CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

JOSEPH H. McKEAGE (DEFENDANT) ..... APPELLANT;

1921

*Oct. 24.
*Nov. 21.

AND

DAME SARAH S. McKEAGE (PLAINTIFF) ..... RESPONDENT.

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

Appeal—Jurisdiction—Donation—Obligation to provide home—Refusal by donee—Conversion into payment of money.

Under a deed of gift of a house from her father to the appellant, her brother, the respondent was entitled to a home with the donee as long as she remained single. Alleging failure by the appellant to fulfil his obligation, the respondent brought action to convert such obligation into a payment of money and to have the immovable charged with the amount awarded. The trial judge held that the appellant should pay the sum of $20 per month or provide the respondent with a home, but did not adjudicate upon the claim that the donated immovable be hypothecated as security, and this judgment was affirmed by the Court of King's Bench.

Held, that there was judisdiction in the Supreme Court of Canada to entertain an appeal. MIGNAULT J. *dubitante*.

*PRESENT: Idington, Duff, Anglin and Mignault JJ. and Bernier J. *ad hoc*.

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APPEAL by the intending appellant from an order of the Registrar affirming the jurisdiction of the Court and approving security.

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

THE REGISTRAR: This is a motion to affirm jurisdiction.

The facts, from the pleadings and the papers filed, appear to be as follows:—A donation was made by plaintiff's father on 8th October, 1887, and accepted by defendant by which certain lands conveyed to the defendant were charged or hypothecated in favour of the plaintiff. The deed of donation amongst other things provided as follows:—

> The said donee or his representatives * * * to pay or cause to be paid to his sister, Sarah S. McKeage the sum of $400 * * * That the said Sarah M. McKeage shall have a home with the said donee or his representatives as long as she will remain single * * * under all which charges and conditions the said donee doth hereby accept the foregoing donation consenting that the said lands shall remain affected and mortgaged for that purpose.

Subsequently difficulties arose between the plaintiff and defendants and an action was instituted by the present plaintiff in December, 1910, in which she alleged that the defendant had failed to furnish her with a home and that his obligation in that regard was of the value to her of $200 a year and asked that the lands in question be declared hypothecated in her favour for such sum of money as would produce an annual rent of $200 a year and that the defendant be condemned to pay that sum. Judgment was pronounced in this case on the 18th December, 1911, by the Superior Court, in which was the following considerant:

Considering that at the argument the interpretation to be given to the word "home" in the donation was by mutual assent of both parties submitted to the court for an expression of opinion, it proceeded to hold that the intention of the donor was to provide the plaintiff with a home on the premises and that she be supported as a member of the family as long as she would not marry and could not be expected to be supported elsewhere.

As the donation had not been actually registered, the court dismissed the conclusions of the action which asked for payment of $200 a year for the past year's board and for a yearly allowance in money, but declared that the plaintiff had according to the terms of the donation a right to have a home with the defendant or his representatives so long as she remained single and to have the immovable property affected by mortgage for the fulfilment of the obligation.

No appeal was taken from this judgment, but trouble did arise subsequently between the parties and the present action was brought, in which the plaintiff alleged that the defendant had failed to comply with his obligation and asked that the donation should be converted into money and the defendant condemned to pay to plaintiff in lieu of the obligation imposed by the act of donation, $50 every month, and as a guarantee of such payment that the immovables in question should be hypothecated in favour of the plaintiff.

Various defenses were set up to the demand and the case went to trial before the Hon. Mr. Justice Pouliot who after reciting all the facts in his considerants gave judgment on 14th June, 1920, and awarded $20 a month to the plaintiff and condemned the defendant to pay that sum unless he should receive the plaintiff into his house as a member of his family and furnish her with support and maintenance until her marriage.

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This judgment was confirmed by the Court of King's Bench (appeal side) and the defendant now appeals to the Supreme Court and asks to have the jurisdiction of the court affirmed.

The disposition of the present motion depends upon the construction to be placed upon section 46 of the Supreme Court Act:—"Does the matter in controversy relate to title to lands or tenements, annual rents and other matters and things, where rights in future might be bound?" It was held in *Rodier* v. *Lapierre*, (1) that the words "annual rents" in this section mean "ground rents" (rentes foncières) and not an annuity or other like charge or obligation. The expression "rentes foncières" is discussed very fully in Pothier vol. IV, chap. 2, art. 14, by Planiol and other French authors and in its simplest form implies an obligation by a donee to make certain payments to the donor or a third party secured by a hypothèque upon the lands donated. I do not understand the respondent to take exception to this construction nor would he seriously contend that if by the present judgment a "rente foncière" was granted that the present appellant would not have a right of appeal to the Supreme Court, but he argues that the judgment in this case places no charge upon the lands mentioned in the donation, or in other words that the judgment is a security of lesser value and importance than the plaintiff already had by reason of the donation and the judgment confirming it, unappealed from, given in 1911. I cannot so construe the judgment in the present case. Although there is no express declaration as there was in the judgment of 1911 that the lands in

(1) 21 Can. S.C.R. 69.

question are charged in favour of the plaintiff, yet I think the judgment has that effect and that in the words of the statute the controversy relates to *"annual rents"*. I therefore hold that the Supreme Court has jurisdiction.

Girouard for the appellant.

Walsh K.C. for the respondent.

IDINGTON J.—I agree that this appeal is, according to the jurisprudence of this court, within its jurisdiction and, therefore, that this appeal from the registrar's ruling should be dismissed with costs.

DUFF J.—I am of the opinion that the appeal from the registrar's judgment should be dismissed with costs.

ANGLIN J.—The intended respondent appeals from an order of the registrar affirming the jurisdiction of this court.

Under a deed of gift from her father to her brother the plaintiff was entitled to a home with the donee (the defendant) so long as she should remain single, and also to be paid a sum of $400. In litigation between the present parties in 1911 the plaintiff was declared entitled to a home according to the terms of the donation and to have the immovable property, which was the subject of the donation, affected by a mortgage for the fulfilment of the donee's obligation to provide her with such a home. In the present action, instituted in 1919, and therefore subject to the Supreme Court Act as it stood before the amendment of 1920, the respondent sought to have the obligation

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to furnish her a home converted into a payment of money and the immovable donated declared subject to a charge in her favour for payment of whatever sum or sums she should be held entitled to. By the judgment of the Superior Court the appellant-defendant's obligation to provide a home for the respondent was so converted and he was condemned to pay the respondent $20 per month while she remained single, reserving to him however the right, instead of paying that sum monthly, to provide her with the home to the furnishing of which the donation to him had been made subject. No adjudication was made on the claim that the donated immovable should be declared charged with the payment of the sums so awarded. This judgment was affirmed on appeal to the Court of King's Bench. An appeal having been taken to this court by the defendant, the registrar on motion made on his behalf affirmed our jurisdiction. From that order the present appeal is brought.

It has been established by many decisions that in applying sec. 46 of the Supreme Court Act "the matter in controversy" means not the matter to be determined upon the appeal, or that disposed of by the judgment *a quo*, but the subject of the plaintiff's claim as disclosed by the declaration. That principle of construction is not confined to cases in which the jurisdiction of the court depends upon the value of the matter in controversy. It extends to the other cases covered by sec. 46 as well. *Bisaillon* v. *City of Montreal* (1). In my opinion the defendant's title to the land donated to him would be affected by the plaintiff's obligation if established as a charge upon such land, as she sought.

(1) Cameron's Supreme Court Practice, Vol. 2, App. C. 15.

I am further of the opinion that this case also falls within the concluding words of paragraph (b) of s. 46— "other matters or things where rights in future might be bound". If the amount allowed the respondent should hereafter be found insufficient and she should desire to have it increased she would find herself bound by the judgment in this case. On the other hand, the representatives of the defendant, should the plaintiff survive him, would also find their rights in the land subject to the charge of the plaintiff's claim, had the judgment accorded her the declaration of such a charge. *Les Ecclésiastiques de St. Sulpice de Montréal* v. *Cité de Montréal* (1).

I am therefore of the opinion that the order affirming jurisdiction was rightly made and that this appeal from it should be dismissed with costs.

MIGNAULT J.—The majority of the court being of opinion that we have jurisdiction to hear this case I will not enter a formal dissent, although I would be inclined to consider our jurisdiction as extremely doubtful, in view of the meaning placed on the words "annual rents" by *Rodier* v. *Lapierre* (2).

BERNIER J.—I am of the opinion that the appeal from the registrar's judgment should be dismissed with costs.

Appeal dismissed with costs.

(1) 16 Can. S.C.R. 399.

(2) 21 Can. S.C.R. 69.