $1,997.92 with interest and costs.

The amount was made up as follows:

1. A promissory note at 4 months, dated 18th May, 1883, for $1,000.

2. A promissory note at 4 months, dated 12th June, 1883, for $500.

3. Interest on the first note from the date it fell due to the date of the declaration, $300.

4. Interest on the second note from the date it fell due to the date of the declaration, $197.92.

On the 19th day of October, 1889, the Superior Court gave judgment for the plaintiff, by default, for $1,997.92 with interest on $1,500 from the 19th September, 1888 (the date of the declaration) and on $497.92 from the 21st September, 1888 (the date of the service).

On the 25th April, 1892, the defendant filed his opposition in the Superior Court to the judgment, because

(1) 9 Can. S. C. R. 460.
(2) 16 Can. S. C. R. 387.
(3) 20 Can. S. C. R. 709.
(4) 12 Wall. 451.

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the action had not been served on him; and no copy of the writ and declaration had been served on him or left at his place of business or domicile.

He also set out his defence on the merits.

On the 16th November, 1892, the Superior Court dismissed the opposition with costs.

From this last mentioned judgment the defendant (opposant) appealed to the Court of Queen's Bench (appeal side), which court, on the 5th day of May, 1896, affirmed the judgment of the Superior Court of the 16th November, 1892, with costs.

From this judgment of the Court of Queen's Bench the defendant has appealed to the Supreme Court of Canada.

The plaintiff has moved to quash because the matter in controversy in the case does not amount to the sum or value of $2,000, and that therefore the case does not come within the provisions of the Supreme and Exchequer Courts Act and consequently the Supreme Court has no jurisdiction to entertain the appeal.

I am of opinion that the opposition filed by the defendant for the purpose of having the judgment by default rendered against him vacated was "a judicial proceeding" within the meaning of section 29 of the Supreme Court Act.

In April, 1892, when the opposition was filed the amount due on the judgment which it sought to have annulled amounted to upwards of $2,000. From this it follows, without any necessity for further demonstration, that the matter in controversy in this "judicial proceeding" exceeded $2,000, and that therefore under section 29 the appeal is within the competence of this court.

It may be added that in the case of *Wallace* v. *Bossom* (1) the court held that a rule or order of the Su-

(1) 2 Can. S. C. R. 488.

preme Court of Nova Scotia setting aside an execution was a proper subject of appeal to this court.

The motion to quash must be refused with costs.

GWYNNE J.—On the 19th September, 1888, the above respondent as plaintiff filed her declaration in an action brought in the Superior Court at Three Rivers, in the province of Quebec, by her as legatee under the will of the late S. A. Senecal, the deceased husband of the plaintiff and in his lifetime indorsee of two several promissory notes made by the appellant, the one dated the 18th of May, 1883, for the sum of one thousand dollars, payable four months after date, and the other dated the 12th of June, 1883, for the sum of five hundred dollars, payable four months after date, and by such her declaration she claimed the right in law to recover a judgment against the above appellant for the said respective principal sums made payable by the said several promissory notes, together with the legal interest recoverable in the said action for non-payment of the said notes at maturity. The action under consideration was instituted and the judgment thereon was rendered before the passing of the Act 54 & 55 Vic. ch. 25 sec. 3, sub-sec. 4, which enacts that " whenever the right of appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered if they are different," and this court has already held, (1), that the Act does not apply to actions commenced and argued and taken *en délibéré* for judgment prior to the passing of the Act; the amount therefore of the judgment against which an appeal is taken is in this case to be looked to and not the amount demanded whatever that may be held to be. It was argued that the judgment appealed against

(1) *Williams* v. *Irvine*, 22 Can. S. C. R. 108.

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is a judgment rendered since the passing of the Act upon an opposition, entered also since the passing of the Act, to the judgment rendered in the action upon the 19th of October, 1889, and that such opposition is to be regarded as a defence to the action. Granting it to be so taken it must be as a defence to the action in its then condition, and if successful would defeat the judgment and avoid it, but if unsuccessful would leave the action in *statu quo*, that is to say in judgment. The judgment appealed against discharged the opposition as unfounded; that judgment did not adjudge any amount to be recovered by force of it; the ground of the opposition was that the judgment of the 19th October, 1889, was obtained by fraud by reason of the defendant as was alleged not having been served with any proceeding in the action. The judgment declared this opposition to be unfounded and no sum of money being directly awarded by that judgment no comparison can be made between the amount demanded and any amount recovered by that judgment.

I am of opinion therefore that the motion to quash the present appeal, which is in substance and in its actual effect if successful against the judgment of the 19th October, 1889, must be refused.

SEDGEWICK, KING and GIROUARD JJ. concurred in the judgment of His Lordship the Chief Justice.

Motion refused with costs.

Solicitors for the appellant: *Bisaillon, Brosseau & Lajoie.*

Solicitor for the respondent: *W. C. Languedoc.*