

THOMAS JOHN JERMYN (DEFEND- } APPELLANT;  
ANT) .....

1898  
\*May 20.

AND

RICHARD TEW (PLAINTIFF).....RESPONDENT.  
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Appeal—Jurisdiction—Matter in controversy—Interest of second mortgagee—Surplus on sale of mortgaged lands—60 & 61 V. c. 34, s. 1 (D).—Statute, construction of—Practice.*

While an action to set aside a second mortgage on lands for \$2,200 was pending, the mortgaged lands were sold under a prior mortgage, and the first mortgagee, after satisfying his own claims, paid the whole surplus of the proceeds of the sale amounting to \$270 to the defendant as subsequent incumbrancers.

Judgment was afterwards rendered declaring the second mortgage void, and ordering the defendant to pay to the plaintiff, as assignee for the benefit of creditors, the amount of \$270 so received by him thereunder, and this judgment was affirmed on appeal.

Upon an application to allow an appeal bond on further appeal to the Supreme Court of Canada, objections were taken for want of jurisdiction under the clauses of the Act 60 & 61 Vict. ch. 34 but they were overruled by a judge of the Court of Appeal for Ontario, who held that an interest in real estate was in question and the appeal was accordingly proceeded with and the appeal case and factums printed and delivered. On motion to quash for want of jurisdiction when the appeal was called for hearing ;

*Held*, that the case did not involve a question of title to real estate or any interest therein but was merely a controversy in relation to an amount less than the sum or value of one thousand dollars and that the Act 60 & 61 Vict. ch. 34, prohibited an appeal to the Supreme Court of Canada.

APPEAL from the judgment of the Court of Appeal for Ontario which affirmed the decision of the High Court of Justice maintaining the plaintiff's action with costs.

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

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The plaintiff, as assignee for the benefit of creditors of the estate of a firm of insolvent traders, brought an action to set aside a second mortgage for \$2,200 on the lands of a member of the insolvent firm, on the ground that it had been given to secure an undue preference and was fraudulent and void as against the creditors in general of the insolvents. It appeared that, while the action was pending and before trial, the mortgaged lands had been sold, by virtue of the powers in a prior mortgage, for a sum sufficient to satisfy all claims thereunder, and that the surplus proceeds, amounting to \$270, had been paid over by the first mortgagee to the defendant. At the trial His Lordship the Chancellor of Ontario made an order setting aside the second mortgage, and directing the defendant to pay the plaintiff the amount of such surplus proceeds so received by him in virtue thereof. On appeal the Court of Appeal for Ontario were equally divided, (Burton C. J. and Maclellan J. being of opinion that the appeal should be allowed, and Osler and Moss JJ. being for dismissal,) and accordingly the Chancellor's decision stood affirmed. The defendant then proceeded to appeal to the Supreme Court of Canada, and on objections on the ground of want of jurisdiction being taken to the allowance of the appeal bond, Maclellan J. held that a title to real estate or some interest therein was brought in question in the case, and that, consequently an appeal would lie under 60 & 61 Vict. (D.) ch. 34, s. 1 (a). The appeal was accordingly proceeded with, the case and factums printed and delivered, and the appeal inscribed for hearing in the usual course. Upon the appeal being called in the Supreme Court of Canada, a motion on behalf of the respondent was made to quash the appeal for want of jurisdiction on the ground that the matters in controversy did not come

within the exceptions mentioned in the first section of the statute, 60 & 61 Vict. ch. 34 (D).

The provisions of the Act affecting the appeal are as follows :

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1. No appeal shall lie to the Supreme Court of Canada from any judgment of the Court of Appeal for Ontario, except in the following cases :—

(a) Where the title to real estate or some interest therein is in question ;

(c) Where the matter in controversy in the appeal exceeds the sum or value of one thousand dollars, exclusive of costs ;

(f) Whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different.

*Wallace Nesbitt, (Clarke with him), for the motion.* The action was originally only to set aside a mortgage and the result was that the assignee for the benefit of creditors was declared entitled to \$270, the whole remaining surplus, proceeds of the sale of the lands, unabsorbed by the prior mortgage under which the mortgaged lands had been sold. Even although the second mortgage was collateral security for \$2,200 that amount is not in dispute. The prior mortgage absorbed all proceeds from the lands sold, except the \$270 which is now the only subject in controversy. The assignee cannot possibly get at the land and cannot possibly recover, in any case, anything but this surplus of \$270, and the controversy is reduced practically to a question as to costs. His Lordship Chancellor Boyd, recognising this, allowed costs only upon the lower scale, although it afterwards turned out that he was not authorised to make this reduction, and the judgment of the court actually gave full costs.

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*Hamilton Cassels*, contra. Subsection (a) of section 1 of the Act governs this appeal. The action was to set aside a second mortgage of lands as fraudulent, which raised a question of title to lands. There was a question of the respondent's title to some interest in real estate and to test its validity. Subsection (c) protects the appellant's right when it depends on the amount in dispute, and in this case we ascertain the matter in controversy and the amount in dispute by reading the prayer demanding that the mortgage on the land for \$2,200 be declared fraudulent and set aside. Subsection (f) makes it clear that the demand was intended to be the test.

After hearing the above arguments the court delivered judgment holding that as no sum was demanded by the action only a matter of \$270 in money was in controversy on the appeal and that no title to real estate or any interest therein was in question. The appeal was quashed with costs as upon a motion to quash.

*Appeal quashed with costs.*

Solicitors for the appellant: *Cassels, Cassels & Brock.*

Solicitors for the respondent: *Beatty, Blackstock, Nesbitt, Chadwick & Riddell.*

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