Privy Council Appeal No. 78 *of* 1931.

Lady Davis and another - - - - - - *Appellants*

v.

Lord Shaughnessy and others - - - - - - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

REASONS FOR REPORTS OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON PETITIONS TO QUASH APPEAL AND FOR SPECIAL LEAVE TO APPEAL, DELIVERED THE 19TH NOVEMBER, 1931.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD THANKERTON.
LORD SALVESEN.
SIR JOHN WALLIS.

[*Delivered by* VISCOUNT DUNEDIN.]

The first of these petitions is one to quash leave to appeal to His Majesty in Council given by a Judge of the Court of King's Bench for Quebec against a judgment of the Court of King's Bench (Appeal Side), and thereafter to dismiss the appeal. The petition is opposed, and the appellants, in case they are unsuccessful in their opposition, at the same time present a petition to His Majesty in Council for special leave to appeal.

Now, the article of the Code of Civil Procedure of Quebec which deals with the right of appeal to His Majesty in Council is Article 68, in the following terms :—

"68. An appeal lies to His Majesty in His Privy Council from final judgments rendered in appeal by the Court of King's Bench :

"1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty ;

"2. In cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected;

"3. In every other case where the amount or value of the thing demanded exceeds twelve thousand dollars."

The action in which the appellants wish to appeal is an action by beneficiaries under a will for the removal of the respondents, who are trustees, alleging maladministration and, in particular, averring that they voted to themselves as salary sums of money which they had no right to do, and paid a large sum to another person. The action was decided against the appellants by the Trial Judge and by the Court of Appeal. The judgment of the Judge of the Court of King's Bench granting leave to appeal was in the following terms :—

"Considering that the appellants submit that, under and by virtue of paragraph 2 of Article 68 of the Code of Civil Procedure, they have the right to appeal *de plano* from the judgment of which they now complain inasmuch as it concerns matters in which their rights in future may be affected, within the meaning of the said paragraph, adding that, although they by their Petition in terms pray that it be allowed by this Court, that prayer is due purely and simply to the fact that they have followed the practice in that regard and adopted the customary form;

"Considering in view of the position taken by this Court in *re* Levack and Samson *et al* (41 K.B. Que. p. 134) 'future rights' may be involved in the judgment *a quo* and that in the circumstances it is right and proper to leave it to His Majesty in His Privy Council to decide as to His jurisdiction in the matter;

"Considering that the want of certainty as to how His Majesty in His Privy Council may construe and apply said Article 68, para. 2, C.C.P., is sufficient to show that the present appeal is not invalid on its face, since it is quite possible that their Lordships of the Privy Council may decide to entertain it;

"Considering that in the case of *Ryan and Cunningham*, now pending before the Privy Council, in which it was urged as a ground of appeal that 'future rights' of the parties were necessarily involved in an action to annul a marriage, this Court received and granted *acte* of a declaration whereby an appeal from its decision was entered to His Majesty in His Privy Council (pp. 26, 27 and 28 of the Record of Proceedings);

"Considering that the appellants are satisfied that they have done all that is required to be done by them in order duly to enter their said appeal to His Majesty in His Privy Council by depositing in the office of this Court an inscription or notice of appeal and the required security, and that in the circumstances *acte* should be given them of having made that deposit;

"Wherefore, I, the undersigned Judge of the Court of King's Bench, without making any pronouncement or expressing any opinion as to the appellants' right to appeal, do hereby grant them *acte* of the deposit which they have made in the office of this Court (Appeal Side) of their petition or notice of appeal to His Majesty in His Privy Council and of the security bond in the sum of £500 stg. to guarantee that they will effectually prosecute their said appeal, satisfy the condemnation and pay such costs and damages as may be awarded by His Majesty in the event of the judgment being confirmed, costs to follow the event of the appeal to the Privy Council."

There is a reported case before this Board from the Supreme Court of Ontario which at first sight might seem to apply. It

can be distinguished because the words of the Ontario statute are not identical with the statute of Quebec ; but their Lordships think it best to draw attention to it because they are satisfied that the concluding sentence of the head note in the Report is wrong and because also they wish to repeat part of what was there said. The case is *Gillett* v. *Lumsden* [1905], A.C. 601, and the head note appears :—

> " Under the Revised Statutes of Ontario, 1897, c. 48, s. 1, it is essential that an appeal to the King in Council should be admitted by the Court of Appeal. The Court is bound to exercise its judgment whether any particular case is appealable or not ; and where it appears by its order that it has left that question open, the appeal is incompetent."

The action was for an injunction to restrain the defendant from infringing a trade mark and for a declaration as to the plaintiffs' right to the exclusive use of the word " cream " in connection with the manufacture of yeast. There was also a claim for damages, but no particular sum seems to have been mentioned and none were awarded by the Court of first instance which granted the injunction. Upon appeal the Appeal Court dismissed the action. Now, what Lord Macnaghten, who delivered the judgment, then said was that it was the duty of the Colonial Court to decide whether the appeal was competent or not and not to leave the question open, but then he went on to say :—

> " In the case before their Lordships the Court of Appeal has carefully avoided expressing any opinion. If indeed the appeal had come forward by the direction of the Court, and it might fairly be inferred that they had considered the question whether it was of appealable value or not, it might be open, and probably would be open, to their Lordships to hear the appeal. But in this particular case it appears from the second paragraph of the order of the Court of Appeal of October 17th, 1904, that the Court left open the question whether the appeal was competent or not, and in their Lordships' opinion the appeal is not competent."

The reporter has thought that the words " in their Lordships' opinion the appeal is not competent " referred to the fact of the question being left open, but their Lordships are satisfied that the reason for saying that it was not competent was that it did not fall within any of the sections allowing appeal, which it clearly did not, for the operative section in the Ontario statute is this :—

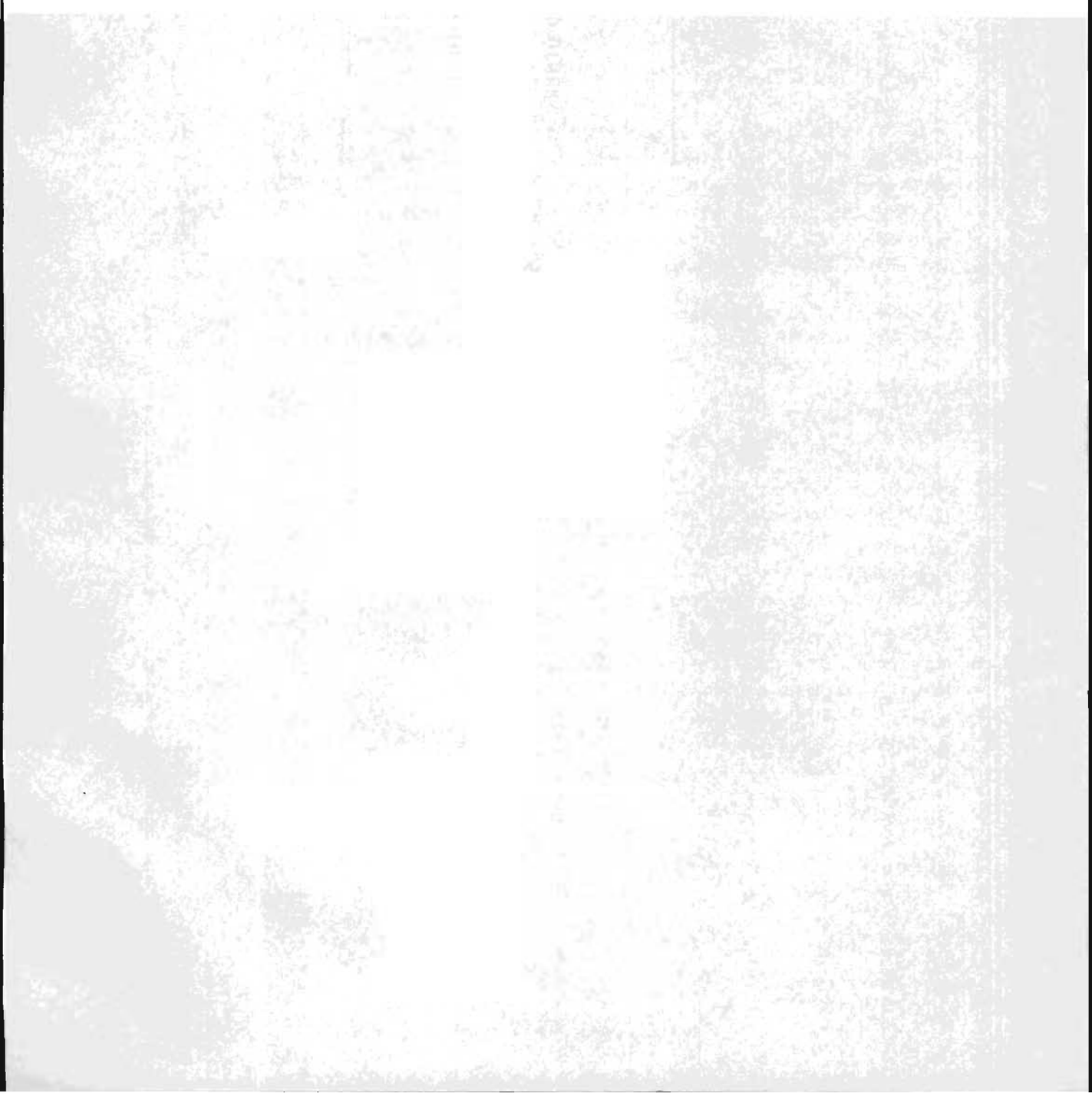
> " 1. Where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council, and except as aforesaid, no appeal shall lie to His Majesty in His Privy Council."

Their Lordships wish to repeat what Lord Macnaghten said as to its being the duty of the Court to come to a conclusion and either to allow the appeal or not. If they allow it, the result usually will not be questioned. If they do not allow it, then the wishful

appellant can always present a petition for special leave to appeal, although, of course, it does not at all follow that such petition will be necessarily successful, as special leave to appeal is a matter of discretion and not of right.

Turning to the merits in this case, their Lordships are of opinion that as a matter of fact leave to appeal was rightly given, as the case seems to them to fall within both clauses 2 and 3. It falls within clause 2 because it affects the future rights of the appellants. Their Lordships do not read " other matters " as necessarily *ejusdem generis* with lands, tenements and annual rents, and it is obvious that the future rights of the appellants are affected since, if the judgment stands, the respondents may again vote themselves sums of money contrary to their duty as *ex hypothesi* they have already done. It falls within section 3 because the sums involved are far more than $12,000.

Their Lordships have therefore humbly advised His Majesty to refuse the petition to quash the appeal. This made it unnecessary to deal with the petition for special leave ; but as all this was hypothetical on the merits, the costs of both petitions were ordered to be costs in the appeal.



In the Privy Council.

LORD DAVIS AND ANOTHER

v.

LADY SHAUGHNESSY AND OTHERS.

DELIVERED BY VISCOUNT DUNEDIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1931.