L. J. LABROSSE AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS; 1908 *Oct. 12. *Oct. 27.

AND

GODFROY LANGLOIS (DEFENDANT) . RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Appeal—Amount in dispute—Interest—Costs—Collateral matter.

An action having been brought against the maker and indorser of a note for $2,000 the makers sued the indorser in warranty claiming that no consideration was given for the note and asking that the indorser guarantee them against any judgment obtained in the main action. They also asked that an agreement under which the makers were to become liable for $3,000 be declared null. The two actions were tried together and judgment given for the plaintiff in the action on the note while the action in warranty was dismissed. On appeal from the latter judgment:

Held, that the amount in dispute was $2,000, the value of the note sued on; that the costs of the action in warranty could not be added and without them the sum of £500 was not in controversy even if interest and costs in the main action were added; the appeal, therefore, did not lie.

Held, also, that the agreement which the plaintiffs in warranty sought to avoid was only a collateral matter to the issues raised on the appeal and could not be considered in determining the amount in dispute.

Interest after the commencement of the action, unless specially claimed as damages, cannot be added to the amount claimed in the declaration in determining the amount in controversy for the purposes of giving jurisdiction upon an appeal to the Supreme Court of Canada.

MOTION for approval of security and to affirm the jurisdiction of the court to entertain the appeal.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington, Maclennan and Duff JJ.

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The motion was by way of appeal from the decision of the registrar in chambers denying the right of appeal.

The circumstances of the case are stated in the judgments now reported.

In refusing the application in chambers the registrar stated the reasons for his decision, as follows:

"THE REGISTRAR.—This is an application to me as a judge in chambers to allow the security upon an appeal to the Supreme Court from a judgment of the Court of Review. A similar application to a judge of the court appealed from was refused and I understand from the counsel it includes a motion to affirm the jurisdiction of the court under rule one. The proceedings commenced by a writ issued on the 3rd of August, 1907, by the Bank of Hochelaga against the present plaintiffs and defendant who were made defendants in that action. A promissory note for $2,000 was made by the present plaintiffs in favour of the present defendant and by him discounted with said bank. Upon the action being instituted by the Bank of Hochelaga, the present plaintiffs, on the 17th of August following, issued a writ against the present defendant in an action *en garantie;* and subsequently the two actions were joined by an order of the court. In the present action, the plaintiff's declaration is as follows:

"Les demandeurs en garantie déclarent:—

"1° Qu'ils ont reçu signification ces jours derniers d'une action de la part de la Banque d'Hochelaga, corps politique et incorporé de Montréal, demandant le recouvrement d'une somme de $2,000, montant réclamé pour un billet promissoire signé par les deman-

deurs en garantie, en date du 24 avril, 1907, à l'ordre de Godfroy Langlois, à deux mois de date, avec $2.54 frais de protêt, ainsi qu'il appert à une copie de la déclaration du bref portant le No. 3271 des dossiers de la dite cour supérieure;

"2° Que le dit billet qui a été consenti et livré par les demandeurs en garantie au présent défendeur en garantie par erreur et sans considération aucune d'une manière illégale, le défendeur en garantie ayant reçu le billet en paiement partiel pour céder des droits dans une certaine compagnie appelée The Quebec & Ontario Cobalt Mining Co., alors qu'il n'avait aucun droit valable et légal et qu'il a ainsi rien cédé aux demandeurs en garantie;

"3° Que le dit défendeur en garantie n'a aucun droit au paiement du dit billet, qu'il n'était pas justifiable de négocier le dit billet ni d'en obtenir le recouvrement;

"4° Que de défendeur en garantie est tenu de rembourser le montant du dit billet et de rembourser et garantir les demandeurs en garantie au cas, où ces derniers seraient condamnés et forcés d'acquitter le dit billet envers la demanderesse principale;

"Pourquoi les demandeurs en garantie concluent à ce que l'action soit maintenue et à ce que le défendeur en garantie soit tenu d'intervenir dans l'action intentée contre les dits demandeurs en garantie pour la demanderesse principale; à ce que le défendeur en garantie soit tenu d'acquitter et d'indemniser les demandeurs en garantie de toute condamnation qui pourrait être portée contre eux par suite de la dite action en principal, intérêt et frais, tant en demandant qu'en défendant, accrus et à accroître, et en particulier à ce que le défendeur en garantie soit con-

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damné aux dépens de la présente action; et de plus à ce que le billet susdit soit déclaré nul, obtenu irrégulièrement et sans considération; à ce que les conventions qui ont pu intervenir entre les parties au sujet du dit billet y faisant partie soient déclarées illégales et faites sans considération.

"To this the defendant filed the following defence:

"Pour défense à la déclaration des demandeurs en garantie, le défendeur en garantie dit:

"1° Il admet l'allégation 1ère de la déclaration des demandeurs en garantie;

"2° Il nie l'allégation 2e de la dite déclaration;

"3° Il nie l'allégation 3e de la dite déclaration;

"4° Il nie l'allégation 4e de la dite déclaration; du reste l'action en garantie ne compète pas aux demandeurs en garantie.

"Pourquoi le défendeur en garantie conclut au renvoi de la dite action des demandeurs en garantie avec dépens.

"The judgment of the Honourable Mr. Justice Martineau sets out the facts which were adduced in the evidence, and from his judgment it would appear that the note in question was given pursuant to an agreement for the transfer by the defendant to the plaintiffs of certain rights in a mining company for the sum of $3,000, and the dispute between the parties was as to the nature of the rights so transferred. It was alleged that these rights were set out in a document which had been in the possession of the plaintiff Labrosse. Labrosse denied having the writing and desired at the trial to give parol evidence of its contents. This was objected to by the defendant on the ground that the plaintiff had not sufficiently accounted for

its non-production, and the objection was maintained by the court.

"After hearing evidence the trial judge upheld the agreement and consequently dismissed the action *en garantie,* and his judgment was affirmed by the Court of Review.

"It is from the latter judgment that the plaintiffs now desire to appeal.

"The question then is: Does an appeal lie to the Supreme Court in this case under section 40 of the "Supreme Court Act," which reads as follows:

"40. In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that court confirms the judgment of the court of first instance, and its judgment is not appealable to the Court of King's Bench, but is appealable to His Majesty in Council ?

"An appeal to His Majesty in Council under article 69 of the Code of Civil Procedure is given by sub-section 3, 'in all cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling.' In the present action the plaintiffs claim that the amount in dispute is $3,000 payable by them to the defendant under said agreement, and in the alternative claim that by adding interest and costs to the $2,000 judgment obtained against them by the Banque d'Hochelaga, the amount in dispute exceeds five hundred pounds sterling.

"As to the first contention I am of the opinion that looking at the pleadings the amount of the dispute is the note for $2,000 upon which judgment was obtained by the Banque d'Hochelaga against the parties to this action. No distinct issue is raised on the record as to the validity of the agreement; in fact it is

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not referred to in the pleadings; and even if the plaintiffs are correct in alleging that the result of the present judgment is to preclude them from setting up in any other action the invalidity or illegality of the agreement, this is a matter collateral to the present issue and an incident resulting therefrom which cannot be taken into consideration in determining the amount in dispute. A statement of the law on this point contained in the decision of *Toussignant* v. *County of Nicolet*(1), it appears to me, applies. There the court said:

"'It is settled law that neither the probative force of a judgment nor its collateral effects nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when our jurisdiction depends upon the pecuniary amount or upon any of the subjects mentioned in section 29 (now 46) of the 'Supreme Court Act.'

"I am of the opinion that the plaintiffs did not establish that the interest and costs added to the $2,000 note brings their claim up to five hundred pounds sterling.

"The costs in the action of the Bank of Hochelaga against them would have been trifling had they not set up a special defence that the bank was simply a *prête-nom* for the present defendant. The amount in dispute in the present action cannot be more than the amount of the judgment obtained by the Bank of Hochelaga and there cannot be added thereto any costs of the present action for the purpose of bringing the amount in dispute up to five hundred pounds sterling.

"On the whole, therefore, I am of opinion, as was

(1) 32 Can. S.C.R. 353.

the judge below, that this case is not appealable to the Supreme Court."

On renewal of the application, before the court, by way of appeal from the registrar's decision.

J. A. Ritchie, supported the motion.

Auguste Lemieux K.C. *contra.*

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is a motion by way of appeal from a judgment of the registrar in chambers refusing, on the ground that the sum involved was below the appealable amount, to allow the appellant to give security (sec. 75 "Supreme Court Act") and also declining to affirm the jurisdiction of this court, under Rule 1.

The facts, so far as we can gather them from the material before us, are briefly these.

Langlois sold to Labrosse and another his rights in a mining company called "The Quebec and Ontario Cobalt Mining Company," and, in connection with that sale, received their promissory note for $2,000, which he apparently discounted with the Hochelaga Bank. The note not being paid at maturity, the bank brought action against the makers and payee and, during the pendency of that suit, Labrosse *et al.* sued their co-defendant, Langlois, in warranty and, by their conclusions, prayed that he, having obtained the note without consideration, be condemned to guarantee them in debt, interest and costs against any judgment that

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might intervene in the suit of the bank. On the application of the parties, the two suits were joined and tried together and, in the result, judgment was rendered in favour of the bank against all the defendants and the action in warranty by Labrosse et al. was dismissed with costs. This judgment was affirmed by the Court of Review. The amount of the condemnation in the main action, according to the figures set out by the appellant in his petition, is for capital $2,002.50; interest from July, 1907; and costs to the bank, $182.79, and of Labrosse et al. $146.55. To these sums the appellant adds the costs of the action in warranty in the Superior Court and the Court of Review, which bring the amount up to $2,970.59. It nowhere appears and we have no means of ascertaining how much costs were incurred or how much interest had accrued at the date of the institution of the action in warranty, August 27th, 1907.

By section 40 of the "Supreme Court Act," and article 68, section 3, of the Quebec Code of Procedure, as it read before the recent amendments, there is an appeal here if the matter in dispute exceeds the sum of £ 500 sterling, and the question to be decided now is: In ascertaining the appealable amount, are interest and costs to be included in the computation?

This question has not, so far as I have been able to ascertain, been previously considered by this court, except as to interest in *Dufresne* v. *Guevremont*(1), and *Bresnan* v. *Bisnaw*(2).

Whatever may be said as to the costs in the main action and the interest on the note sued for in the action in warranty, it is quite certain that the costs

(1) 26 Can. S.C.R. 216. (2) Cout. Cas. 318.

in the action in warranty in the Superior Court and the Court of Review cannot be added to the amount of the note in estimating the principal sum. *Bank of New South Wales* v. *Owston*(1); and *Quebec Fire Assurance Co.* v. *Anderson*(2). In *Doorga Doss Chowdry* v. *Ramanauth Chowdry*(3), Lord Chelmsford said:

> The costs of a suit are no part of the subject matter in dispute and cannot be used for the purpose you seek; if they were allowed to be added to the principal sum claimed, it would be in the power of every litigant, by swelling the costs, to bring any suit up to the appealable value.

Again, in *Great Western Ry. Co. of Canada* v. *Braid*(4), it was held that costs incurred by a losing party cannot be taken into account. To the same effect, Fuzier-Hermann, vo. *"Appel en matière civile,"* nos. 268 *et seq.*

With respect to the interest accrued on the note from maturity there seems to be some uncertainty as to whether it should be added. Apparently the Privy Council, in *Voyer* v. *Richer,* referred to but not reported in 2 Legal News, at page 313, held on the application for leave that interest should be added to the principal in computing the amount demanded; but the Court of Appeal in Quebec, on the ground that it was a statutory court, as this court is, and could not exercise the discretionary power which the Privy Council has to allow appeals, refused to follow this judgment in *Stanton* v. *Home Insurance Co.*(5).

In France, the question seems to have been definitely settled. Rosseau-Laisney, Dictionnaire de Procédure Civile, vo. "Appel," nos. 80, 81 and 82:

(1) 4 App. Cas. 270.
(2) 13 Moo. P.C. 477.
(3) 8 Moo. Ind. App. 262.
(4) 1 Moo. P.C. (N.S.) 101, at pp. 114, 115; 1 N.R. 527.
(5) 2 Legal News 314.

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Les intérêts accrus depuis l'introduction de l'instance ne doivent pas être compris dans l'évaluation de la demande pour déterminer si le jugement est en premier ou en dernier ressort.

Fuzier-Hermann, vo. "*Appel (mat. civ.),*" nos. 435, 436, makes a distinction as to interest accrued before and since the institution of the action, and the conclusion is that the latter cannot be taken into account because it is only consequential and incidental to the sum claimed by the declaration and cannot be considered as forming part of the principal demand.

In the Supreme Court of the United States, it has been held that interest cannot be added to give jurisdiction unless claimed as damages. *Udall* v. *The "Ohio"*(1), and *Western Telegraph Co.* v. *Rogers*(2).

The interest accrued on the note before the institution of the action in warranty and the costs incurred in the main action, so far as we can ascertain from the figures supplied by the appellant, if added to the face value of the note and costs of protest would not bring the appellant's claim within the appealable amount, five hundred pounds sterling.

As to the costs in the action in warranty, and interest, we hold that they are not to be added to the principal sum in estimating the appealable value, except that portion of the costs in the main action and of the interest on the note which are covered by the conclusions of the action in warranty and form part of the demand in that action.

By their conclusions in the action in warranty the appellants ask that the agreement in connection with which the note sued on was given should be declared null and void, but no distinct issue was raised on the record as to the validity of this agreement and the

(1) 17 How. 17. (2) 93 U.S.R. 565.

money value of Labrosse's interest, stated here to be $3,000, is not set out in the pleadings and I agree with the registrar that, on the pleadings, this is a matter collateral to the present issue and an incident resulting therefrom which cannot be taken into consideration in estimating the amount in dispute. The words "matter in dispute" have reference to the matter which is directly in dispute in the particular cause (here, the action in warranty), in which the judgment sought to be reviewed had been rendered; and do not permit this court, for the purpose of determining such sum or value, to estimate its collateral effects. *Elgin* v. *Marshall*(1). This point is put in Fuzier-Hermann, vo. "*Appel* (*mat. civ.*)," no. 421:

> C'est dans la demande principale et non dans les accessoires de la demande, qu'il faut chercher le détermination de taux du ressort. Dès lors il convient de dégager la demande de tous les éléments qui ne sont pas le *principal* et qui, conséquemment, ne doivent pas servir à la supputation du ressort.

Vide Toussignant v. *County of Nicolet*(2).

In *New Jersey Zinc Co.* v. *Trotter*(3), and in *Starin* v. *The "Jessie Williamson, Jr."*(4), it was held that reference can only be had to the matter actually in dispute in the particular cause in which the judgment is rendered for the purpose of estimating the value on which the jurisdiction of the court depends and the collateral effect of the judgment is not to be taken into account.

The motion is dismissed with costs taxed at $50.

Motion dismissed with costs.

(1) 106 U.S.R. 578.
(2) 32 Can. S.C.R. 353.
(3) 108 U.S.R. 564.
(4) 108 U.S.R. 305.