G. M. KINGHORN (PLAINTIFF CONTESTING OPPOSITION) ..... } APPELLANT ;

AND

A. LARUE (OPPOSANT) ..... RESPONDENT.

1893

*Oct. 3.

*Oct. 23.

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

Opposition afin de conserver on proceeds of a judgment for $1,129—*Amount in dispute—Right to appeal—R. S. C. c.* 135, *sec.* 29.

K. (plaintiff) contested an opposition *afin de conserver* for $24,000 filed by L. on the proceeds of a sale of property upon the execution by K. against H. & Co. of a judgment obtained by K. against H. & Co. for $1,129. The Superior Court dismissed L.'s opposition but on appeal the Court of Queen's Bench (appeal side) maintained the opposition and ordered that L. be collocated *au marc la livre* on the sum of $930 being the amount of the proceeds of the sale.

Held, that the pecuniary interest of K. appealing from the judgment of the Court of Queen's Bench (appeal side) being under $2,000 the case was not appealable under R.S.C. c. 135 sec. 29. *Gendron* v. *McDougall* (Cassels's Dig. 2 ed. 429) followed :

Held also, that sec. 3 of 54 & 55 Vic. c. 25 providing for an appeal where the amount demanded is $2,000 or over has no application to the present case.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court which had rejected an opposition *afin de conserver* filed by the respondent. The appellant, Kinghorn, in this case obtained judgment at Quebec, for $1,125 against the executors of late Dame Patterson, widow of late G. B. Hall. A writ of execution was issued to the Sheriff of the District of Quebec, and a return of *nulla bona* made thereon. A writ *de terris* was then issued to the Sheriff of the Dis-

*PRESENT :—Sir Henry Strong C. J. and Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

1893

KINGHORN v. LARUE.

trict of Three Rivers, upon which a large block of land, known as the St. Joseph Forge Lands, was seized and sold, realizing a sum of $950.

The respondent having filed an opposition *afin de conserver* for $24,000 claiming to be collocated on this sum of $930 *au marc la livre*, the appellant contested his opposition and the Superior Court maintained his contestation. On appeal to the Court of Queen's Bench for Lower Canada (appeal side) that Court reversed the judgment of the Superior Court, and maintained the respondent's opposition, ordering that he be collocated *au marc la livre* on the sum of $950.

The respondent moved to quash the appeal for want of jurisdiction.

Belcourt for motion cited and relied on *Flatt* v. *Ferland* (1); *Gendron* v. *McDougall* (2); *Chagnon* v. *Normand* (3).

Stuart Q. C. for appellant contended that the amount of the demand in the Superior Court being $24,000, the case was appealable under 54 & 55 Vic. c. 25 sec. 4, and cited and relied also on *Doutre* v. *Gosselin* (4); *Beaudry* v. *Desjardins* (5); and art. 2311 R.S.Q.

The judgment of the court was delivered by

TASCHEREAU J.:—This case is before the court on a motion by the respondent to quash the appeal taken by Kinghorn from a judgment of the Court of Appeal, in Montreal, dismissing his, Kinghorn's, contestation of an opposition *afin de conserver* for $24,000 filed by the respondent on the proceeds of a sale upon the execution by Kinghorn against Hall & Co., of a judgment by him obtained against the said Hall & Co., for $1,129, the judgment now appealed from, having

(1) 21 Can. S.C.R. 32.
(2) Cassels's Dig. 429.
(3) 16 Can. S.C.R. 661.
(4) 7 L. C. Jur. 290.
(5) 4 Rev. Leg. 555.

1893

KINGHORN v. LARUE.

Taschereau J.

maintained the said opposition for $24,000, and ordered that the respondent be collocated *au marc la livre.*

The proceeds of the sale amount to $930. I am of opinion that this appeal must be quashed, according to the well settled jurisprudence on this point, viz., that it is the interest of the party appealing from a judgment that has to be taken into consideration, to determine whether the case is appealable or not. Here the appellant's judgment is for $1,129, and to that amount and that amount alone, is he pecuniarily interested in the present case The case of *Gendron* v. *McDougall* (1) is clearly in point. In that case, Gendron had obtained a judgment against one Ogden for $231, and in execution thereof seized an immovable worth $2,000. McDougall filed an opposition *afin de distraire* claiming the land so seized as his property. Gendron contested that opposition. The Court of Queen's Bench dismissed his contestation and maintained McDougall's opposition. Gendron then appealed to the Supreme Court, but, though the question at issue on McDougall's opposition was one of title to a piece of land, and that piece of land was worth $2,000, this Court quashed Gendron's appeal, on the ground that his pecuniary interest on his appeal was limited to $231, the amount of his judgment. That case, which is binding upon us, seems conclusive upon the question. The appellant invoked in support of his right to appeal the case of *Mac Farlane* v. *Leclaire* (2), but as I view that case it does not help him.

The facts of that case were as follows:

Leclaire brought an action in the Superior Court against one Delesderniers for £417.0.8, Canadian currency, with a *saisie-arrêt* or attachment before judgment in the hands of MacFarlane. MacFarlane upon the *saisie-arrêt* denied that he had any goods, effects,

(1) Cassels's Dig. 2 ed. 429. (2) 15 Moo. P. C. 181.

1893

KINGHORN v. LARUE.

Taschereau J.

&c., of Delesderniers' in his possession, but that the property alleged to be the property of Delesderniers had been purchased by him for £1,642.14.5, from one Prévost and were his property. Leclaire, the plaintiff, contested this declaration and alleged that the sale invoked by MacFarlane was null and made in fraud of Delesderniers' creditors. The Superior Court dismissed the contestation on the declaration of the *tiers-saisi*, on the ground that as Prévost was not a party to the proceedings, the court could not declare the transfer of the property to the *tiers-saisi*, MacFarlane, by Prévost, to be fraudulent; the Court of Queen's Bench on appeal reversed the judgment of the Superior Court, maintained the contestation by Leclaire of MacFarlane's declaration and declared the goods in MacFarlane's hands to have been those of Delesderniers.

The appellant, MacFarlane, being dissatisfied, applied for and leave was granted by the Court of Queen's Bench to appeal to the Privy Council. Leclaire then applied by petition to the Privy Council to have the leave rescinded on the ground that the matter in dispute did not exceed the sum or value of £500 sterling, the amount fixed by 34 Geo. III., c. 6, sec. 30, and therefore that the judgment of the Court of Queen's Bench was final. But the Privy Council dismissed that petition, and held that MacFarlane's pecuniary interest on the appeal being over £500 sterling, the case was appealable under the statute. Now it is evident that in that case all of MacFarlane's goods, amounting in value to £1,600, were put in jeopardy by the judgment maintaining the contestation of his declaration, as every article of it might have been sold to satisfy Leclaire's writ of execution. And MacFarlane, in that case, stood in the position that Larue, the respondent occupies in the present case, whilst Leclaire occupied a position analogous to the position Kinghorn, the

present appellant occupies here. And their Lordships in the Privy Council clearly intimate, though of course without determining it, that, had the judgment in the case of *MacFarlane* v. *Leclaire* (1) been against Leclaire, he, Leclaire might not have had a right of appeal, because in such a case, Leclaire's pecuniary interest on the appeal would not have amounted to £500 sterling.

In a case of *Gugy* v. *Gugy*, as long ago as 1851 (2) under an analagous statute, Sir James Stuart laid down the rule that on a judgment dismissing an opposition for £10,000 filed by a defendant against an execution for £200 being the balance of a judgment against him for £900 the case was not appealable to the Privy Council. The case of *L'Espérance* v. *Allard*, in a foot note to that case of *Gugy* v. *Gugy* (2), is in the same sense. I refer also to *Bourget* v. *Blanchard* (3) and in appeal (4) and for the facts of the case (5). See also *Champoux* v. *Lapierre* (6); *Martin* v. *Mills* (7); *Russell* v. *Graveley* (8). The statute 54 & 55 Vic. does not affect this case. This is not a case where the amount demanded and the amount granted, are different.

Appeal quashed with costs.

Solicitors for appellant: *Caron, Pentland & Stuart.*

Solicitors for respondent: *L. P. Guillet.*

---

(1) 15 Moo. P. C. 181.
(2) 1 L. C. R. 273.
(3) 9 Q. L. R. 262.
(4) 6 Legal News 51.
(5) Cassels's Dig. 2 ed. 423.
(6) Cassels's Dig. 426.
(7) 12 Q. L. R. 98.
(8) 2 L. C. R. 494.