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*Oct. 28.
*Dec. 1.

SIMEON LAMOTHE (PLAINTIFF) .....APPELLANT;

AND

ADOLPHE DAVELUY (DEFENDANT) .RESPONDENT.

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

Appeal—Actio Pauliana—Controversy involved — Title to land — R.S.C. [1906] *c.* 139, *s.* 46.

In the Province of Quebec, the *actio Pauliana*, though brought to set aside a contract for sale of an immovable, is a personal action and does not relate to a title to lands so as to give a right of appeal to the Supreme Court of Canada.

APPEAL from a decision of the Court of King's Bench, reversing the judgment of the Court of Review in favour of the plaintiff, and restoring the judgment of the Superior Court, District of Arthabaska.

The appellants, creditors of an insolvent for a claim of $53.50, brought the suit, *actio Pauliana,* on behalf of themselves and all other creditors of the insolvent, to set aside a sale of land by the insolvent to the defendant, as having been made in fraud of creditors and asking that the land in question should be attached as their common pledge and sold for their common benefit. At the time of the sale complained of, the land had not been granted by the Crown, but was held under location and the letters patent of grant were subsequently issued in the name of the transferee.

A motion was made, on behalf of the respondent, to quash the appeal, for want of jurisdiction, on the

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

grounds that the action was, in its nature, merely personal and for an amount insufficient to give jurisdiction to the Supreme Court of Canada to hear the appeal, and that there was no controversy involved affecting title to or any interest in real estate.

On the part of the appellants, it was contended that the effect of the proceedings, if the action were maintained, would be to set aside the title to the land which the defendant held under the letters patent of grant in virtue of the alleged fraudulent transfer by the debtor to him, and that, therefore, a title or interest in the land was in controversy, and an appeal would lie.

J. A. Ritchie, supported the motion.

G. G. Stuart K.C. contra.

THE CHIEF JUSTICE.—This is an action *Pauliana* and the respondent moves to dismiss for want of jurisdiction. I would grant the motion on the ground that the amount of the plaintiff's claim is not within the appealable limit and no question of title to land, in the sense in which that term is used in section 46 of the Act, is involved in this appeal. It is quite true that the plaintiff in such an action brought under the Quebec Code represents not only himself, but all the other creditors of the fraudulent debtor prejudicially affected by the sale (art. 1036 C.C.), but it does not appear, and there is some evidence to the contrary, that the total amount of Leclerc's indebtedness would exceed $500; and the value of the property is certainly not of the appealable amount. *Labelle* v. *Meunier* (1), and *Leclaire* v. *Coté* (2).

(1) Q.R. 3 S.C. 256. (2) Q.R. 3 S.C. 331.

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In a very learned essay on the nature of the action *Pauliana,* in "La revue trimestrielle de droit civil," vol. 5, p. 85 (1906), a distinguished French writer, Mr. Jean Acher, says:

> La controverse sur la nature de l'action paulienne a rapport aux plus anciens et aux plus ardus problèmes du droit civil;

and even the most superficial examination of the jurisprudence in France and of the text books of those who write with most authority, such as Laurent, Demolombe and Aubry & Rau, brings home the conviction that M. Acher does not overstate the difficulties with which this question is surrounded. There are two judgments of the "cour de cassation," S. V. 1844, 1, 122, and S. V. 1885, 1, 77, in which diametrically opposite conclusions are reached. In the first the "action paulienne" is held to be an "action mixte" and in the second it is said to be "une action personnelle." There are also judgments of the court of appeal in France in which it was decided that it was an "action réelle"; and in the courts of the Province of Quebec we have the same diversity of opinion. *Beaulieu* v. *Lévesque*(1), and *Leduc* v. *Tourigny*(2). In *Beaulieu* v. *Lévesque*(1) it was held by Casault C.J., Caron J., and Andrews J., a very strong court, that the action *Pauliana* is a real action because what is sought by the conclusions is the annulling of a title to an immovable; and consequently such an action, affecting title to land, is of the exclusive jurisdiction of the Superior Court and would be appealable here. See Mignault, vol. 5, p. 306. In *Leduc* v. *Tourigny*(2), it was held by the Court of King's Bench, Dorion C.J. presiding, that the action *Pauliana*

(1) Q.R. 2 S.C. 193. (2) 17 Q.L.R. 385.

is a personal action and that the amount claimed in the action was solely to be considered in determining the question of jurisdiction, in which case no appeal would lie.

As to the doctrine in France compare Demolombe, vol. 25, No. 248, and Laurent, vol. 16, No. 483, *et seq.* In presence of such a conflict of authorities one might well be tempted to say with Johannes Faber: *"Super hoc teneas quidquid volueris non est magnus effectus."*

I have gone over the cases decided in this court and have not been able to find one in which the question now in issue has been considered.

In the conclusion that I have reached I adopt the opinion of Planiol as to the nature of the action: Vol. 2, No. 327:

> L'action paulienne (Planiol says) a pour but de procurer aux créanciers la réparation du préjudice que leur a causé le fraude commise contre eux par le débiteur. Tel est le but pratique de l'action.

And at No. 328 he says:

> Il n'y a d'action réelle que celle qui garantit les droits réels, tels que la propriété, les servitudes, les hypothèques; et ici il n'y a rien de semblable. *L'action paulienne est une action personnelle qui naît d'un fait illicite.* Elle tend à réparer le préjudice subi par le créancier. Elle rentre donc dans la famille des actions délictuelles. La nullité qui en est la conséquence n'est qu'un moyen de donner au créancier la réparation à laquelle il a droit sous la forme la plus directe et la plus simple.

See Dalloz, "codes annotés," art. 1167 C.N., no. 10 and at no. 367. Also note by Esmein to Sirey, 1875, 2, 146. *Vide* S. V. 1904, 1, 136.

The Quebec Code differs from the French Code in this respect; by art. 1036 the defendant creditor is compelled to restore the thing received or the value thereof for the benefit of the creditors of the insolvent debtor according to their respective rights, and

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not exclusively, as in France, for the benefit of the plaintiff in the action. Comp. Vigié, vol. II., no. 1250. Vol. 5, Revue Trimestrielle, at p. 111. Nothing, however, turns on this difference in this case because as before stated the total amount of the alleged fraudulent debtor's indebtedness does not exceed $500.

I do not deny that in the final result the title of the defendant to the property with respect to which he is alleged to have acquired a fraudulent title may be affected; but I may safely say that the settled jurisprudence of this court is that in dealing with the question of jurisdiction reference can only be had to the matter actually in dispute in the particular case and the collateral effect of the judgment is not to be taken into account.

Motion granted with costs fixed at $25.

GIROUARD and DAVIES JJ. concurred in the opinion stated by the Chief Justice.

IDINGTON J.—The test of the jurisdiction of this court in any such case as this ought to be whether or not "the matter in controversy" falls within the range of subject matters that give a right to appeal.

Section 46 of the "Supreme Court Act" provides that

> no appeal shall lie to the Supreme Court from any judgment rendered in the Province of Quebec in any action suit cause matter or other judicial proceeding unless the *matter in controversy* * * * relates to any fee, etc. * * * or to any title to lands, tenements, etc., * * * where rights in future might be bound.

This question has been passed upon time and again and it has been decided that no adjudication gives rise to the jurisdiction when relative merely

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to any assessment or other basis for or imposition of taxation, although in the ultimate result the enforcing thereof might affect and even change the ownership and thus the title; or to a *procès-verbal* of council though it would affect the ownership of land either alleged to be a right of way, or needed for a highway, and to be expropriated for such a purpose; or the right to enforce a mortgage, or affecting the amount of such charge on lands or relieving lands from such charge; or the validity of a by-law on the mere ground that its being held valid would affect lands or the title thereto; or removing a guardian or tutor entrusted with lands; or to restrain the execution of an award or direction of engineer under the Ditches and Watercourses Act; or order in a decided *bornage* case defining how the line should be established; or in a suit where right of way had been adjudged, but dispute had arisen over whether settlement had or had not been made that averted need of execution; or the price of real estate sold with warranty even though a plea of fear of future troubles from a prior hypothec; or a lease within this sub-section by reason of the title to land coming in question.

In this case no one disputes the title. Everything relative thereto is admitted.

Therefore there is no title to land as such in controversy.

The only question is whether or not there has been a fraud upon creditors.

If there has not there can be no disturbance of the title. If there has the present holder of the title must either pay the creditors or submit to the lands being made answerable therefor.

The case seems to me clearly to fall within the

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principle upon which the numerous cases I have referred to proceeded.

Indeed, the case of *Flatt* v. *Ferland*(1) seems in point though no one appears to have had the courage to raise the question and claim such a ground of jurisdiction as claimed here. The suit was just as this to set aside a sale as fraudulent against creditors whose united claims were less than $2,000, and hence the court refused to entertain the appeal.

The defendant in that case had offered to consent to set aside the attacked sale to him on receiving a stated sum of money.

I fail to see how that could make any difference when his offer was rejected and the issue tried. *The Canada Carriage Co.* v. *Lea*(2), examined closely, implies the same thing; for if the title to land had been held to have been involved the statute gave an appeal as of right.

The future consequences of the decision on the controversy count for nothing.

See *Dubois* v. *Village of Ste. Rose*(3), which turned upon the question of future rights.

Talbot v. *Guilmartin*(4), which is analogous to that in principle.

The authorities referred to and others are all collected in the R.S.C. 1907, ch. 139, p. 2328 of vol. 3.

I find, however, reason to doubt the classification of the cases in that list, and therefore refer to the following out of the list which furnish one or more authorities for each of the respective points I refer to above as decided: *McKay* v. *Township of Hinchin-*

(1) 21 Can. S.C.R. 32.
(2) 37 Can. S.C.R. 672.
(3) 21 Can. S.C.R. 65.
(4) 30 Can. S.C.R. 482.

brooke(1); *The Bank of Toronto* v. *Le Curé et les Marguilliers de L'Œuvre et Fabrique de la Paroisse de la Nativité de la Sainte Vierge*(2); *Toussignant* v. *County of Nicolet*(3); *Leroux* v. *Parish of Ste. Justine*(4); *Noel* v. *Chevrefils*(5); *Waters* v. *Manigault* (6); *Cully* v. *Ferdais*(7); *City of Hull* v. *Scott & Walters*(8); *Jermyn* v. *Tew*(9); *Canadian Mutual Loan & Investment Co.* v. *Lee*(10); *Carrier* v. *Sirois* (11); *Fréchette* v. *Simmoneau*(12).

I think the appeal should be quashed with costs.

MACLENNAN and DUFF JJ. concurred in the opinion stated by the Chief Justice.

Appeal quashed with costs.

Solicitor for the appellant: *Louis P. Crépeau.*
Solicitor for the respondent: *J. E. Méthot.*

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(1) 24 Can. S.C.R. 55.
(2) 12 Can. S.C.R. 25.
(3) 32 Can. S.C.R. 353, at p. 355.
(4) 37 Can. S.C.R. 321.
(5) 30 Can. S.C.R. 327.
(6) 30 Can. S.C.R. 304.
(7) 30 Can. S.C.R. 330.
(8) 34 Can. S.C.R. 617.
(9) 28 Can. S.C.R. 497.
(10) 34 Can. S.C.R. 224.
(11) 36 Can. S.C.R. 221.
(12) 31 Can. S.C.R. 12.