THE MARITIME BANK OF THE DOMINION OF CANADA (PLAINTIFFS) ..... APPELLANTS ;

1891

*Mar. 13.
*Nov. 17.

AND

R. A. & J. STEWART (DEFENDANTS)...RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Final Judgment—Judicial discretion—R. S. C. c. 135 ss. 2 (e) and 27.

The defendants to an action in the High Court of Justice for Ontario were made bankrupt in England, and the plaintiffs filed a claim with the assignee in bankruptcy. The High Court of Justice in England made an order restraining the plaintiffs from proceeding with their action and a like order was made by a Divisional Court Judge in Ontario perpetually restraining plaintiffs from proceeding but reserving liberty to apply. This latter order was affirmed by the Divisional Court and the Court of Appeal, and plaintiffs sought an appeal to the Supreme Court of Canada.

Held, that the judgment from which the appeal was sought was not a final judgment within the meaning of the Supreme Court Act.

Held, per Patterson J., that if it were a final judgment the order the plaintiffs wished to get rid of was made in the exercise of judicial discretion as to which sec. 27 of the Supreme Court Act does not allow an appeal.

MOTION to quash for want of jurisdiction an appeal from the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) by which an order of Rose J. staying proceedings in the cause was upheld.

The facts material to the motion are sufficiently stated in the above head-note and in the judgment of Mr. Justice Patterson. The judgment of Rose J. on

PRESENT :—Sir W. J. Ritchie C. J. and Strong, Fournier, Gwynne and Patterson JJ.

(1) 13 P.R. (Ont.) 491. (2) 13 P.R. (Ont.) 262.

1891

THE MARITIME BANK OF THE DOMINION OF CANADA v. STEWART.

the application for the order is reported in the Ontario Practice reports (1).

McCarthy Q. C. and *Ferguson* Q. C. for the motion, cited *Phosphate Sewage Co.* v. *Molleson* (2); *Virtue* v. *Hayes* (3); *Ontario & Quebec Railway Co.* v. *Marcheterre* (4); *McKinnon* v. *Kerouack* (5).

Robinson Q. C. and *Gormully* Q. C. *contra* referred to *McHenry* v. *Lewis* (6); *Barrett* v. *Day* (7); *Lawrance* v. *Norreys* (8).

Sir W. J. Ritchie C.J., and Strong, Fournier and Gwynne JJ., were of opinion that the judgment from which the appeal was sought was not a final judgment within the meaning of the Supreme Court Act, and that the appeal should be quashed.

PATTERSON J.—Two actions, one commenced on the 15th of March, 1887, and the other on the 12th of March, 1888, on a number of bills of exchange, &c.

The defendants are bankrupts. A receiving order was made in their bankruptcy in England on the 15th of March, 1887, the same date as the writ in the first action, and a year before the issue of the writ in the second.

The plaintiff bank is also being wound up under the Canadian Winding-up Act, and these actions are brought by the liquidators by order of the court.

On the 17th of September, 1887, the liquidators filed in the English Bankruptcy Court a claim for the same debts for which these actions are brought.

Orders were made in the English court restraining the prosecution of these actions on the third of March,

(1) 13 P. R. (Ont.) 86.
(2) 1 App. Cas. 780.
(3) 16 Can. S.C.R. 721.
(4) 17 Can. S.C.R. 141.
(5) 15 Can. S. C. R. 111.
(6) 22 Ch. D. 397.
(7) 43 Ch. D. 435.
(8) 15 App. Cas. 210.

1891

THE MARITIME BANK OF THE DOMINION OF CANADA v. STEWART.

Patterson J.

1888, in the first action, and on the 29th of May, 1888, in the other.

On motion of the defendants orders have been made in these actions staying proceedings for ever, but reserving leave to apply.

The plaintiffs desire to appeal from those orders, and the question of our jurisdiction to hear the appeal depends on the view proper to be taken of the character of the orders.

Are they final judgments within the meaning of that term as used in the Supreme and Exchequer Courts Act (1), in sections 24 and 28 ?

If they are final judgments an appeal will lie unless forbidden by section 27 which enacts that

No appeal shall lie from any order made in any action, suit, cause, matter, or other judicial proceeding made in the exercise of the judicial discretion of the court or judge making the same ; but this exception shall not include decrees and decretal orders in actions, suits, causes, matters or other judicial proceedings in equity, or in actions, suits, causes, matters or other judicial proceedings in the nature of suits or proceedings in equity instituted in any superior court.

The expression

"Final judgment" means any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded (2).

The case of *Harley* v. *Greenwood* (3) was decided in 1821 under the act 49 Geo. III c. 121, which enacted (4)

That it shall not be lawful for any creditor who has brought any action against the bankrupt in respect of any demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission, &c., without relinquishing such action,"

And

That the proving or claiming a debt under such commission shall be

(1) R.S.C. c. 135.
(2) Sec. 2 (*e*).
(3) 5 B. & Al. 95.
(4) In sec. 14.

1891

THE MARITIME BANK OF THE DOMINION OF CANADA v. STEWART.

Patterson J.

deemed an election by the creditor to take the benefit of the commission with respect to the debt so proved or claimed.

It was shown by Bayley J., who delivered the judgment of the court, that the commencement of an action in one court does not destroy the right of the party to commence an action for the same debt in another court; that while the pendency of another action might be pleaded in abatement, it could not be pleaded in bar; and that to restrain a creditor from commencing an action until the commission was superseded might be very injurious to him, perhaps leading to his debt being barred in the interim by the statute of limitations; and it was held that the words of the statute would be satisfied and a very beneficial remedy given to the creditor by holding that when a creditor has proved his debt and afterwards brings an action the bankrupt may, under the act, apply to the Chancellor to expunge the debt, or to the court in which the action is brought to stay the proceedings.

Now we need not follow the process of evolution by which, three quarters of a century after the passing of the act 49 George III, the law took the slightly different form in the English Bankruptcy Act, 1883, sections 9 and 10.

That inquiry, and the effect upon us in this country of the English statute, and the question of election which was dealt with in terms by the act from which I have quoted, would doubtless be proper topics for discussion if we were hearing the appeal. I cite the case of *Harley* v. *Greenwood* (1) for the assistance it gives in dealing with the two points on which our decision has at present to turn. It supports the view that this order is not a final judgment, inasmuch as it suspends only and does not put an end to or finally determine and conclude the action, and it also supports the

(1) 5 B. & Al. 95.

contention that the order is made in the exercise of the judicial discretion of the court or the judge who made the order. Whatever may be the grounds on which the orders are to be considered as having been made; whether on the idea that the plaintiffs elected to proceed in the bankruptcy court; or on the ground that our courts are required by the effect of the English statute to act as auxiliary to the court of bankruptcy; or that on some considerations of comity it is proper to do so, the order must, as I apprehend, be regarded as an exercise of discretion. The propriety of what was done, in view of all the considerations to be taken account of, is quite a different thing. That question has been debated at least three times before the courts below, and the plaintiff may have no just cause to repine if the law which creates and limits our jurisdiction does not afford him an opportunity to debate it again.

I agree that we must quash the appeal.

Appeal quashed with costs.

Solicitors for appellants: *Gormully & Sinclair.*

Solicitor for respondents: *A. Ferguson.*