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WILLIAM KANDICK.....APPELLANT;

*June 8, 9.

AND

ROBERT H. MORRISON.....RESPONDENT.

Appeal—Demurrer—Final judgment—Supreme and Exchequer Court Act.

An Order setting aside a demurrer as frivolous and irregular under the *Nova Scotia Practice Act* (1) is an Order on a matter of practice and not a final judgment appealable under the 11th section of the *Supreme and Exchequer Court Act*.

The Respondent, the Plaintiff in the Court below, recovered a judgment against the Defendant, administrator of the goods, etc., of *William Morrison*, deceased, in the Supreme Court of *Nova Scotia*, on the 25th June, 1875, for \$164.28, together with \$60.90 costs, upon which execution was issued to the Sheriff of *Halifax*, commanding him to make the above sums out of the goods and chattels in his county “which were of *William Morrison*, deceased, at the time of his death, in the hands of *William Kandick* to be administered, if the said *William Kandick* have so much thereof in his hands to be administered, or if not so much in his hands, then to make the costs out of the proper goods and chattels of said *William Kandick*.”

To this writ the Sheriff made a return in the following words and figures only:—

“The within named *William Kandick* has no goods or chattels which were of the within named *William Morrison*, at the time of his death in his hands, to be administered in my bailiwick, whereof I can cause to be made the sum of \$164.28 and interest, or any part

*PRESENT:—Richards, C. J., and Ritchie, Strong, Taschereau and Fournier, J.J.

(1) Revised Statutes of *Nova Scotia*, 4th Series, ch. 94.

thereof, but hath paid and satisfied the residue of this execution, being the costs within mentioned."

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Upon this return being made, the Plaintiff in the Court below brought the present action, setting out in his writ and declaration the above facts, also setting out the above return of the Sheriff, as the return made to said writ. The first count of his declaration concluded as follows: "Whereby it appears that said Defendant hath eloined, wasted and converted to his own use the goods and chattels of the said *William Morrison*, which came into his hands to be administered at the death of the said *William Morrison*."

To this count the Defendant obtained upon the usual affidavit and papers an order from Mr. Justice *McCully* for leave to plead and demur; and he demurred only.

The chief ground of demurrer was that while the action purports to be for a *devastavit*, yet no allegation of a *devastavit* is made in the declaration, the only reference to a *devastavit* being in the latter part of the count demurred to, commencing "Whereby, &c.," which does not contain any allegation of a *devastavit*, but merely alleges that it appears from the return of the Sheriff that a *devastavit* has been committed, whereas, as a fact, such does not appear at all from said return, or from any part of the declaration.

The Plaintiff, on September 18th, 1875, obtained a rule *nisi* to set aside the demurrer.

This rule, in Michaelmas Term 1876, was made absolute on the ground of the demurrer being frivolous and irregular.

In delivering the judgment of the Court, *McDonald* J. said: "Section 124 of our Practice Act (1) provides that duplicity, argumentativeness and uncertainty shall be no longer grounds of objection to a pleading unless

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such pleading be so framed as to embarrass the opposite party in which case application may be made to a judge to compel an amendment, and section 123 provides that except as therein provided no pleadings shall be deemed insufficient for any defect at the time of the passing thereof objectionable on special demurrer only. In this case all the grounds of demurrer stated and all the arguments used in support of them are based upon the assumed uncertainty or argumentativeness of the declaration, and I am clearly of opinion that the directions of the statute should have been followed by the defendant to compel an amendment before resorting to his demurrer if he felt at all embarrassed by the pleadings. * * * *

It is not simply that the demurrer is frivolous but that it is irregular as the defendant was precluded from demurring to this declaration, except under section 125 of the Practice Act after noncompliance on the part of the plaintiff with a judge's order to amend."

From the judgment of the Court making the rule absolute, to set aside the demurrer, the Defendant, now the Appellant, brought the present Appeal.

This appeal was inscribed *ex parte*, the Respondent not deeming it necessary to appear.

Mr. *W. H. Walker*, and Mr. *A. Ferguson* for Appellant :

The demurrer was not a frivolous demurrer, because it points out the want of a material allegation in the count demurred to, which allegation was the very gist of the whole action, and, consequently, the demurrer was not for a merely formal defect, but for a substantial defect in the frame of the action.

[THE CHIEF JUSTICE:—Under what section of the *Supreme and Exchequer Court Act* has the Court a right to review a decision in a matter of this kind ?]

Under the 11th section the judgment in this case is final, as no other plea was made to the first count.

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The judgment of the Court was delivered by

THE CHIEF JUSTICE :

We are all of opinion that this appeal should be quashed. The rule setting aside the demurrer in this case was simply an order on a mere matter of practice and not a final judgment which is appealable under the *Supreme and Exchequer Court Act*. As the Respondent has not thought fit to appear, we cannot allow costs.

Appeal dismissed without costs.

Solicitors for Appellant : *Bligh & Longley.*

Solicitors for Respondent : *L. W. Desbarres.*
