THOMAS RAPHAEL, *ès qualité* (PLAINTIFF) ..... } APPELLANT;

AND

DAVID MACLAREN AND OTHERS (DEFENDANTS)..... ..... } RESPONDENTS.

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*May 12.

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

Appeal — Jurisdiction—Appealable amount—Future rights—Alimentary allowance—"Other matters and things"—R. S. C. c. 135, s. 29 (b)—56 V. (D.) c. 29.

The classes of matters which are made appealable to the Supreme Court of Canada under the provisions of section 29, subsec. *b* of "*The Supreme and Exchequer Courts Act*," as amended by 56 Vict. ch. 29, do not include future rights which are merely pecuniary in their nature and do not affect rights to or in real property or rights analagous to interests in real property. *Rodier* v. *Lapierre* (21 Can. S. C. R. 69) and *O'Dell* v. *Gregory* (24 Can. S. C. R. 661) followed.

(1) 26 Can. S. C. R. 216.

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MOTION before Mr. Cassels, the Registrar in Chambers, to allow security for costs in appeal.

The matters in issue upon the appeal sought from the judgment of the Court of Queen's Bench are sufficiently set out in the Registrar's judgment.

McDougall Q.C. for the motion.

Aylen Q.C. contra.

THE REGISTRAR.—The late James Maclaren, by his will, clause 16 thereof, bequeathed to his sons David and Alexander Maclaren, $30,000,—

to be held and invested by them in trust, and in such manner as they may deem advisable, for the benefit of my daughter, Louisa Maclaren (who, some few years ago, married one Thomas Raphael against my will and advice, and who does not find the necessary means to support his family), and the interest or revenue thereof to be paid by them to her half yearly on her own receipt, for her support and maintenance, and free from all marital or other control or liability whatsoever, and exempt from all seizure or attachment. The said capital to be paid, by my executors and trustees, to my two sons David and Alexander Maclaren, after the expiry of three years after my decease unless my executors and trustees think it to the advantage of my estate to pay the amount over sooner, but until the expiry of three years my executors and trustees shall pay to the said Louisa Maclaren the sum of fifteen hundred dollars per annum in half yearly payments as interest on the said principal sum of thirty thousand dollars, and such said capital sum, upon the decease of my said daughter, shall go and belong to her lawful children surviving her, share and share alike, but none of the principal to be paid to the said children until they are of the age of thirty years. They may, however, after the death of their mother, receive the interest of the same until they are thirty years of age, share and share alike.

I also release and discharge my said daughter, Louisa Maclaren, from all her liability to me, a statement of which may be seen in my books.

By a codicil the testator modified this clause of his will, as follows:

I increase the legacy of thirty thousand dollars, made by me in paragraph sixteen of my said will, to be held by my sons, David and Alexander, in trust for my daughter, Louisa, to the sum of seventy

thousand dollars, and the annual interest of fifteen hundred dollars to her therein, to three thousand five hundred dollars, and I ordain that my said two sons shall have the right and power, in their discretion, not to pay the said interest to my said daughter, but may apply the same for her benefit and support, and the benefit, support and education of her children, as they may deem best, * * it being my desire and will, that the husband of my said daughter, Thomas Raphael, shall not, either directly or indirectly, have any power or control over the benefits and legacies made by me to my said daughter Louisa, or any benefit, directly or indirectly, therefrom. I also ordain that my said two sons may pay the share of the capital of the said legacy to my daughter Louisa, to her lawful children, before they respectively attain the age of thirty years, as provided by my said will. I also ordain that the survivor of my said two sons may alone act as trustee in the matter of said legacy, to my daughter Louisa, or in any other legacies in which they are constituted trustees by my said will.

The testator died on the 10th of February, 1892.

For the following three years interest was paid by the executors on the $70,000 at the rate of 5 p. c. to Mrs. Raphael. On the 10th of February, 1895, the executors paid over the $70,000 to the trustees who replaced the money in the hands of the executors as a temporary investment at 5 p. c.

On the 8th April, 1895, Mrs. Raphael died leaving three minor children.

On the 21st May, 1895, the sum of $70,000 together with $949.32 for accrued interest, was repaid by the executors to the trustees, who deposited it in the Savings Department of the Bank of Ottawa at three and a half per cent. On the 20th December, 1895, the trustees invested the $70,000 with accrued interest, amounting to $402.07 in trust debentures of the City of Ottawa of the face value of $69,493, paying 3·87 per cent. These debentures bring in 4 per cent.

In the meantime, on the 13th June, 1895, the plaintiff, Raphael, was appointed tutor to his three minor children, and on the 4th January, 1896, accepted their mother's succession on their behalf.

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On the 9th December, 1895, Raphael, as tutor to his children, sued the trustees for $1,750, being for one half yearly payment due 10th August, 1895, of the yearly interest on the $70,000, and also for interest on said sum of $1,750, from the said last mentioned day.

The conclusion of his declaration is as follows:

Wherefore the plaintiff, in his quality of tutor to the said three minor children, issue of his marriage with Dame Louisa Maclaren aforesaid, prays that defendants be jointly and severally condemned to pay and satisfy unto him the sum of seventeen hundred and fifty dollars, current money of Canada, with interest since the tenth day of August last past, and costs *distraits* to the undersigned.

The defendants pleaded in substance as follows:

(*a*) That plaintiff could not claim from them the interest accrued upon the said trust funds, save what might be necessary for the maintenance, support and education of his said children.

(*b*) That they invested the trust funds as best they could, and could not obtain better than a fraction under four per cent thereon, which in any event would be the only amount plaintiff would be entitled to claim.

(*c*) That, out of such interest sums, they should only be held to pay to plaintiff such amount as might be deemed sufficient for the support and education of the children, upon monthly or other statements of the moneys required furnished by the tutor plaintiff.

The Superior Court sitting in the District of Ottawa rendered judgment on the 5th day of June, 1896, declaring that the trustees were bound by the terms of the will and codicil to procure five per cent a year on the sum bequeathed to them in trust; that, however, they were not bound to pay over the whole of the revenue but only as much as was sufficient to support and educate the children according to their position in life; and that an annual sum of $1,800 was sufficient for that purpose, and condemning the trustees to pay

to the tutor the sum of $900 for the half year which had ended on the 10th August, 1895.

Both parties inscribed in review and the Court of Review rendered judgment on the 27th day of November, 1896, declaring that on the death of their mother, the minor children, issue of the marriage of the late Louisa Maclaren with Thomas Raphael, became the proprietors of the capital sum of $70,000; that their father as tutor was entitled to receive from the trustees the sum of $1,750 for a half yearly payment of the interest, virtually deciding that the trustees were bound to procure five per cent a year, and condemning them to pay such sum of $1,750 to the tutor for the half yearly instalment due on the 10th day of August, 1895.

The defendants thereupon appealed to the Court of Queen's Bench, which court, on the 24th February, 1897, rendered judgment as follows, after reciting the facts above set forth:

Considering that by the terms of the will and codicil the executors of the late James Maclaren were bound to pay interest at the rate of five per cent a year on the sum of $70,000 bequeathed by him for his daughter Louisa Maclaren and her children, during the three years that the amount of such bequest was to remain in their hands, but that no obligation was imposed on the trustees to pay such a rate of interest to the beneficiaries whether they could find or not an investment which would yield it, and that they were only subject to the ordinary rules respecting the investment of trust funds, and are only responsible to the beneficiaries for the income derived from the investments and received by them;

Considering that the provision contained in the codicil authorizing the trustees not to pay the interest to the testator's daughter, but to apply it for her benefit and support, and the benefit, support and education of her children, only applied to his daughter and not to her children, who are the absolute owners of the capital; and that the condition that the testator's son-in-law, Thomas Raphael, should not derive any benefit, either directly or indirectly, from the bequest applies to him personally, and not to him in his quality of tutor to his children;

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Considering that although the acceptance of their mother's succession by the minor children was only made by their tutor on the 4th day of January, 1896, between the date of the service of the action and the date of its return, it has a retroactive effect to the day of her death and that no exception was taken by the trustees in their pleas to the circumstance of the acceptance having been made after the institution of the action;

Considering that the tutor, the respondent in this cause, was entitled to demand and had a right to receive the income derived from the principal of the trust for the half year which ended on the 10th day of August, 1896, from the trustees, the appellants in this cause;

Considering that the appellants received on the 21st day of May, 1895, from the executors of the late James Maclaren the sum of $949.32 for interest on the principal sum of $70,000, and that the interest at the rate of three and a half per cent a year on the deposit made by them in the Savings Department of the Bank of Ottawa amounted on the 10th day of August, 1895, to the sum of $551.07, forming together $1,500.39, and that such amount on that day became payable to the beneficiaries;

Considering that the appellants could and should only have invested the principal of the trust and that they had no right to invest the income which was payable to the beneficiaries, and notably the above mentioned sum of $1,500.39, and that the fact of their having invested it does not relieve them from their liability to account for and to pay the same to the tutor of the minor beneficiaries;

Considering on the one hand that the appellants are not bound to procure a revenue equal to five per cent a year on the principal of the trust, and that the amount for which they are accountable is $1,500.39 and not $1,750, and on the other hand that the respondent is entitled to receive the whole of the revenue and not such portion only thereof as may be necessary for the maintenance, support and education of the minors, and that there is therefore error in both judgments;

Doth maintain the appeal with costs, and doth set aside and annul the judgment appealed from of the Court of Review rendered at Montreal on the 27th day of November, 1896, and proceeding to pronounce the judgment which should have been rendered, doth set aside and annul the judgment of the Superior Court, rendered at Hull, in the District of Ottawa, on the 5th day of June, 1896, and doth condemn the appellants in their capacity of trustees to pay to the respondent, in his capacity of tutor, the sum of $1,500.39 for the income accrued from the 10th day of February, 1895, to the 10th day of August, 1895, on the trust funds, with interest thereon from the

2nd day of January, 1896, date of the service of process, and his costs in the Superior Court, and on his inscription in review, of which costs distraction is granted to Mtre. J. M. MacDougall, his attorney, but doth condemn the respondent to pay to the appellants the costs of their inscription in review, and the court on motion of Mtre. Henry Aylen, attorney for appellants, doth grant him distraction of costs.

The plaintiff has now applied for the approval of a bond which he proposes to give as security for the costs of an appeal to the Supreme Court of Canada, pursuant to sec. 46 of the Supreme and Exchequer Courts Act.

It was agreed between counsel that the bond offered should be considered satisfactory, if jurisdiction to entertain the appeal were held to exist.

It was also admitted by counsel that the amount claimed by the declaration was under $2,000. Indeed, by a successful appeal to this court, it is apparent that the plaintiff would recover only the difference between $1,500.09, and $1,750. But the plaintiff contends that the controversy comes within the words of subsec. (*b*) of sec. 29 of the Supreme and Exchequer Courts Act, as amended by sec. 1 of 56 Vict ch. 29, passed on the 1st April, 1893, and relates " to a matter where the rights in future might be bound," a matter within the meaning of the words " other matters or things " in that subsection.

If apparent that the direct result of granting the plaintiff's contentions would be to enable him to recover, in this action, the comparatively small sum of $250, it is equally apparent that the effect of the judgment on the rights of the children acting through their tutor, is, or at any rate may be, very serious. It should be noted that the word used in subsec. (*b*) is " might," not " are," or " will be," " where the rights in future *might* be bound."

Now the controversy in this action does seem to relate to a matter where the rights in future might be

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bound. The judgment rendered on the controversy appears to settle the point that the trustees are bound by the terms of the trust to pay over to the tutor, during a long minority, only the actual income received from the investment of the fund, which is now, and may be for the whole period, less than $3,500 per annum.

On this application there is no question raised as to the correctness of the judgment sought to be appealed from. The question is: What is the nature of the controversy between the parties, and does such controversy come within the words of sec. 29?

Then, admitting that future rights might be affected, are they future rights within the meaning of subsection (*b*)?

Can this case be distinguished from *Gilbert* v. *Gilman* (1); *Dominion Salvage & Wrecking Co.* v. *Brown* (2); and more particularly from *Rodier* v. *Lapierre* (3).

It is contended that there is an important difference between *Rodier* v. *Lapierre* (3), and this case, inasmuch as *Rodier* v. *Lapierre* (3), dealt with the right to recover a fixed and undisputed amount; if entitled to recover at all, there was no question as to the amount which the plaintiff was and would in the future be entitled to. In this case, the dispute is as to the extent of the amount the trustees are liable for, and the judgment will fix not only the amount directly in controversy in the immediate action, but the rights of the parties *inter se*, during the continuance of the whole trust.

In that case the plaintiff alleged that she was entitled to receive $100 monthly out of the revenues of the estate of her father under his will, which monthly allowance had been increased to $300 by an Act of the Legislature of Quebec, and she claimed from the respondent, as testamentary executrix, the additional $200 for the month of February, 1891.

(1) 16 Can. S. C. R. 189. (2) 20 Can. S. C. R. 203.
(3) 21 Can. S. C. R. 69.

The appellant argued, [I quote from the judgment of the court delivered by Mr. Justice Taschereau,] that her appeal could be entertained on the ground that as the judgment dismissing her action, if allowed to stand, would be *res judicata* between her and the respondent, and a bar for ever of her claim, her appeal came within the words "where the rights in future might be bound" of sec. 29 of the Supreme Court Act.

Is not this exactly the contention of the plaintiff in this case? If the judgment stands it will be *res judicata* as to the amount which the tutor will be entitled to receive from the trustees.

The learned judge then proceeds as follows:

But that contention cannot prevail. We have in numerous cases determined that these words of the statute are governed by the preceding words of the clause "fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or any title to lands or tenements, annual rents, or such like matters or things."

The words "annual rents" cannot support the appeal. They mean ground rents (*rentes foncières*), and not an annuity or any other like charges or obligations.

Neither can the appeal be entertained on the ground that the appellant's claim, being for a monthly allowance of $200, should be considered as being for an amount exceeding $2,000. The only amount actually in controversy in the present case is $200. The consequences of the judgment and its effect on the appellant's future rights in the matter cannot render the case appealable as being a case of $2,000.

This judgment seems to me to dispose of the case under consideration, unless the alteration in the subsection made by 56 Vict. ch. 29, in changing the words "or such like matters or things," into "and other matters or things," would lead us to conclude that *Rodier* v. *Lapierre* (1), would have been differently decided under the amendment.

Prior to the amendment, subsection (*b*) of section 29 was construed as applying to real rights, or rights at least analogous to real rights and having some connection with the ownership or enjoyment of land.

Now no case decided since the amendment has gone so far as to say that future rights which are pecuniary

(1) 21 Can. S. C. R. 69.

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in their nature, rights to money as distinguished from rights to or in land, or analogous to such rights, come within the subsection. Two cases, *Chamberland* v. *Fortier* (1), and *Stevenson* v *City of Montreal* (2), have, it is true, held that the effect of the amendment was to widen the scope of the enactment, but in both these cases the rights in question were, if not real rights, analogous to real rights.

In *O'Dell* v. *Gregory* (3), the effect of the amendment was considered, and it appears to me that the judgment of the Right Honourable the Chief Justice in that case, must be deemed conclusive against the appellant here. He says:

> The first part of the subsection relates to appeals in the case of claims by the Crown. It is out of the question to say that this appeal involves any title to land, or to any annual rent. There only remains the words "and other matters or things where the rights in the future might be bound." I cannot hold that this confers jurisdiction. The other matters or things referred to must, on the ordinary rule of construction *noscitur a sociis*, be construed to mean matters and things *ejusdem generis* with those specifically mentioned. Then these are "title to lands and tenements and annual rents." We must therefore interpret the words, "other matters and things" as meaning rights of property analogous to title to lands and annual rents, and not personal rights however important.
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> It is sufficient, however, for the present purpose to say that the appeal does not come within any of the provisions of section 29, inasmuch as the action does not involve an amount equal to $2,000, nor does it relate to any matters or things in the nature of vested property rights which alone and not personal rights are intended by section 29, subsection *(b)* to be made the test of the right to appeal.

The application must be refused with costs.

KING J. on appeal from the Registrar, confirmed his decision.

Motion refused with costs.

Solicitor for the appellant: *J. M. McDougall.*

Solicitor for the respondent: *Henry Aylen.*

(1) 23 Can. S. C. R. 371 (2) 27 Can. S. C. R. 187.
(3) 24 Can. S. C. R. 661.