ROBERT HALBERT AND ANOTHER (DEFENDANTS) ..... APPELLANTS;

AND

NETHERLANDS INVESTMENT COMPANY OF CANADA LIMITED (PLAINTIFF) ..... RESPONDENT.

1945

*Feb. 14, 15
*Mar. 23

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Debtor and creditor—Mortgages—Foreclosure action—Authorized by permit of Debt Adjustment Board—Permit cancelled after action brought—Whether any effect from cancellation—Period of redemption shortened by order nisi—Whether order interlocutory or final—Jurisdiction

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Kellock and Estey JJ.

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of judge making it—Judicature Act, section 34 (f)—Interpretation of sub-paragraphs (ii) and (iii)—Judicature Act, Amendment Act, R.S.A., 1942, c. 129.—Roy v. Plourde ([1943] S.C.R. 262) referred.

The respondent was granted a permit by the Debt Adjustment Board to commence and continue a foreclosure action against the appellants. Aside from filing and serving the statement of claim, no further steps were taken until after the cancellation of the permit by the Board. Immediately thereafter the appellants filed their statement of defence alleging the cancellation of the permit and that no permit authorizing the commencement or continuation of the action was outstanding as required by the *Debt Adjustment Act of 1937*. The respondent then moved for an order striking out the statement of defence and fixing the amount owing under the mortgage and a period within which the appellants might redeem. Upon the return of the motion, Sheperd J. found a sum of $9,246.69 to be due, fixed a redemption period of four months and directed that in default of payment the property might be offered for sale. No appeal was taken from that order and, upon default of payment, O'Connor J. directed a final order vesting the property in the respondent, which order was affirmed by the appellate court. The appellants contended before this Court that they have been improperly denied the benefits of the *Judicature Act Amendment Act*, 1942, whose provisions stipulating a redemption period of one year were alleged to be mandatory. The judgments of the Courts below were rendered at a time when that Act had been declared *ultra vires* by the Appellate Division and, subsequently, the Act was held by this Court to be *intra vires*. The appellants also contended that the cancellation of the permit placed them in a position as if no permit had ever been issued; that, the order nisi having been made without giving effect to the Act, such error vitiated the right to make the final order of foreclosure and vesting, and that the respondent had not made the required specific application to shorten the period of redemption fixed under s. 34 (*f*) of the Act.

Held that the appeal should be dismissed with costs.

Held, also, that the order nisi cannot be regarded as an interlocutory order within the meaning of Alberta Rule No. 609, as it finally disposed of the rights of the parties. The order being valid and subject to appeal and no appeal having been taken, the final and vesting order was therefore validly made.

Per the Chief Justice and Estey J.—Section 34 (*f*) of the *Judicature Act Amendment Act*, 1942, does not apply to the respondent's action. Sub-paragraph (iii) (*b*) of paragraph (*f*) expressed in clear terms that such paragraph does not apply to "any action authorized by a permit granted by the Debt Adjustment Board."

Per the Chief Justice and Estey J.:—The use of the words "any action authorized" in sub-paragraph (iii) (*b*) refers to the commencement as distinguished from a step in, or a continuation of the action. The respondent's action, when commenced, was authorized by a permit, and the cancellation of the permit did not place the appellants in a position as if no permit had ever been issued.

Per the Chief Justice and Estey J.—Section 34 of the Amendment Act merely gives direction with respect to the terms to be granted in certain orders nisi, but it does not purport to confer jurisdiction on the judge. Any failure to follow or misconstrue its provisions is a mistake in law which would provide a proper basis for an appeal, but does not involve any question of jurisdiction.

Per the Chief Justice and Kerwin and Estey JJ.—The judge at the time he made the order nisi for sale, was bound by the judgment of the Appellate Division declaring the Amendment Act *ultra vires*, and accordingly paid no attention to it.

Per Kerwin J.—However, he had power on an "application" to decrease the period of redemption, having regard to certain circumstances set out in the enactment; he did in fact decrease the period and whether he did so on "application" is immaterial as his order was not appealed from.

Per Kerwin and Hudson JJ.—Even if this Court had power on this appeal to alter the terms of the order nisi, this case in view of its circumstances is not one where that should be done.

Per Kellock J.—The order cannot be treated as no order, but should be treated as an order made under the jurisdiction which in fact existed.—The fact that the proviso in paragraph (*f*) of section 34 applies to clauses (i) and (ii) renders clear the meaning of the words "on application" in the proviso. Where the case is one within clause (i), a special application must be made because the order nisi has already been made; while, if the case is within clause (ii), there is no good reason why the jurisdiction given by the proviso cannot be exercised on the application for the order nisi. The notice of motion given by the respondent entitled the judge hearing the application to abridge or enlarge the period of one year under the jurisdiction given to him by the proviso.

Judgment of the Appellate Division ([1943] 3 W.W.R. 669; [1944] 1 D.L.R. 300) affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of O'Connor J. who had made a vesting order in an action brought by the respondent for foreclosure under a mortgage.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

J. P. McCaffery and *M. C. Shumiatcher* for the appellants.

J. E. A. Macleod K.C. for the respondent.

(1) [1943] 3 W.W.R. 669; [1944] 1 D.L.R. 300.

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The judgment of the Chief Justice and of Estey J. was delivered by

ESTEY J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta dismissing the appellant's appeal to that Court from a vesting order made by Mr. Justice O'Connor.

The respondent, under date of May 27, 1940, was granted a permit by the Debt Adjustment Board of Alberta permitting it

> to commence and continue an action against Robert Halbert to foreclose a mortgage dated the 13th day of March, 1920, covering the Northeast quarter of 33 and the Northwest of 34 in 32-24-4,

on the condition that the final order for foreclosure should not be taken out until the 15th of November, 1940.

The action was commenced on May 29, 1940, but aside from filing and serving the statement of claim no further steps were taken until after the cancellation of the permit by the Debt Adjustment Board on January 27, 1941. Immediately thereafter the appellants filed their statement of defence alleging the cancellation of the permit and that no permit authorizing the commencement or continuation of the action was outstanding as required by the *Debt Adjustment Act* of 1937. Then on February 17, 1941, the respondent filed an amended statement of claim under Rule 259 (now 191) of the Alberta Rules of Court.

Under date of September 21, 1942, the respondent moved for an order striking out the appellants' statement of defence, fixing the amount owing under the mortgage and a period within which the appellants might redeem.

Upon the return of that motion, counsel for the respondent appeared and read material disclosing, among other facts, that the appellants had made application under the *Farmers' Creditors Arrangement Act* of 1934 and thereby in 1935 their then indebtedness was reduced to $6,500 upon terms of repayment with interest thereafter at the rate of 6 per cent. per annum from the 1st of August, 1935. Interest only was payable during the years 1935, 1936 and 1937, and thereafter the sum of $250 on the principal sum and interest on the 1st of December in each year 1938 to 1947 inclusive. That during the period August 1, 1935, to December 1, 1941, the appellants made but one payment of $130 on December 1, 1935.

It does not appear that the appellants filed any material upon this motion. The learned judge found the sum of $9,246.69 to be due and owing, computed as follows:—

Principal, as fixed by Board of Review	$6,500.00
Interest	2,725.45
Advance of	21.24
	$9,246.69

He fixed a period of four months within which the appellants might redeem, and directed that in default of payment the property might be offered for sale by tender, subject to certain specified conditions.

No appeal was taken from this order and upon default of payment, an attempted sale proving abortive, Mr. Justice O'Connor, under date of February 22, 1943, directed a final order vesting the property in the respondent.

The appellants appealed from this vesting order to the Appellate Division of the Supreme Court of Alberta. That Court unanimously affirmed the vesting order made by Mr. Justice O'Connor, and this further appeal is taken therefrom.

The appellants complain that throughout this action they have been improperly denied the benefits of the provisions of the *Judicature Act Amendment Act, 1942,* (1942 Alta. Statute, ch. 37, sec. 2, now 1942 R.S.A. 129, sec. 34). They point out that both the order nisi and the vesting order were made after that amendment was declared *ultra vires* by the Appellate Division in *Plourde* v. *Roy* (1), and before that decision was reversed in this Court (2), and therefore the learned judges, in directing these orders, did not give effect to the provisions of that amendment. In this regard the appellants are under a misapprehension as this amendment never did apply to a case authorized by a permit granted by the Debt Adjustment Board. The legislature, in defining the limits within which this amendment should apply, provided by sec. 34 (*f*) (iii):

> Nothing in this paragraph shall apply to,—
>
> * * *
>
> (*b*) Any action authorized by a permit granted by the Debt Adjustment Board.

(1) [1942] 2 W.W.R. 607; [1942 (2) [1943] S.C.R. 262.

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In this amendment the legislature has clearly expressed its intention, and it is the duty of the Court to give effect to that intention. As was stated by the Lord Chancellor in *Brophy* v. *Attorney General of Manitoba* (1):

> The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact * * * those, who either framed or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judically to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said.

I am, therefore, in agreement with the Appellate Division of Alberta disposing of the case upon this ground. I have not overlooked the suggestion relative to this clause (iii) based upon certain passages in *Plourde* v. *Roy* (2) in this Court. These passages were not essential to the decision of the issues before the Court, and in the result the entire Act was declared *intra vires*.

The appellants also contend that the cancellation of the permit by the Debt Adjustment Board on January 27, 1941, placed them in a position as if no permit had ever been issued; or in other words, placed them in a position where this was not an "action authorized by a permit granted by the Debt Adjustment Board." In my opinion this contention is not well-founded. The use of the words "any action authorized" refers to the commencement as distinguished from a step in, or a continuation of, the action. The word "action" appears several times throughout the amendment and always refers to the whole action as distinguished from a step in the action. Then too, the word "action" is defined in the *Judicature Act*, sec. 2 (*a*) as:

> "Action" means a civil proceeding commenced in such manner as may be prescribed by Rules of Court, and shall include a suit.

In my opinion the action was commenced but once, May 29, 1940, when it was authorized by the permit.

Even if the provisions of the *Judicature Act Amendment Act* of 1942 were applicable, the defendants encounter certain insurmountable difficulties. They contend that because Mr. Justice Sheperd did not

(1) [1895] A.C. 202, at 215. (2) [1943] S.C.R. 262.

give effect to the provisions of the *Judicature Act Amendment Act* of 1942 * * * by the order nisi * * * by reason thereof the same error vitiated the right to make the final order of foreclosure and vesting herein.

It should be observed that both the order nisi and the vesting order were made prior to the decision of this Court in *Plourde* v. *Roy* (1), April 2, 1943, and after the decision of the Appellate Division in the same case (2), and therefore upon dates when both the learned judges were bound by the decision of the Appellate Division that the *Judicature Act Amendment Act* of 1942 was *ultra vires*. This is so even if it be taken into account that the vesting order was neither directed nor entered until March 8, 1943, but dated February 22, 1943.

This amendment does not purport to confer jurisdiction on the judge. His jurisdiction is determined apart from the provisions of this amendment, which merely gives direction with respect to the terms to be granted in certain orders nisi. It places some limitation upon the discretion the judge previously exercised in fixing the period for redemption, but does not affect his general jurisdiction to hear and determine the application. Any failure to follow or misconstrue the provisions of this amendment is a mistake in law which would provide a proper basis for an appeal, but does not involve any question of jurisdiction. Therefore, the appellants' contention that the order nisi was invalid, and therefore the final order of foreclosure and vesting order was, by reason thereof, invalid, cannot be maintained.

This appeal may be disposed of on a further ground.

While the appeal is from the final and vesting order, the appellants' real effort is to make this an appeal from the order nisi and have directed their attack upon that order. They reason that:

(1) The learned trial judge erred in failing to give effect to the provisions of *The Judicature Act Amendment Act*, 1942, Alberta, Cap. 37, and in particular section 2 (*ddd*) (ii) thereof, now herein quoted as R.S.A 1942, cap. 129, section 34 (*f*) (ii), by arbitrarily shortening the statutory time fixed for redemption by the order nisi in complete disregard of the mandatory statutory requirements, and that by reason thereof the same error vitiated the right to make the final order of foreclosure and vesting herein.

(1) [1943] S.C.R. 262.

(2) [1942] 2 W.W.R. 607; [1942] 3 D.L.R. 646.

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The provisions of this amendment of 1942 are restricted to the order nisi, and if the appellants are to obtain the benefits of that amendment, they realize that somehow they must get back to a consideration of that order. They recognize that no appeal was taken from the order nisi, that the time for appeal therefrom has long since passed, and therefore appreciate the difficulties which they must overcome in order to succeed.

They therefore appeal from the final and vesting order and rely upon Rule 609 of Alberta Rules of Court to raise upon this appeal issues which must be dealt with upon the application for order nisi. Rule 609 reads as follows:

> No interlocutory order from which there has been no appeal shall operate so as to bar or prejudice the Court from giving such decision upon the appeal as may be just.

Is, therefore, this order nisi an interlocutory order within the meaning of Rule 609? The word "interlocutory" is variously used, and in determining its meaning regard must be had to the context. It is recognized that in one sense no order or judgment is final until the time for appeal therefrom is exhausted. *In Re The Child Welfare Act; In Re Shand Infants* (1).

Again it is usual to provide a different time or procedure for appeals from final and interlocutory judgments, and therefore it often becomes necessary to determine whether an order is final or interlocutory. In this regard Lord Alverstone C.J., in determining whether an order is final or interlocutory, applied this test:

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

Bozson v. *Altrincham Urban District Council* (2).

The test above quoted has been adopted by the Appellate Division in Alberta when determining whether an order is final or interlocutory under section 47 of the *District Courts Act*, R.S.A. 1942, chap. 121. There it is provided that an appeal may be taken:

> * * * from every decision or order made in any cause or matter disposing of any right or claim, if such decision or order is in its nature final and not merely interlocutory.

(1) [1943] 1 W.W.R. 269.

(2) [1903] 1 K.B. 547.

Bennefield v. *Knox* (1), *Roeske* v. *Senerius* (2), *Wagar* v. *Little* (3), *Pomfret* v. *Morie* (4).

A similar provision is found in the Ontario *Judicature Act*, (1937) R.S.O., chap. 100, sec. 24. In that province the same test is applied. *Hendrickson* v. *Kallio* (5).

Upon the application for order nisi in this action, the rights of the parties were substantially determined; the defence filed by the appellants was struck out; the amount due under the mortgage was determined; the time was fixed within which the appellants might redeem. This order disposed of the issues raised by the parties in this litigation, and this is the general practice whether the order nisi is directed after a trial or in chambers.

It is true that the foregoing decisions are not under the Alberta Rule No. 609, but it does seem that as both provisions deal with questions of appeal the same interpretation ought to be adopted.

In my opinion the order nisi was, for the reasons indicated, not an interlocutory order.

It may be added that this Rule 609 is almost identical with the English Rule No. 878. Under the latter it has been stated that it never was the intention that the time for an appeal from an interlocutory order should be extended by this provision, nor did it provide a collateral appeal from the interlocutory order. *White* v. *Witt* (6). See also *Beynon & Co.* v. *Codden & Son* (7).

In dealing with a somewhat similar question, Anglin J. (later Chief Justice) stated:

> To permit the review of interlocutory judgments on appeals from the final judgments in actions brought in provinces in which legal procedure is based on the English system would tend to unduly prolong litigation and to enormously increase its expense. *Hasseltine* v. *Nelles* (8).

In my opinion this appeal should be dismissed with costs.

KERWIN J.—While in form this is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta affirming a vesting order made by a judge of the Trial Division on March 8, 1943, in an action for fore-

(1) (1914) 17 D.L.R. 398.
(2) [1922] 2 W.W.R. 977.
(3) (1923) 20 Alta. L.R. 47.
(4) [1931] 3 D.L.R. 557.
(5) [1932] O.R. 675.
(6) (1877) 5 Ch. D. 589.
(7) (1878) 4 Ex. D. 246.
(8) (1912) 47 Can. S.C.R. 230, at 242.

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closure of a mortgage, in reality what the appellants object to are the terms of an order nisi for sale, dated September 28, 1942, by which a period of four months was given the appellants to redeem. At that time, there was on the statute books of Alberta an amendment to the *Judicature Act* which came into force on March 19, 1942. On August 7, 1942, in *Plourde* v. *Roy* (1), the Appellate Division held this amendment to be *ultra vires,* and while that judgment was reversed by this Court on April 2, 1943 (2), the judge of the Trial Division was, of course, bound, in the meantime, by the judgment of the Appellate Division. Accordingly he paid no attention to the amendment to the *Judicature Act.*

However, he had power on an "application" to decrease the period of redemption, having regard to certain circumstances set out in the enactment. He did in fact decrease the period and whether he did so on "application" is immaterial as his order was not appealed from.

Even if we had power on this appeal to alter its terms, this is not a case where that should be done. The mortgage in question was given in 1920. Under *The Farmers' Creditors Arrangement Act, 1934,* the sum due under the mortgage amounting, as at March 3, 1935, to $8,477.70, was reduced to and fixed at $6,500, as at August 1, 1935, payable with interest at six per cent. per annum as follows:— Interest only on December 1, 1935, 1936 and 1937; thereafter $250 on account of principal, with accrued interest, on December 1, 1938 to 1947, inclusive, and the balance on December 1, 1948. The first four months interest, which accrued on December 1, 1935, was paid but nothing further, either on principal or interest. The mortgaged lands not having been redeemed within the four months allowed by the order nisi for sale of September 28, 1942, and the sale thereby ordered having proved abortive, the respondent applied for the usual final foreclosure order by which the mortgaged property would be vested in it. This application was adjourned one week and after the respondent, at the request of the presiding judge, had agreed to lease the lands to the appellant Robert Halbert for one year at a one-third crop rental, the order was made. The mortgaged lands are now in the name of the respondent as registered owner and in accordance with its agreement, the respondent

(1) [1942] 2 W.W.R. 607; [1942] 3 D.L.R. 646.

(2) [1943] S.C.R. 262.

executed a lease, which was accepted by the appellant Robert Halbert without prejudice to his right to appeal from the vesting order. Whether anything has been paid under the lease, we do not know but certainly nothing further has been paid on account of the amount of the mortgage.

The appeal should be dismissed with costs.

HUDSON J.—The facts in this case are fully set forth in the judgments of my brothers Kellock and Estey which I have had an opportunity of reading. I agree with them that the appeal should be dismissed with costs. This conclusion might be supported on a number of grounds. I shall refer only to one. Mr. Justice Shepherd had jurisdiction to consider the application made by the respondents for the order nisi and to make an order thereon. When such order was made it was a final order within the meaning of Rule 609 of the Alberta Rules of Court and, therefore, subject to appeal, but no appeal was taken. Once it is accepted that the order nisi was valid, there is no objection to the final vesting order from which the appeal was taken to the Appellate Division. I think the Appellate Division was right in dismissing such appeal, and none the less because the conduct of the appellants throughout does not warrant any indulgence beyond that given by a strict adherence to the rules of law.

KELLOCK J.—This is an appeal by the defendants from the order of the Appellate Division of the Supreme Court of Alberta dated December 15, 1943, dismissing an appeal by the appellants from a vesting order made in the action, which was brought by the respondent for foreclosure under a mortgage dated the 13th of March, 1920. The order, which was made on the 22nd of February, 1943, followed an order nisi dated the 28th of September, 1942, by which the time for redemption was fixed at four months from the date of service of the order. The action itself was commenced on the 29th of May, 1940.

On the 19th of March, 1942, an amendment to the *Judicature Act* came into force. This amendment, enacted by chapter 37 of the 1942 statutes, section 34, provided

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that, as therein set forth, in actions for foreclosure of a mortgage commenced either before or after the passing of the Act, the time to be fixed for redemption by the order nisi should be one year, provided that upon certain evidence, this time might be abridged or extended. On the 7th of August, 1942, before the order nisi here in question was made, the Appellate Division had held in *Plourde* v. *Roy* (1) that the *Judicature Act Amendment Act 1942* was *ultra vires*. On the 2nd of April, 1943, after the vesting order, this judgment was reversed by this Court (2), the legislation being held *intra vires*.

The appellants contend that the provisions of the *Judicature Act Amendment Act 1942* were ignored by the learned judge who made the order nisi, owing to the mistaken view of the law which prevailed at that time, and which continued to prevail at the time of the final order. The appellants submit that the order nisi should have prescribed a period of one year for redemption, and that its failure to do so should have been adjusted, on the making on the final order, and that this would have been done had the judge making that order correctly applied the law.

Section 34 reads in part as follows:

(i) Notwithstanding the terms of any order nisi heretofore granted in an action for foreclosure of a mortgage or of any order for specific performance heretofore granted in an action in respect of any agreement for sale of land in any case where no final vesting order or cancellation order has been granted the time for redemption under any such order shall be extended for a period of one year from the date of the coming into force of this Act;

(ii) In any action for foreclosure of a mortgage * * * commenced before or after the passing of this Act, the time to be fixed for redemption by the order nisi in the case of a mortgagee * * * shall be one year from the date of the granting of the order. Provided, however, that in any action coming under the provisions of clauses (i) or (ii) of this paragraph, the judge may, upon application, decrease or extend the said period of redemption having regard to the following circumstances:

(*a*) In case the action is in respect of a security on farm lands, the ability of the debtor to pay the value of the land including the improvements made thereon, the nature, extent and value of the security held by the creditor, and whether the failure to pay was due to hail, frost, drought, agricultural pests or other conditions beyond the control of the debtor.

The notice of motion for the order nisi was dated the 21st of September, 1942, and in addition to other relief, asked for an order

(1) [1942] 2 W.W.R. 607; [1942] 3 D.L.R. 646.

(2) [1943] S.C.R. 262.

fixing a time within which the defendants may redeem, and in default of redemption within the time so fixed, ordering sale of the mortgaged premises.

This notice of motion was supported by an affidavit of the general manager of the respondent company, which produced the mortgage and established the default. There was also an affidavit of value of the mortgaged premises, in which it was stated that the mortgaged premises had a value at a forced sale of $6,500 on terms and of $5,500 for cash. Apart from the mortgaged premises themselves, the only assets of the appellants were some stock and implements. While the mortgage had been originally given to secure the sum of $4,000 payable on the 1st day of November, 1924, the principal had been allowed to remain outstanding and there were substantial arrears. On the 5th of August, 1935, under the provisions of the *Farmers' Creditors' Arrangement Act,* the amount then outstanding was reduced to $6,500, the interest rate being cut from 8 per cent. to 6 per cent. per annum, interest only to be paid in the years 1935, 1936 and 1937 and $250 of principal on the 1st of December in each of the years 1938 to 1947, the balance of the principal to be paid on the 1st of December, 1948. Apart from taxes, the only payment made was interest of $130 which fell due on the 1st of December, 1935. At the time of the application for the order nisi, the amount outstanding on the mortgage was in excess of $9,000.

The Appellate Division held that the learned judge who made the order nisi had in fact abridged the time provided by the proviso to clause (ii) of the amending section, and that if the proper procedure was not followed by way of a special application for an order abridging the time, this was an irregularity which could be waived, and the appellants had not appealed from the order.

While the appeal is from the final order, the appellants found their appeal upon an attack upon the order nisi. Appellants' argument is that (1) the order nisi is void because it is contrary to the amendment to the *Judicature Act* and (2) that by reason of the provisions of rule 609 of the rules of the Supreme Court of Alberta, the judge hearing the application for the final vesting order was not

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bound by the order nisi and should have refused to grant a final order. They submit, therefore, that the Appellate Division ought to have set aside the final order.

With respect to the first ground, the appellants submit that the provisions of clause (ii) of the amending paragraph providing for a period of one year for redemption are mandatory and any order made ignoring its provisions is a nullity. They submit that the proviso to clause (ii) is to be left out of account, as no application was actually made under it. It is said that the words "on application" in the proviso require a special notice of motion apart from any notice which is appropriate under the earlier part of the clause, or else if one notice of motion is sufficient, it must specially ask for an order to abridge the period of one year.

When it is seen that the proviso applies to clauses (i) and (ii), the meaning of the words "on application" becomes clear. Where the case is one within clause (i), a special application must be made because the order nisi has already been made. When the case is within clause (ii), however, there is no good reason why the jurisdiction given by the proviso cannot be exercised on the application for the order nisi, and in my opinion the notice of motion given in the case at bar entitled the judge hearing the application to abridge or enlarge the period of one year under the jurisdiction given to him by the proviso. I do not think, therefore, the order nisi can be treated as no order, but that it should be treated as an order made under the jurisdiction which in fact existed: *Ex Parte May* (1). Any objection on evidentiary grounds does not go to the question of jurisdiction: *Rex* v. *Nat. Bell Liquors Ltd.* (2); *The Colonial Bank of Australasia* v. *Willan* (3).

As to the second ground of objection, I think the provisions of rule 609 do not apply. The order not only fixed the amount of the debt, the period of redemption and provided for a sale, but struck out the statement of defence, which had set up the *Debt Adjustment Act 1937* and the

(1) (1884) 12 Q.B.D. 497.
(2) [1922] 2 A.C. 128, at 151 and 152.
(3) (1874) L.R. 5 P.C. 417, at 443.

lack of a permit thereunder. The order finally disposed of the rights of the parties and cannot be regarded as an interlocutory order within the meaning of the rule. The authorities are referred to in the judgment of my brother Estey.

I would dismiss the appeal.

Appeal dismissed with costs.

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Solicitor for the appellants: *J. P. McCaffery.*

Solicitors for the respondent: *Macleod, Riley, McDermid & Dixon.*

STANLEY ALEXANDER THOMPSON, PERSONALLY AND AS EXECUTOR OF HARRY ALCROFT THOMPSON, DECEASED, AND JOHN A. NORRIS..... APPELLANTS;

AND

EDYTHE G. LAMPORT

AND

CHARTERED TRUST AND EXECUTOR COMPANY AND STANLEY ALEXANDER THOMPSON, SURVIVING EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALEXANDER MONTGOMERY THOMPSON, DECEASED ..... RESPONDENTS.

1944

*Nov. 16, 17

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*Feb. 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Costs—Trustees—Executors—Direction in will that fund be set apart for benefit of testator's daughter—Executors and trustees of the will also trustees of the fund—Unsuccessful action by daughter against the executors and trustees with regard to the fund as set up—Question out of what fund (said fund or the residuary estate, or both) the solicitor and client costs incurred by the executors and trustees in said action (to the extent that they exceeded the party and party costs) should be paid.

By his will, T., who died in 1929, appointed his two sons and a trust company to be executors and trustees and gave to them all his estate upon trusts, one trust being to set apart for the benefit of his daughter, L., the sum of $100,000, revenue from which was to be paid

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.