

JOSEPH L. MORIN (PLAINTIFF) APPELLANT;

AND

HERMAN WALTER (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE,
PROVINCE OF QUEBEC

*Appeal—Motion to quash—Payment of costs below—Thread of execution
—Acquiescence in judgment—Right of appeal.*

Payment of costs in the courts below made under threat of execution does not amount to acquiescence in the judgment rendered and the right of appeal to this court therefore still exists.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court and dismissing the appellant's action.

The respondent moved to quash the appeal on the ground of acquiescence in the judgment appealed from by payment of the costs of the Court of King's Bench and the Superior Court.

THE CHIEF JUSTICE.—I concur in dismissing with costs the respondent's motion to quash on the ground that the payment of costs by the appellant under the circumstances was not such a voluntary act as would indicate an intention to acquiesce in the judgment and forego his right of appeal therefrom.

IDINGTON J.—The respondent moves to quash the appeal herein on the ground of acquiescence on the part of the appellant in the judgment appealed from.

The alleged acquiescence consists simply in the appellant having paid the costs, or asked the surety to pay the costs, awarded the respondent in the court below.

The payment was made in response to repeated threats that unless the costs were paid proceedings would be taken to enforce payment either from appellant or his surety.

I am of the opinion that payment of costs under such circumstances is not an acquiescence in the judgment which would bar appellant's right to come here.

I think, therefore, the motion should be dismissed with costs.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

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*Oct. 22.

DUFF J.—I can find no evidence of an intention on part of the appellant to forego his right of appeal or of facts which in point of law must be treated as abandonment of his right of appeal. My conclusion is that the payment was made under a threat of execution. Nevertheless, I should not wish to commit myself to the proposition that payment of a judgment in response to a demand of the judgment creditor without an express threat of execution, or initiation of execution proceedings, could, save in very exceptional circumstances, properly be treated as a voluntary payment.

ANGLIN J.—The fair conclusion from the material before us would appear to be that the appellant caused the costs, for which the respondent had judgment against him, to be paid under threat of execution. That payment was not such a voluntary act on his part as would indicate an intention to acquiesce in the judgment and forego his right of appeal therefrom. The respondent's motion to quash cannot succeed and should be dismissed with costs.

MIGNAULT J.—The respondent moves to quash the appeal on the ground of acquiescence in the judgment appealed from by payment of the costs of the Court of King's Bench and of the Superior Court on the dismissal of the appellant's action.

With the consent of the appellant, the costs were paid by The United States Fidelity & Guarantee Company, which had given security for these costs at the time of the appeal to the Court of King's Bench. It appears however by the correspondence between the attorneys of the two parties that these costs were paid after the respondent's attorneys had threatened to issue execution against the appellant if they were not paid. They wrote to the surety, to whom they had been referred by the attorney for the appellant, demanding payment and stating that if they did not receive a satisfactory answer before a stated date they would immediately have the appellant's property seized. It was under these circumstances that the payment of the costs was effected.

Although no reservation of the right of appeal was made, which of course would have been more prudent, my opinion is that this was not a voluntary payment from which

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acquiescence in the judgment can be inferred. I find a decision of *la cour de cassation*, of the 28th May, 1867 (Daloz, 1867.1.215) very much in point. It was held that le paiement des frais d'un arrêt, après signification de l'arrêt et de l'exécutoire de dépens, et sur une menace écrite d'exécution forcée, n'emporte pas acquiescence à cet arrêt; et, dès lors, ne rend pas non recevable le pourvoi en cassation forme contre le même arrêt.

I would therefore dismiss the motion with costs.

Motion dismissed with costs.

Gregor Barclay for the motion.

C. M. Cotton contra.
