ALEXANDER BAPTIST (DEFENDANT)...APPELLANT; 1892

AND *June 6.
*Oct. 10.

MARGARET BAPTIST (PLAINTIFF *en réprise d'instance*)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Appeal—Final judgment—Action en réprise d'instance—Art. 439 *C.C.P.—R.S.C. ch.* 135, *secs.* 2, 24 *and* 28.

The plaintiff in an action brought to set aside a deed of assignment died before the case was ready for judgment, and the respondent having petitioned to be allowed to continue the suit as legatee of the plaintiff under a will dated the 17th November, 1869, the appellant contested the continuance on the ground that this will had been revoked by a later will dated 17th January, 1885. The respondent replied that this last will was null and void, and upon that issue the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court, declared null and void the will of 17th January, 1885, and held the continuance of the original suit by respondent to be admitted. On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the judgment appealed from was an interlocutory judgment, and it was

Held, that the judgment was *res judicata* between the parties and final on the petition for continuance of the suit, and therefore appealable to this court. R.S.C. ch. 135 secs. 2 and 28. *Shaw* v. *St. Louis* (8 Can. S.C.R. 385.) followed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court.

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*PRESENT :—Strong, Taschereau, Gwynne and Patterson JJ.

(Sir W. J. Ritchie C.J. was present at the argument, but died before judgment was delivered.)

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This was a motion by the respondent to quash the appeal for want of jurisdiction. The facts of the case and proceedings are fully stated in the head note and in the judgment of His Lordship Mr. Justice Taschereau, hereinafter given.

Lafleur for respondent. This is not a final judgment but an interlocutory order in the original suit. As stated in our code of procedure it is an incidental proceeding. C. C. P. ch. VII. art. 434. *Darling* v. *Templeton* (1). There is no evidence in the proceedings for the continuance of the original suit that any particular amount is in controversy, and therefore the case is not appealable, R.S.C. ch. 135, sec. 29. *The Rural Municipality of Morris* v. *The London & Canadian Loan Agency Co.* (2).

G. Stuart Q.C. for appellant. As to the amount involved the suit originally brought is for a balance of over $4,000 alleged to be due by the appellant, and that is the amount which by her petition the respondent seeks to recover.

As to the finalty of the judgment it cannot be said that it is not *res judicata* and final as between these parties, and if so it is a final judgment by the highest court in the province, upon a judicial proceeding and therefore appealable under sections 2 and 28 of the Supreme and Exchequer Courts Act. See *Chevalier* v. *Cuvillier* (3); *Shaw* v. *St. Louis* (4); *Dawson* v. *Dumont* (5); Dalloz Répertoire (6).

The judgment of the court was delivered by:

TASCHEREAU J.—This case comes up on a motion by the respondent to quash the appeal for want of jurisdiction, on the ground that the judgment appealed

(1) 19 L.C. Jur. 85.
(2) 19 Can. S.C.R. 434.
(3) 4 Can. S.C.R. 605.
(4) 8 Can. S.C.R. 385.
(5) 20 Can. S.C.R. 709.
(6) Vo. jugement No. 12.

from is not a final but merely an interlocutory judgment. It is necessary for a proper understanding of the question raised by the respondent to go more minutely than usual upon such a motion into the details of the case. I will do so, however, as concisely as possible.

On the 17th November, 1869, Isabella Cockburn, widow of George Baptist, and mother of the litigating parties in this case, made her will in favour of Margaret Baptist, the present respondent and others.

On the 17th January, 1885, the said Isabella Cockburn made another will, but this time in favour of Alexander Baptist, the present appellant. On that same date, the 17th January, 1885, she passed a deed of transfer and assignment or gift also in favour of the present appellant.

On the 23rd March, 1889, the said Isabella Cockburn was interdicted for cause of insanity and one Houliston was appointed her curator.

Houliston, then in his said quality, instituted an action against Alexander Baptist, the present appellant, asking, in her name, that the deed of transfer or gift passed by her, Isabella Cockburn, in favour of the present appellant, on the 17th January, 1885, be set aside, as having been passed by the said Isabella Cockburn when *non compos mentis*, and obtained by the appellant by undue influence and fraudulent manœuvres. To this action the defendant, present appellant, pleaded a general denegation and an exception amounting to nothing more, by which he says that his mother Isabella Cockburn, though since interdicted, was *compos mentis* on the 17th January, 1885, when she consented to give him the said deed, and that all the plaintiff's allegations of undue influence and fraudulent manœuvres are unfounded. Soon after issue had been so joined the said Isabella Cockburn died, September

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28th, 1889. Thereupon, Houliston's powers as her curator and plaintiff in her name in the said action against the present appellant having come to an end, Margaret Baptist, the present respondent, asked the court to be allowed to continue the suit, alleging in her petition, as the basis of her right to do so, the said Isabella Cockburn's will of 1869 in her favour (jointly with others) and that the said will had never been revoked. To this petition the present appellant pleaded that the respondent had no right to continue the suit as he, the appellant, was the late Isabella Cockburn's legatee by her will of 1885, revoking that of 1869. The respondent replied that this will of 1885 passed on the same day as the transfer impugned by the principal action, was null and void for the same reasons and upon the same grounds invoked in the said action, that is to say, that it had been passed when the testatrix was not *compos mentis* and obtained by the appellant by undue influence and fraudulent manœuvres; she therefore prayed that the said will be declared void *à toutes fins que de droit*, and that the appellant's contention of her demand for permission to continue the suit be declared unfounded and rejected. The parties went to trial upon those issues, which clearly raised a *question préjudicielle* (1) and on the 16th January, 1891, the Superior Court of Three Rivers gave a judgment maintaining the will of 1885 in favour of the present appellant, holding that the respondent's allegations of fraud and illegality against it had not been proved, declaring that the respondent was consequently not entitled to continue the original action as the will of 1869 upon which she based her claim had been revoked by that of 1885, and dismissing her petition for continuance of the principal action. Upon appeal to the Court of Queen's Bench, however, the judgment of the

(1) See Merlin vo. question préjudicelle.

Superior Court was reversed, and the will of 1885 set aside on the grounds of insanity of the testatrix, and of undue influence and fraudulent manœuvres by the present appellant. It is this judgment that the respondent contends to be not appealable to this court. I, at first, was inclined to think that she was right but, after further consideration, I have come to the conclusion that we have jurisdiction to entertain the appeal.

By section 2 of the Supreme Court Act, it is enacted that the expression "final judgment" therein, from which an appeal would lie to this court means

> any judgment, rule, order or decision, whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

Now, though we have held that no interlocutory judgments can be reviewed by this court under that clause, and though in form, perhaps, this is, in one sense, an interlocutory judgment, yet, it is clear that, though upon a side issue, the controversy between the parties has been, as far as can be in the provincial courts, determined and concluded. See *Shaw* v. *St. Louis* (1) and authorities therein cited.

The judgment setting aside the will of 1885 would not bind this court on an appeal from a judgment on the action setting aside the deed of assignment of the same date, but it would remain in force as *res judicata* between the parties upon the validity of the said will. The parties have, in fact, given themselves the luxury of two contestations where one would have been sufficient. They have made of the controversy between them on the petition for continuance of the suit a second case quite independent of the other. Upon that case the judgment which has been obtained is final and consequently we have jurisdiction. It is a noticeable fact, though not by itself a conclusive one, that the appeal to the Court

(1) 8 Can. S. R. 385.

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of Queen's Bench was taken *de plano* by the present respondent, without objection. Of course she was appealing from a judgment which had dismissed her petition, and that judgment was appealable as a final one, but why the judgment she has obtained in the Court of Queen's Bench maintaining her petition and dismissing the contestation thereof is not also a final one, and as such appealable by her adversary to this court, I fail to see.

Motion refused with costs.

Solicitor for appellant: *A. Oliver.*

Solicitor for respondent: *E. Lafleur.*