JAMES TAYLOR, - - - - - - - APPELLANT.

AND

THE QUEEN, - - - - - - - - - RESPONDENT.

ON APPEAL FROM THE COURT OF ERROR AND APPEAL FOR ONTARIO.

Jurisdiction—Construction of the 26th Section of 38th Vict. Ch. 11.

Held: That the Supreme Court of Canada has no jurisdiction when judgment appealed from was signed, or entered or pronounced, previous to the 11th day of January, 1876, when, by Proclamation issued by order of the Governor in Council, the provisions referred to in the latter part of 80th Section of 38th Vic., Ch. 11, and the judicial functions of the Court took effect and could be exercised.

That the Court proposed to be appealed from or any Judge thereof, cannot, under Section 26 of the Supreme and Exchequer Court Act, allow an appeal when judgment had been signed, entered or pronounced, previous to the 11th day of January, 1876.

Information for penalties, filed by the Attorney-General of Ontario, in the Court of Queens Bench of that Province, alleging: "That the Defendant was a brewer in the town of St. Catharines, in the County of Lincoln, after the passing of the Provincial Statute 37 Vic., intituled: 'An Act to amend and consolidate the Law for the sale of fermented or spirituous liquors' and then, being a brewer licensed by the Government of Canada for the manufacture of fermented, spirituous or other liquors, did manufacture, a large quantity of liquors, to wit; one thousand gallons of beer, and afterwards at St Catharines aforesaid, unlawfully, and in contravention of the Act, did sell by wholesale a large quantity of the said fermented liquor for consumption within the Province of Ontario, without first obtaining a license as required by the said Act of the Legislative Assembly of the Province, to sell by wholesale, under the said Act, liquor so manufactured by him for consumption within the Province, and without having

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PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, and Fournier, J. J.

obtained any shop license or any other license under the said Act, to sell wholesale, as a brewer, liquor, in contempt of the Queen and her laws, to the evil example of all others and contrary to the form of the Statute, and against the Peace."

To this information a demurrer was filed. The special matter stated for argument was, that the Legislature of Ontario had no power to pass the statute under which the penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale, as stated in the information.

The Attorney-General joined in demurrer, and, on 16th March, 1875, judgment was given for the Defendant, and judgment was signed on the 12th May, 1875.

The case was taken to the Court of Error and Appeal of the Province of Ontario, on the 12th May, 1875, and on 17th May, errors were assigned. On the 18th May, joinder in error.

The case was argued in the court of Error and Appeal on the 17th and 18th June, 1875, and, on the 25th September of that year, that Court ordered and adjudged that the writ of error should be allowed, and that the judgment of the Court of Queen's Bench should be reversed and judgment entered in that Court for the Plaintiff.

On the 13th April, 1876, the Honorable Mr Justice *Moss*, one of the Judges of the Court of Error and Appeal, with the consent of the parties, ordered and allowed that the appeal then might be brought within ten days from that date, notwithstanding that such appeal had not been brought within the time prescribed by the Statute in that behalf, and he declared that it did not seem to him necessary or proper to impose any terms as to security or otherwise under the circumstances.

The Supreme and Exchequer Court Act, by which the Supreme Court of Canada was established was passed on the 8th April, 1875. But by Section 80 of this Statute it was provided that "this Act shall come into force as respects the appointment of Judges, Registrar Clerks and Servants of the said Courts, the organization thereof and the making of general rules and orders under the next preceding Section on a day to be appointed by proclamation under order of the Governor in Council; and the other provisions thereof, and the judicial functions of the said Courts respectively shall take effect and be exercised only at and after such other time as shall be appointed by proclamation under order of the Governor in Council."

The Proclamation respecting the organization of the Court was issued on the 17th September, 1875, and the Proclamation calling into exercise the judicial functions of the Court was issued on the 10th day of January, 1876.

The case was set down for the sittings of the Supreme Court, held in June, 1876, when the question of whether the Supreme Court of Canada had jurisdiction was discussed.

5th June, 1876.

Mr. *J. Bethune*, Q. C., (of the Ontario Bar) for Appellants:

The Supreme Court established by virtue of 101 Section of British North America Act, as a general Court of Appeal for Canada, is a substitute for the Privy Council. *Maxwell* on Statutes (1). By chap. 13, Cons. S. U.C. sec. 57, 58, one year from date of the judgment is given to either party to bring his appeal to the Privy Council, and the same margin as to time ought to be

(1) pp. 195, 196.

allowed. *Chowdry* v. *Mullick* (1); *Tronson* v. *Dent* (2); Sect. 47 of the Supreme Court Act, states that the judgment shall be final in all cases saving the usual right of prerogative of Her Majesty, and there is, therefore, no right to pass by this Court and appeal to the Privy Council. *Vide* case of *Cuvillier* v. *Aylwin*, (3); and the case of *Earl of Roseberry* v. *Sir John Inglis* (4) in which a decree was pronounced by the Court of Session in Scotland in 1695, and, immediately after the union of the two Kingdoms in 1707, the House of Lords heard an appeal from this decree. Moreover, an appeal is a mere step in a cause, a procedure, and the Court may give any order concerning a proceeding in a cause. *Vide Cranmer's* Practice of House of Lords (5); *Queen* v. *Vine* (6). Now under sections 21 and 26 a Judge of the Court below may, in his discretion, extend the time for appealing. An order to that effect has been given, and so long as it is not moved against it remains in force, and the fact of the Court having been organized at the date the appeal was granted, enabled the limitation as to the time of entering the case to be overruled.

The combined effect of sects. 15 and 47 gives this Court alone the appeal, and if there is a doubt as to the jurisdiction, the consent of the parties should be sufficient.

[RITCHIE, J.—No jurisdiction of appeal can be taken, unless expressly given by Statute.]

Sect. 17 clearly gives this Court jurisdiction over cases decided before its existence by proclamation, and the proviso in sect. 26 gives the power to a Judge of the Court below to extend this limitation of time. By sect. 24,

(1) 1 Moore, P. C. C. p. 404; (2) 8 Moore, P. C. C., p. 419; (3) 2 Napps. P. C. C.; (4) MacQueen's Practice in the House of Lords, p. 287; (5) p. 147; (6) L. R. 10 Q. B. 195.

all proceedings not otherwise provided for by the Act, or by the rules to be made by the Court, are ordered to be as nearly as possible in conformity with the practice of the Judicial Committee, and there one year from the rendering of the judgment is the limit of time granted to appeal. This case now stands before this Court as if proceedings were taken in the Court below within such time as to warrant the Judge of the Court below, in his discretion, to grant the appeal, and the power of this Court to try the case cannot be called in question.

Mr. *Adam Crooks*, Q. C., for the Respondent:

This is an amicable suit, brought to determine the furisdiction of the Legislature of the Province of Ontario. The time limitation was imposed for the protection of the parties, but neither of them wishing to invoke it it cannot apply. This is a proceeding in the nature of a writ of error, and an appeal lies to the highest tribunal where there is error. *Tronson* v. *Dent* (1). *Vansittart* v. *Taylor* (2). This was not an appeal except in that such cases were designated by that conventional expression by the Supreme Court Act.

January 15th, 1877.

THE CHIEF JUSTICE:—

I believe we are all agreed that,as to powers of the Supreme Court of Canada under the Statute 38 Vict., ch. 11, we are to construe the Statute as if it had been assented to by the Crown on the eleventh day of January, 1876, when, by the proclamation issued by order of the Governor in Council, the provisions referred to in the latter part of the 80th section of the Act, and the judicial functions of the Court, were to take effect

(1) 8 Moore P. C. C. p. 420; (2) E. and B. 910.

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Under the Statute, those provisions and the judicial functions of the Court were to take effect and be exercised *only at and after* the time appointed by the proclamation.

At this time, this case had been decided by the Court of Appeals in Ontario. The judgment was pronounced on the 25th day of September, 1875. The provisions of the Act allowing an appeal to this Court had not then been brought into operation, and could not be exercised; and the right of appeal which the Defendant in the suit had, if any, was to Her Majesty, in Her Privy Council.

This state of things continued until after the statute had come into full operation, and until the thirteenth day of April last, when one of the Justices of the Court of Appeals for the Province of Ontario, upon hearing Counsel for the Queen, the Plaintiff in error, and *by consent*, ordered and allowed that the appeal in this cause might be brought within ten days from that date, notwithstanding that such appeal had not been brought within the time prescribed by the statute in that behalf. And he declared that it did not seem to him necessary or proper to impose any terms as to security or otherwise, under the circumstances.

The 16th section of the Statute says: "whenever *error in law* is alleged, the proceedings in the Supreme Court shall be in the form of an appeal." The 17th Section declares that "an appeal shall lie to the Supreme Court from all *final* judgments of the highest Court of *final resort.* * * * * now or hereafter established in any Province of Canada, in cases in which the Court of original jurisdiction is a Superior Court * * * and the right of appeal in civil cases given by the Act shall be understood to be given in such cases only as

are mentioned in this section, except Exchequer cases, and cases of mandamus, habeas corpus or municipal by-laws " as thereinafter provided. Section 18 provides that an appeal shall lie upon a special case. Appeal shall lie, by Section 19 " from the judgment upon any motion to enter a verdict or non-suit upon a point reserved at the trial "; by Section 20, " from the judgment upon any motion for a new trial, upon the ground that the Judge has not ruled according to law." By Section 21, under these three sections, no appeal is allowed unless notice of appeal is given within 20 days after the decisions complained of " or within such *further time* as the Court appealed from or a *Judge thereof may allow.*" Section 25 provides, that every appeal, other than an election appeal shall be brought within 30 days from the signing or entry or pronouncing of the judgment appealed from. Then follows the 26th Section. " That the Court proposed to be appealed from, or any Judge thereof, may allow an appeal under special circumstances, except in the case of a election petition, notwithstanding that the same may not be brought within the time hereinbefore prescribed in that respect: but in such case, the Court or Judge shall impose such terms as to security or otherwise as shall seem proper under the circumstances."

This appeal is not under Sections 18, 19 or 20 of the Statute. It is not a special case, or on a judgment on a motion to enter a non-suit or verdict, or for a new trial upon the ground that the Judge has not ruled according to law. There was, therefore, no necessity of giving a notice of appeal within 20 days after the decision complained of under Section 21.

There is no other provision as to regulating appeals when error in law is alleged, than Section 16, except

that it must be brought within 30 days from the signing, entry or pronouncing of the judgment appealed from. No writ is required to bring any appeal into the Court. It is sufficient if the party desiring to appeal, shall within the time *hereinbefore limited*, have given the security required, and obtained the *allowance of the appeal*; in this case that would be 30 days.

It was more than three months after the judgment appealed against in this cause was pronounced, before any right to appeal under this statute existed, and unless it can be shewn that that right was to be given to judgments pronounced before the Statute was an operative law, then I fail to see how this case can be appealable here.

It is contended, however, that by the 26th section any Judge of the Court appealed from might allow an appeal, though it might not have been brought within the time prescribed ; in effect, that any Judge of the Court to be appealed from had a right to grant an appeal in a case, though such right did not exist, and the Statute allowing it had not become operative as a law until long after the judgment had been rendered, and long after an appeal under the provisions of this Act had, according to its terms, become impossible, but for the section referred to.

I do not think the Dominion Parliament intended to leave it in the discretion of a single Judge to grant an appeal in a case decided before the Confederation of the Provinces or the Parliament of the Dominion had an existence, and yet such would be the case, if we would give the interpretation to this section which the Appellant desires.

The rule of law is not disputed, that the right of appeal to a Court like this is one which must be created by express enactment.

If the Dominion Parliament had intended to give the right contended for, it would have been easy to have expressed that intention in distinct words, but that clearly has not been done, and we are asked to infer it. It is said, however, that the power to allow the appeal under the 26th section can never be exercised, when the judgment to be appealed from was pronounced *more than a year* before the application, because the 24th section of the Act provides that proceedings in appeal, when not otherwise provided for by the Act or by the rules to be made under it, shall be as nearly as possible in conformity with the practice of the Judicial Committee of Her Majesty's Privy Council, and that by the rules of that Committee no appeal will be heard unless the record be lodged there within a year from the time judgment was pronounced in the Court below. But under our Statute and rules, the case in appeal must be filed within a month after the security required by the Act *is allowed*, or the party will be considered as not duly prosecuting his appeal, and so the rule referred to in the Privy Council would not apply. It is said the natural tendency of all tribunals is to grasp jurisdiction, but certainly an Appellate Court, which only exercises a jurisdiction expressly conferred on it, ought not extend that jurisdiction by construction.

The reasonable view of the provisions of the statute referred to, and one which would give complete form and effect to them all, is: That the Legislature contemplated that, from the time the statute became operative, certain judgments and decisions of certain Courts within the several Provinces might be appealed to the Supreme Court created under the Act.

That if, from circumstances, an appeal in any case *which might have been brought within* the time therein

prescribed, was not brought within such time, then the Court or Judge might allow the appeal. Section 26 and this Section, taken in connection with Section 21, seems to shew that what was intended by both sections was virtually to extend the time within which the party desiring to appeal might perfect his security and get it allowed. The final act in allowance of the appeal seems to be the approving of this security. Section 33 says when the security has been perfected and allowed, any Judge of the Court appealed from may issue a fiat to the Sheriff to stay execution.

It was argued that the right of appeal existed, and that the Dominion statute in effect abolished the appeal to Her Majesty in Her Privy Council, given by the statute of Ontario, and substituted the appeal to this Court for it; and, therefore, in all cases pending in Ontario which, at the time of the Dominion statute, were appealable under the laws of Ontario, ceased to be appealable at all unless the right could be revived under the 26th section of the Dominion Act. There is nothing in the statute itself declaring in terms that such shall be the effect of establishing the Court. It certainly does not assume to abolish the right to appeal to Her Majesty in Her Privy Council, conferred by Local legislation. The 17th section declares that, subject to limitations, an appeal shall lie to this Court from all final judgments of the *highest Court of final resort* in any Province of Canada, and the 47th section declares that "the judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be

ordered to be heard; saving any right which Her Majesty may be graciously pleased to exercise, by virtue of Her Royal Prerogative." Suppose Appellant, within a month after judgment pronouced, had taken steps to appeal to Her Majesty in Her Privy Council, and the necessary bond had been given, and all the proceedings taken then necessary to go on with the appeal in England, could the Respondent contend, when the case came on to be heard before the Judicial Committee of the Privy Council, that the Appellant had no *locus standi* there, because all the powers of this Court could then be exercised, and that, under the 26th section of the statute, a Judge of the Court of Appeals in the Province of Ontario might have allowed the appeal, notwithstanding the same was not brought within the time in that respect prescribed by that Act; and as there was in Canada a Court to which an appeal might be had, therefore it should not be heard before the Judicial Committee of the Privy Council. Would not the answer be that, when the steps to appeal the case were taken, the statutory powers given to the Supreme Court of Canada were not in force, and the Appellant, so far from being guilty of any laches in not bringing his appeal within the time prescribed by that Act, had, in fact, brought it before either the Supreme Court or the Judges of the Court of Error in Ontario had any power whatever in relation to appeals or as to allowing an appeal under the Supreme Court Act.

I am now assuming that steps were taken to bring the appeal before the Judicial Committee of the Privy Council previous to the 11th January, 1876. If, in the hypothetical case which I have put, the Judicial Committee of the Privy Council would have decided to hear the appeal, on the ground that the Dominion Statute

did not prevent the Appellant from exercising the right which he had of appeal, and which, in fact, could only, at that time, have been exercised in that way; then, I think, we are bound to hold that we cannot properly hear this appeal. In the view suggested, the case would be heard by the Judicial Committee of the Privy Council, because, at the time the judgment was given in the Court of Appeals in Ontario, there was no tribunal in the Dominion of Canada authorised to hear appeals from the decision of that Court; and that state of things continued from 25th September, 1875, when the judgment was pronounced, to the 11th January, 1876, when this Court become endowed with appellate powers.

The fact that the Supreme and Exchequer Court Act of 1875, under its 26th section, permitted a Judge of the Court appealed from to allow an appeal under it, in cases where the same had not been brought within the time prescribed by that Act, would hardly authorise the rejection of an appeal regular in all its forms, and, perhaps, ready to be heard when the Act of 1875 was brought into force.

We should not give a forced construction to the Statute. It is not reasonable to suppose the Legislature intended to legislate as to cases in which judgment had been pronounced by the final tribunal in this country before this Court became possessed of any appellate power whatever. If they had so intended, it would have been easy to express that intention in an unequivocal manner. The provision in the 26th section of the Statute, to give the right to appeal when the party from excusable causes omitted to take the proper steps under the statute to appeal within the time prescribed by the Act, seems reasonable and quite proper to be made and applicable to judgments or decisions after this Court had full power to deal with the matter.

If it is decided that this Court has jurisdiction in this cause, because the Judge of the Ontario Court of Appeal ordered and allowed that the appeal might be brought within ten days from the 30th April last, notwithstanding the appeal had not been brought within the time prescribed by the Statute, what is to prevent appeals being granted in cases in which judgments were entered 15 years ago, and in which the money has been paid under execution. Surely such could not have been the intention of the Legislature.

The 25th section of the Act, after providing that appeals from decisions on election petitions shall be brought within eight days from the rendering thereof proceeds: "and every other appeal shall be brought within thirty days from the signing or entry or pronouncing of the judgment appealed from." This language expels the idea that it was contemplated that judgments pronounced before the language used became law, should be appealable under the Act. If we are to consider only the effect of these words, there would not be any doubt on the subject, but if it is contended that the 26th section gives the right, the language is: "Provided always, that the Court proposed to be appealed from, or any Judge thereof, may allow an appeal under special circumstances, except in the case of an election petition, notwithstanding that the same may not be brought within the time hereinbefore prescribed in that respect; but in such case the Court or Judge shall impose such terms as to security or otherwise, as shall seem proper under the circumstances."

Does not this language imply that the case must be one in which the appeal might have been "brought within the time hereinbefore prescribed." But this case

could not have been brought within that time ; there was no Court to bring it in. Does not the reference to the imposing terms as to security, &c., imply that the party seeking relief had been guilty of laches, but, as already suggested, he was guilty of no laches, for he could not have brought in his appeal within the thirty days.

I have referred to the cases cited on the argument, and I do not think they conflict with the conclusion I have arrived at in this case, that we have no jurisdiction Mr. Bethune referred to the case of the *Earl of Roseberry* v. *Sir John Inglis*, the first case from Scotland appealed after the union. There was some difficulty at first but it was finally settled.

As before the union the people of Scotland had the right to appeal to the Scots Parliament, the act of union was not intended to deprive the Queen's subjects of any privileges formerly enjoyed by them. The British Parliament came in, in place of the Scots Parliament, and the appellate jurisdiction exercised by the latter was transferred to the former by plain and necessary implication, though not by positive enactment. (1) The latest case referred to on the argument was *The Queen* v. *Vine*.(2) The statute there under consideration 33 and 34 Vic., c. 29, s. 14, enacted that " every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no license to sell spirits by retail shall be granted to any person who shall have been so convicted, and if any person after having been so convicted, shall take out or have a license to sell spirits by retail the same shall be void to all intents and purposes." Many cases are referred to in the argument.

(1) MacQueen's House of Lords Practice p. 288; (2) L. R. 10 Q. B. 195.

The question was whether a person who had been convicted of a felony before the passing of the Act became disqualified on the passing of the Act; and the majority of the Court held he did. Cockburn, Chief Justice, said the Act was not to punish offenders, but to protect the public against public houses in which spirits were retailed, being kept by persons of doubtful character. He thought, from comparing the Statute with others for similar purposes passed by the Legislature, that it was intended to apply the rule to persons who had been convicted of felony before the passing of the Statute.

The case of Taylor was referred to on the argument as shewing the proper view of the subject.

In *Vansittart* v. *Taylor* (1); Jervis C.J., in giving judgment said: "we are all agreed that jurisdiction cannot be given by the conduct of the parties, if we have none independent of it; so that the only question is whether it is given in this case." The case was under the 34th section of the English Common Law Procedure Act, which is as follows: "In all cases of rules to enter a verdict or non-suit upon a point reserved at the trial, if the rule to shew cause be refused or granted, and then discharged or made absolute, the party decided against may appeal." The trial was before the Statute received the royal assent, but the rule to obtain a verdict was obtained after the Act came into operation. As before that there was no appeal in such a case, it was only by consent that such a reservation could be made, it was in fact an agreement to refer the case to the Court of Queen's Bench. In that case Parke, B. said: "I take it to be a clear rule of law that the language of a Statute is *primâ facie* to be construed as

(1) 4 E. & B. 910.

prospective only. This is according to the legal maxim, *Novâ constitutio futuris formam imponere debet non preteritis.*" A point reserved at the trial before the Act was only by consent of parties, and was a consent to refer it to a particular Court, only and not that the decision should be reviewed in error. The rule to set aside the proceeding was made absolute. Platt, B. dissenting.

In *Kimbray* v. *Draper*, (1); in an action commenced in a Superior Court before August, 1867, application was made under the County Court Act of that year, passed in the month of August, to transfer the case to the County Court unless the Plaintiff gave security for costs, it being shewn by Defendant's affidavit, that he had no visible means of paying the costs in case the verdict should go against him. It was considered this was a matter of procedure only, and the order could be made, although the Act was passed after Plaintiff had commenced his action. Though the Judges had great doubt on the subject, they thought the case of *Wright* v. *Hale*, (2), an authority for Defendant, and granted an order to transfer the case to the County Court. *Blackburn*, J. said in giving his judgment: "When the effect of an enactment is to take away a right, *primâ facie*, it does not apply to existing rights, but when it deals with procedure only, *primâ facie* it applies to all actions pending as well as future"

In *Evans* v. *Williams* (3) it is laid down that it is a broad principle of construction that, unless the Court has a clear indication of an intention in an Act of Parliament to legislate *ex post facto*, and to give to the Act the effect of depriving a man of a right which belonged to him at the time of the passing

(1) L. R. 3 Q. B. 160; (2) 6 H. and N. 227; (3) 2 Drew and Sm. 324.

of the Act, the Act will be declared not to have a retrospective operation.

The Midland Railway v. *Pye* (1), Plaintiff, a married woman, obtained an order, under Acts 20 and 21 Vict., c. 85, of protection; before that she had brought an action in the County Court to recover the value of some furniture, some of which had been acquired by her after the desertion by her husband. It was contended on her part that the order of protection related back to the time of the desertion, and she could maintain the action in her own name; the concluding part of the 21st section being: "If any such order of protection be made, the wife shall, during the continuance thereof, be, and be deemed to have been, during such desertion of her, in the like position, in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation." The Court held that this order of protection obtained by her during the pending of the suit would not entitle her to maintain an action which was not maintainable at its commencement. *Erle*, C.J., said: "Those whose duty it is to administer the law, very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the Legislature that it should be so construed is expressed in clear, plain and unambiguous language; because it manifestly shocks one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law; and, *wherever it is possible to put upon an Act of Parliament a construction not retrospective, the Courts will always adopt that construction.*" Can there

(1) 10 C. B. (N. S.) at p. 179.

be any doubt that the allowing an appeal where no right of appeal existed materially affects the rights of parties to enforce their judgments, as well as increases the expenses?

In *Vansittart* v. *Taylor*, already referred to, Baron *Parke* said the proceedings in error are far more expensive than where the case is not subject to appeal, and ought not to be imposed on a party who did not consent to it.

My Brother Ritchie has drawn my attention to the case of *Atty.-Gen.* and *Sillem* (1). Many of the observations of the Judges in that case, both in the Exchequer Chamber and the House of Lords, have a bearing on some of the questions discussed in this cause. There, there were different opinions entertained by the Judges in the Courts below and by the Law Lords when taken into the House of Lords. One question was, whether an appeal was a proceeding in the cause or a new right. Willes, J., said: The understanding to be gathered from works with respect to practice is that a proceeding by way of error or appeal is part of the practice on the side of the Court in which the process originates." Erle, C.J., said: "Procedure in a suit includes the whole course of practice from the issuing of the first process by which suitors are brought before a Court, to the execution of the last process on the final judgment." According to the provisions of the Common Law Procedure Acts, the appeal is effected by the act of the suitor in the Court of first instance.

The question was whether, under the power given by statute to the Barons of the Exchequer Court to apply the provisions of the two Common Law Procedure Acts to the process practice and mode of proceeding on

(1) 10 H. of L. 720.

the revenue side of the Court, with the purpose of making it, as nearly as may be, uniform with the process practice and mode of pleading on the pleas side of the Court of Exchequer, an appeal would be given. Compton, J., said: "No doubt the Legislature might, had it so pleased, have given such a power of creating such appeal to this Court, and ultimately to the House of Lords ; but it certainly would be a new and unusual course of legislation in creating a new statutory appeal." * * * "There is great difference between the machinery of the appeal and the right of appeal. The former might, with less difficulty, be called practice but I have great difficulty in seeing how the giving a right to appeal is practice."

Cockburn, J. said : "Can it be supposed, in the absence of clear legislative enactment, that Parliament intended to confer on the Court of Exchequer the power of creating or withholding an appeal in matters of revenue at its pleasure and discretion ?"

In arguing the case in the House of Lords, Sir Hugh Cairns said : "It cannot be supposed that the Legislature intended that a party who gained a verdict at a trial should have his right to retain that verdict affected by a statute, still less by new rules of Court coming into operation after the trial." He referred to *Moon* v. *Durden*, (1) where it was held that the 8 & 9 Vic., c. 109, did not defeat an action upon a wager commenced before the statute, and the rule was also applied in *Pinhorn* v. *Souster*, (2) to pleadings demurred to before the Common Law Procedure Act of 1852.

The Attorney General, in reply, as to the retrospective operation of the rules, said : "The cases cited only shew that the substantive rights of the parties are not to be

(1) 2 Exch. p. 22. (2) 8 Exch. 138.

retrospectively affected ; but they do not shew that the Court may not, the instant after the passing of a Statute, regulate the proceedings taken to enforce those rights in conformity with its provisions ; and in that way a party may even incur a new liability to costs. *Freeman* v. *Moyes* (1); *Cox* v. *Thomason* (2); *Wright* v. *Hale* (3).

Lord Westbury, in giving his judgment, said : " The creation of a new right of appeal is plainly an act which requires legislative authority * * * A new right of appeal * * is in effect a limitation of the jurisdiction of one Court, and an extension of the jurisdiction of another * * * An appeal is the right of entering a Superior Court and invoking its aid and interposition, to redress the error of the Court below. * * * The appeal itself is wholly independent of these rules of practice. * * The words *step in the cause* are used, as is well known, for the purpose of denoting that in future it should not be necessary to sue out a new writ for the purpose of entering a Court of Error."

Lord Wensleydale said : " The new law took away no right from the claimant ; it gave both the claimant and the Crown precisely the same right, that of questioning the propriety of the decision of the Court of Exchequer on a rule for new trial for misdirection. If judgment was given for the claimant the Crown has the right to question that by appeal. If for the Crown, the claimant has exactly the same right. The new law is therefore perfectly fair to both parties " * * * " There is no doubt of the justice of the rule laid down by Lord Coke, that enactments in a statute are generally to be construed to be prospective and to regulate the future

(1) 1 Ad. & Ellis 338; (2) 2 C. & J. 498; (3) 6 H. & N. 227.

conduct of parties. But this rule of construction would yield to the intention of the Legislature. It could not be supposed the Legislature intended to deprive a man of a vested right of action; this was laid down in *Moon* v. *Durden*," (1).

"On the other hand, it is clear that there is a material difference when an Act of Parliament is dealing with a right of action already vested, not intended to be taken away; and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate and alter. This has been most clearly and satisfactorily explained in the case of *Wright* v. *Hale* (2); particularly by Sir James Wilde." * * *

"The right of action does not constitute a title to keep all the consequences of the right as they were before. It gives the right to have the action conducted according to the rules then in force with respect to procedure."

I think, when a party has obtained a judgment, issued an execution under which he is enforcing the collection of his debt, who is disturbed by an appeal, the right to which has been created more than a year, perhaps ten years, after he has obtained his judgment, such disturbance is a very serious interference with an important right, the result of which may be ruinous to him. If we decide the right to appeal exists in this case, because a Judge of the Court below, whose judgment is appealed from, allowed an appeal, we must hold if an allowance were made in a case, where the judgment had been given ten years ago, the appeal would be legal and proper.

I do not think the Legislature ever contemplated such a serious interference with the rights of successful

(1) 2 Exch. 22; (2) 6 H. & N. 227.

litigants. I do not consider this a mere question of procedure.

If it be a mere matter of procedure in the cause in the Ontario Court, has not the Ontario Legislature the exclusive right to regulate the procedure in civil suits brought in the Courts established by it?

The statute creates a new Court, gives a new right of appeal which did not exist before; and in my judgment, is not to be considered as a matter of procedure. As already intimated, I do not think the Dominion Parliament, in passing the Statute, intended to legislate in relation to judgments rendered years before the Act was passed, and under which most important rights may have been considered as decided. I think the whole scope of the Act is to provide for appeals in cases in which decisions or judgments should be pronounced after the Act came in force.

Under the circumstances, I think we should pronounce no judgment on the subject-matter of this appeal. If application had been made to set aside or quash these proceedings as in *Vansittart* v. *Taylor*, (1) we would have made the rule absolute, and in *Tronson* v. *Dent* (2) where it is said, when Appellate Court has no jurisdiction, the Respondent ought to apply to quash the appeal.

RITCHIE, J.:—

All questions of jurisdiction, more particularly questions touching jurisdiction of a Court such as this, are so vital, and the jurisdiction which we are now called on to declare that this Court possesses, involve such important consequences, and both parties having contended that this Court has the jurisdiction claimed, I feel it my duty to state at greater length, the reasons that

(1) 4 E. & B. 910; (2) 8 M. P. C. C. 444.

have led me to the conclusion at which I have arrived, than otherwise I should have thought necessary to do in a case to my mind so very clear.

No doubt there are exceptions engrafted on the rule of law which I presume at this day cannot be denied, that the language of a Statute is *primâ facie* to be construed as prospective as where it clearly appears, from the wording of the Statute, that the Legislature intended it to have a retrospective operation, or where the Statute relates to matters of procedure not affecting rights, for when a Statute deals with procedure only, it applies to all actions, those pending as well as future.

In proceedings to recover rights, it is quite reasonable that a pending suit should be conducted in the way and according to the practice of the Court in which it is brought, and if an Act of Parliament alters the mode of procedure, the right to have it conducted in that altered manner would seem to be proper enough, because it takes nothing away from the parties; the Court merely says to the parties, that an Act of Parliament declares how you shall proceed to enforce your rights; in other words, that the action shall be conducted from time to time according to the rules in force, with a respect to procedure during the progress of the suit. See *Atty.-Gen.* v. *Lillon*, (1). But the cases establishing this doctrine, clearly demonstrate that while such is the case with reference to procedure when the enactment changes or takes away rights, it is not to be construed as retrospective.

This distinction will be found very clearly enunciated in *Wright* v. *Hale* (2), and in *Kinbury* v. *Draper* (3). In the present case I can see no reason why this

(1) 10 H. of L., 764; (2) 6 Hurl. and N., 227, 232; L. R., 3 Q. B., 161; (3) 2 Exch., W. H. & G., p. 22.

Statute should have a retrospective operation, inasmuch as I cannot consider the creation of this Court and the right of appeal thereto mere procedure, and I can discover no language in the Statute indicating that in its construction the *primâ facie* rule that statutes ought to be construed to operate in the future, was to be departed from. On the contrary, such a construction would, in my opinion, prejudicially affect existing vested rights, and the legal character of past acts. It may be well, before proceeding further, to cite some cases and notice the very strong language used in respect to the retrospective construction of Statutes.

As *Moon* v. *Durden* (1) may be, and I believe is, considered a leading case, I will refer to the rule as put forward by Rolfe Baron in that case, because it has been frequently cited and approved of. "The general rule" (he says) "on this subject is stated by Lord Coke, in the 2 Inst., 299, in his commentary on the Statutes of Gloucester."—'*Nova constitutio futuris formam imponere debet non præteritis*,' and the principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively." "In *Pinhorn* v. *Souster*, (2) Parke, B., says, the well known maxim is '*Nova constitutio* &c.'" We must therefore read the Act as if its words had been "no future pleading shall be deemed insufficient &c.," and adds: "the rule as to construction of Statutes was fully considered by this Court in *Moon* v. *Durden*."

On *Freeman* v. *Moyes*, (3) being mentioned, he

(1) Exch. 22; (2) 8 Exch. 142; (3) 1 A. & E, 338,

said: "Littledale, J., dissented from that judgment, and I can't help thinking with strong reasons." In *Doolubdals* v. *Ramcoll et al.* (1), the Privy Council agreed with the Court in the construction of Statutes in *Moon* v. *Durden.*

In *Thompson* v. *Lach* (2), Wilde, C. J. says: "The "general principle that a Statute is not to be con-"strued so as to have a retrospective operation, is a "just one; for persons ought not to have their rights "affected by laws passed subsequently." And again "in order to give a retrospective effect to any Statute "the words should be very clear." In the *Midland Railway* v. *Pye* (3), Earl, C. J., says: "Those whose "duty it is to administer the law, very properly guard "against giving to an Act of Parliament a retrospec-"tive operation, unless the intention of the Legisla-"ture that it should be so construed is expressed in "clear, plain and unambiguous language; because it "manifestly shocks one's sense of justice that an act "legal at the time of doing it should be made unlawful "bysome new enactment. Modern legislation has "almost entirely removed that blemish from the law, "and whenever it is possible to put upon an Act of "Parliament a construction not retrospective, the "Courts will always adopt that construction."

In *Waugh* v. *Middleton* (4) it was held in construing the 224th section of the Bankrupt Act (5), which enacts that "every deed or memorandum of arrangement *now* "or hereafter entered into &c." did not operate upon such instruments as were entered and completed before the passing of the Statute, but applied to such instruments as were entered into before and were inchoate

(1) 7 M. P. C. C. 256; (2) 3 C. B., 551; (3) 10 C. B. N. S., 191; (4) 8 Exch., 352; (5) 13 & 14 Vic., c. 106.

at the time of the passing of the Act and had been completed since that time.

In *Marsh* v. *Higgins* (1), Wilde, C. J., says : " Statutes are not to be held to operate retrospectively, " unless they contain express words to that effect. " Sometimes, no doubt, the Legislature finds it expe- " dient to give a retrospective operation to an Act to a " considerable extent ; but, then, care is always taken to " express that intention in clear unambiguous lan- guage." And again : " The words of an Act are to be " construed to be prospective only unless the intention " of the Legislature to the contrary is unequivocally " expressed."

In *Jackson* v. *Woolley*, (2), *Thompson* v. *Waithman* (3) was overruled and the language of Rolfe, B., approved. And *William* v. *Smith* (4) affirmed *Jackson* v. *Wolley*, and referred again with approval to Rolfe, B., observations in *Moon* v. *Durden*.

And in *Evans* v. *Williams*, as reported in 13th Weekly Reporter, 424, Kindersley, V.C., says : " But " the ground on which I come to my conclusion, is, " that unless the Court sees clearly an indication that " the Legislature intended *ex post facto* to deprive a " man of rights which existed at the time of the passing " of the Act, it will never deprive him of those rights. " Where an Act deprives a man of his land it gives him " ample compensation, and provides for the taking away " of the right. But, unless it is clear that the Legisla- " ture meant the Act to be retrospective, the Court will " not hold it to be so, and upon that point the case of " *Moon* v. *Durden*, in the Exchequer, is a very strong " authority. That was the case of pending action, and

(1) 9 C. B. 567 ; (2) 8 E. & B., 784 ; (3) 2, Drew, 628 ; (4) 4 H. & N., 562.

"yet in the face of the words 'shall be maintained,' it "was held that the Statute was not retrospective, so as "to defeat an action instituted before the passing and "on the same principle as I am now acting upon, three "of the Judges, Lord Cranworth, B. Alderson and B. "Parke, were clearly of opinion (in which I concur, and "that is not the only case in which it was so held), that "the Court will not deprive a man of existing rights "by giving the Act a retrospective effect."

In *Vansittart* v. *Taylor*, (1) Pollock, C. B., says: "The "language of section 34 is no doubt couched in terms "apparently absolute; but," he says, "generally speak-"ing the language of an Act of Parliament, however "much it may be couched in the present tense, is to be "construed as applying to the future only."

In *Queen* v. *Vine*, (2) the Court held the words "any person convicted of felony" in the wine and beer amendment in Act 33 & 34 Vict., ch. 29, sect. 14, applied to a person convicted either before or after the Act passed, and so the Act was retrospective. And though Cockburn, C. J., and Mellor, J., thought the Act was not to punish offenders, but for the protection of the public, and that the Legislature categorically drew a hard and fast rule as to who should receive licenses, and Archibald, J., thought the language of the Act showed the Act was intended to be retrospective, Lush, J., was of opinion that the general rule, even in such a case, should not be departed from, and the Statute should apply only to a person convicted after the passing of the Act.

And *ex parte* Jones, (3) under the 126th section of the Bankrupt Act, which declared that the composition

(1) 4 E. B., 913; (2) L. R., 10 Q. B., 195; (3) 10 L, R., Ch. App. 663.

should be "binding on all creditors whose names and addresses and the amounts of whose debts were shewn in the debtor's statement," it was held that a resolution for composition had no retrospective effect so as to invalidate securities obtained by a creditor in the interval between the filing of the petition and the first meeting of creditors at which the resolution was passed to accept a composition.

Sir W. James, L. J., says: "In order to take away a legal right from any body, it is necessary to shew express words or clear implication. In this" he says, "the Respondents have, by due process of law, obtained a security on all the goods which the sheriff could seize that was their legal right and they have it still, unless it can be shewn to have been taken away from them."

Now, in the case before us, can it be said that rights will not be changed or affected if we give a retrospective effect to the Supreme Court Act? When judgment was pronounced by the Appeal Court of Ontario, the suit ceased, in my opinion, to be a pending or existing litigation; the matter became *res judicata*, because a final judgment is the putting an end to the action by an award of redress to one party or discharge of the other, as the case may be. The Court pronouncing the judgment in this case had at the time full and final jurisdiction over the subject-matter, and it disposed of the controversy and established the rights of the parties by a judgment then final and unimpeachable so far as relates to Courts in this Dominion.

Procedure, in my opinion, is mere machinery for carrying on the suit, whether in the Court appealed from or the Court appealed to, and for removing the cause from the Court appealed from to the Court appealed to but not affecting the respective jurisdictions of either Courts,

But if an appeal was mere matter of procedure, which I humbly think it is not, I fail to see how, (unless the proceedings were opened up by clear statutory enactments), such procedure could apply to a suit thus settled and disposed of by a final judgment before any such procedure or right to take such procedure existed.

I cannot think that the Legislature contemplated that the rights of parties so established should be altered or affected by the creation of an appellate tribunal by a Statute subsequently passed, in which no language, that I can discover, is to be found indicating any such intention. I think the fair and proper construction of the Statute is that the Legislature intended to establish an appellate tribunal to regulate the future, not the past. To which all judgments pronounced after the coming after the operation of the Act might be appealed, and that there was no intention by *ex post facto* legislation to disturb or interfere with causes previously determined and settled, and thereby to jeopardise judgments and rights thereunder, which successful litigants had a just right to consider the law as administered by a competent tribunal and sacredly assured to them. It is not easy to foresee the litigation, confusion, insecurity and hardships that might arise, should it be held that all judgments pronounced before the coming into operation of the Supreme Court Act, in each and every of the Courts of final resort in the several provinces of the Dominion, were now opened to be appealed by simply obtaining an order from a single judge of any of such Courts respectively, allowing such appeal, no matter what length of time may have elapsed since the judgment was pronounced ; for if a judgment given three months before the Act came into operation can be appealed, I can see no reason why one pronounced

three years ago or longer is not equally opened to be appealed, if the Court or a judge should make the necessary order. In my opinion the Legislature intended to give either party an appeal as of right, and I do not think the Act was intended to apply to any case that the party had not the appeal as a right. In this case the Appellant could have no appeal of right by reason of the impossibility of appealing within 30 days after the pronouncing of the judgment, for the obvious reason that there was no Court to appeal to. I think the Statute only contemplated the exercise of the discretionary power of the judge, where a party, having had the right and opportunity to appeal, was prevented by accidental causes without negligence, and not to any case where the party never could, of his own motion, have exercised the right. In other words, I do not think that the Legislature could have intended that while as to all the judgments pronounced after the passing of the Act, the parties were, of their own motion, to have the right of appeal as to all judgments pronounced anterior to 30 days before the coming into operation of the Statute, the appeal was to be purely discretionary in the Court appealed from or a judge thereof. I think it would be most unjust to parties who, having had their rights passed upon and determined by law, and who had been for months or years, as the case may be, in the enjoyment of such rights so awarded to them by the solemn judgment of the law, unimpeachable at the time it was pronounced, if this Court now, by calling an appeal mere procedure, give this Statute a retrospective operation, and so render the security heretofore looked upon as unimpeachable, namely : the security of a judgment of a competent tribunal, a delusion, and could make the decisions under

which parties had hitherto held and possibly dealt with property, feeling themselves as safe as the law could make them, now liable to be re-opened and appealed at the discretion of a single judge.

The principle of this Statute should apply to the future and not to the past, seems to my mind so clear, the consequences, if the contrary was held, so disastrous to parties who may have received and disposed of the full benefit of their judgments, as also to those who may have acquired rights to property on the faith of such adjudications and on the belief that litigation was at an end in respect thereto, and would not be re-opened, that in the language of Parke B. in *Vansittart* v. *Taylor*, (1) " I think this would be such an unjust construction that, independent of the general rule referred to, I am quite clear the Legislature never meant it." But, independent of all this, I think the creation of a right of appeal is by no means mere matter of procedure, but is a matter of jurisdiction, that is, of the limitation and extension of jurisdiction, and by which limitation and extension the rights of suitors may be most materially affected. After the Supreme Court Act came into operation, the jurisdiction of the Courts of final resort in the several Provinces of the Dominion became more limited, their adjudications becoming subject to affirmance or reversal by this Court, which in its turn acquired a jurisdiction not heretofore existing in the Dominion. Bearing strongly, I think, on this view, are the observations of Lord Chancellor Westbury and Lord St. Leonard in the celebrated case of *Attorney General* v. *Sillem*. (2) At p. 720 the former says :—

" The creation of a new right of appeal is plainly an " Act which requires legislative authority. The Court

(1) 4 E. & B., 915; (2) 10 H. of L. C. 704.

"from which the appeal is given, and the Court to which "it is given must both be bound, and that must be the "act of some higher power. It is not competent to "either tribunal, or to both collectively, to create any "such right. Suppose the Legislature to have given to "either tribunal, that is to the Court of the First In- "stance, and to the Court of Error or Appeal respectively, "the fullest power of regulating its own practice or "procedure, such power would not avail for the creation "of a new right of appeal, which is in effect a limitation "of the jurisdiction of one Court, and an extension of "the jurisdiction of another. A power to regulate the "practice of a Court does not involve or imply any "power to alter the extent or nature of its jurisdiction."

And again at page 724:—

"An appeal is the right of entering a Superior Court "and invoking its aid and interposition to redress the "error of the Court below. It seems to denominate this "paramount right part of the practice of the inferior "tribunal. The mode of proceeding may be regulated "partly by the practice of the inferior and partly by the "practice of the superior tribunal; but the appeal itself "is wholly independent of these rules of practice. The "right to bring an action is very distinct from the re- "gulations that apply to the action when brought and "which constitute the practice of the Court in which it "is instituted. So the 34th and 35th sections of the "Act of 1854, which create new rights of appeal, and "the 36th section which defines and binds certain "Courts to receive and determine such appeals, cannot "with any accuracy or propriety be termed provisions "which relate to process, practice or mode of pleading, "either in the Court appealed from or that to which the "appeal is to be made. They are enactments creating

"new relations between certain Courts in cases which "are defined, and they are as distinct from rules of "practice as international is distinct from municipal "law."

And at page 752 Lord *St. Leonards* says:—

"Now the making of orders, giving a right of "appeal from the Court of Exchequer, where such "right of appeal did not before exist, is an act by "the present Barons of the Court of Exchequer which "does, if valid, affect and prejudice the jurisdiction "and authority of the Court in all time to come. "The present Barons, exercising their power, have super-"added what did not before exist, namely, a right of "appeal in various modes from the decision of the Court "of Exchequer. The Court of Exchequer, having a right "to decide without any power of appeal, the present "Barons of the Exchequer have, in the exercise of the "authority which they claim, made their judgments "subject to the decisions of a higher tribunal. If that "is not affecting the jurisdiction of the Court, I cannot "imagine what can be said to be so."

It has been suggested that the remarks of the learned Judge Dr. *Lushington*, in the *Alexander Larsen* (1), militate against this view, but I cannot see that it does so at all. He says: "I am not aware of any principle or decision which establishes the doctrine that where a Statute affords a new mode of suing, the cause of action must necessarily arise subsequently to the period when the Statute comes into operation. On the contrary, where a Statute creates a new jurisdiction, the new jurisdiction, I apprehend, takes up all past cases, and there is not the slightest injustice in this, for although the circum-

(1) 1st Robinson's Admiralty Reports, 295.

stances may have occurred prior to the passing of the Statute, the suit or action may have been commenced subsequently."

This is all right enough as applicable to Courts established to enable parties to recover their rights, but I am not aware of any case where a Statute passed affording a new mode of suing, creating a new jurisdiction, or establishing a new Court or regulating procedure, has ever been held to apply to a suit that has been duly litigated and finally decided by a competent Court before the passing of the Statute, whereby the litigation and the rights of the parties thereunder had passed as the law stood in *rem adjudicatam*, so as to open the controversy and enable the matters originally in dispute to be adjudicated upon afresh. For these reasons, and because I think this Court should be extremely careful not to assume any jurisdiction which it does not unquestionably possess, I am of opinion we have no right and ought not to adjudicate upon this matter.

STRONG, J.:

It is a well established exception to the rule that Statutes are not to receive a retroactive construction, that enactments regulating procedure may have such an operation, so as to be applicable to pending suits, when the language of the Act is sufficiently large to bear such a construction (1). In such cases, the ordinary presumption against a retrospective effect, requiring that general words be restricted to future cases, does not apply. The creation of a new right of appeal is a regulation of procedure (2), and, as section

(1.) Maxwell on Statutes, p. 199; (2) Atty.-Gen. vs. Sillem, 10 H. of L. C., 704; and Vansittart vs. Taylor, 4 E. & B., 910.

26 of the Supreme and Exchequer Courts Act is sufficiently comprehensive in its terms to include cases pending at the time it was passed, I should, if it stood alone, consider that this appeal was admissible. Section 32 of the same Act, however, provides for a stay of execution on certain conditions, as a consequence of an appeal. This, it seems to me, is more than an enactment concerning procedure, as it amounts to a serious interference with the substantial rights of the respondent. Therefore, reading sections 26 and 32 together, I think that section 26 ought not to operate retrospectively, and, for this reason, I concur in the judgment that the appeal be quashed without costs.

TASCHEREAU, J.:----

Section 25 of the Supreme Court Act enacts, that, except in election cases, every appeal must be brought within thirty days from the rendering or entry or pronouncing of the judgment appealed from; but by Section 26 it is enacted that a Judge of the Court appealed from may allow an appeal, under special circumstances, after the thirty days.

In this case, the judgment sought to be appealed from was rendered and signed several months before the existence of this Court. The order allowing the appeal was made without any affidavit of circumstances to justify the order, and authorize a deviation from the general rule of the statute; at least no such affidavit is apparent on the face of the record, but the order mentions that it was granted by consent of parties.

At the date of such order, the judgment had acquired all the authority of a final judgment, so far as this Court is concerned, and, in my opinion, no consent of parties could give this Court any jurisdiction over the

case. The consequence of allowing such an appeal after the expiration of legal delays, nay, even with the authority of the Legislature, would be very serious indeed, inasmuch as vested rights in other people might be greatly affected, such as those of creditors; but the case of allowing an appeal by consent from a judgment rendered several months before the existence of a tribunal would be fraught with the greatest danger. I do not think that such was the intention of Parliament in framing the 26th section of the Supreme and Exchequer Court Act. I am happy to find that the majority of this Court in the present case agrees with me, and will decide that the 26th section of the Supreme and Exchequer Court Act does not apply to cases finally decided before the existence of our Supreme Court. The authorities quoted by my learned colleagues are in point and completely warrant our decision.

FOURNIER, J.:—

Le jugement soumis à la révision de cette Cour a été rendu le 25 Septembre, 1875, par la Cour d'Appel d'Ontario, "Court of Error and Appeal."

L'Acte créant cette Cour n'est devenu en opération que le 11 Janvier 1876, c'est-à-dire, plus de trois mois après la date de ce jugement

D'après la 25ième section, le délai dans lequel un appel doit être porté, est de trente jours, mais lorsqu'il est interjeté en vertu des sections 19, 20 et 21, il doit être précédé d'un avis par écrit donné à la partie ou à son procureur, dans les vingt jours après le prononcé du jugement, à moins que le délai ne soit prolongé par la Cour ou le Juge dont est appel.

Il est évident que ce n'est pas en vertu d'aucune de

ces sections que le présent appel a été interjeté, puisque les délais pour le faire étaient expirés longtemps avant la mise en opération de la loi. Aussi ce n'est pas sur ces sections, mais sur une autre, la 26ième que l'Appelant base son droit d'appel. Elle se lit comme suit :—" 26. Pourvu toujours que la Cour dont on " voudra en appeler, ou l'un des Juges de cette Cour, " pourra permettre qu'appel soit interjeté dans des " circonstances spéciales, sauf dans le cas d'une pétition " d'élection, bien que l'appel n'ait pas été interjeté dans " les délais ci-dessus prescrits à ce sujet ; mais dans ce " cas, la Cour ou le Juge imposera telles conditions, à " l'égard du cautionnement ou autrement, qui lui " paraîtront justes dans les circonstances." Sans cette section et l'interprétation que lui donne l'Appelant, un appel du jugement en cette cause n'était pas possible. C'est en se fondant sur cette disposition qu'il a, plus de six mois après la date de son jugement, demandé et obtenu la permission de porter le présent appel, laquelle est en ces termes : " Upon the application of Counsel for the said James Taylor, the Defendant in Error, and by consent, I order and allow that the appeal herein may be brought within ten days from this date, and notwithstanding that such appeal has not been brought within the time prescribed by the Statute in that behalf. And I declare it does not seem to me necessary or proper to impose any terms as to security." Comme on le voit par ce document, les parties en cette cause s'accordent avec l'honorable Juge qui a rendu cet ordre à considérer que malgré que le délai d'appel fut expiré, avant la mise en force de la loi, cette disposition a l'effet de donner au Juge, même en ce cas, le pouvoir de prolonger le délai d'appel.

Telle est la prétention des deux parties

litigantes, prétention qui a l'effet de soulever une question préliminaire de la plus grande importance, celle de savoir si cette cour a droit de prendre connaissance de la présente cause. Il me semble pourtant, bien évident, qu'un appel en vertu du présent Acte ne pouvait exister avant la mise en force de la loi créant le tribunal qui devait l'entendre ; et qu'il n'était pas possible de proroger un délai qui n'a pas existé. Aussi pour sortir de cette difficulté les parties prétendent-elles que la section 26 donnant au Juge le pouvoir, pour des raisons spéciales, de permettre un appel après le délai fixé, doit être interpretée comme s'appliquant indistinctement à tous les jugements rendus soit avant soit après la passation de l'Acte établissant cette Cour ; ou, en d'autres termes, que cette section doit être interpretée comme ayant un effet rétroactif, affectant les droits acquis dans les jugements rendus avant sa passation.

Bienque les deux parties soient d'accord à reconnaître que cette Cour a juridiction dans le cas actuel, leur consentement n'est cependant pas suffisant pour l'autoriser à assumer une juridiction que la loi ne lui donne pas. Il n'y a rien de plus certain que cette maxime, que le consentement des parties ne peut avoir l'effet de donner juridiction. La loi seule peut le faire. Cette Cour doit donc indépendamment de ce consentement considérer la question de savoir si l'ordre permettant l'appel en cette cause est légal.

Si sa légalité ne fait pas doute, il en résulte nécessairement que la disposition qu'il s'agit d'interpréter doit avoir un effet rétroactif. Mais la loi a-t-elle eu cette intention ? Contient-elle quelque disposition qui serait de nature à forcer d'admettre une telle interprétation ? Je cherche en vain des traces d'une telle

intention soit dans le préambule de l'Acte qui établit cette cour, soit dans son dispositif. Au contraire, tout son contexte fait voir qu'il a pour but la création d'une institution nouvelle tirant son origine de l'article 101 de l'Acte Constitutionnel, et le langage de sa rédaction est celui dont on se sert pour donner aux lois effet pour l'avenir seulement. On n'y trouve pas une seule des expressions généralement employées lorsqu'on veut leur donner un effet rétroactif. Une interprétation qui produirait ce dernier effet me semblerait donc blesser, sans raison, un des principes fondamentaux en matière de législation.

Voici comment s'exprime Maxwell on Statutes, p. 191:

"It is a general rule that all Statutes are to be construed to operate in future, unless from the language a retrospective effect be clearly intended." *Nova Constitutio futuris formam imponere debet, non præteritis.* Maxime qui appartient, on peut dire, à toutes les législations, et que la loi Française formule en ces termes si brefs et si expressifs:

"Les lois n'ont d'effet que pour l'avenir."

Mais à ce raisonnement l'Appelant objecte que le langage de la section 26 est général; qu'il ne distingue pas entre les jugements rendus avant ou après la passation de la loi; et que conséquemment tous indistinctement peuvent être soumis à l'exercise du pouvoir discrétionnaire qu'elle accorde au Juge.

A cette objection je réponds que si c'eût été l'intention de la loi de porter atteinte aux droits acquis, elle se serait exprimée en termes clairs et formels ne laissant aucun doute sur sa volonté (1). "It has been said that nothing but clear and express words will give a retro-

(1) Maxwell on Statutes, p. 191.

spective effect to a Statute, and that much, however the present tense may be used in it, it must be construed as applying only to future matters."

Je me demande en outre s'il n'y a pas une autre manière d'expliquer cette disposition, et s'il s'en trouve une qui soit d'accord avec l'ensemble des dispositions de l'acte, ne doit-on pas, d'après les règles d'interprétation, la préférer à celle qui lui donnerait un effet rétroactif? Il me semble qu'une explication logique et sensée de cette disposition résulte du fait que les délais d'appel ont été considérablement abrégés par l'acte créant cette Cour. En effet, on sait que l'appel au Conseil Privé de Sa Majesté des Jugements de la Cour d'Erreur et d'Appel doit être interjeté dans l'année de la date du jour qu'ils ont été prononcés. Il en est de même pour la Province de Québec et je crois qu'on peut en dire autant de toutes les autres Provinces de la Puissance. L'appel à cette Cour ayant été, en vertu de la 47e section de l'Acte de la Cour Suprême, substitué à l'appel à Sa Majesté en Son Conseil Privé, on comprend que les délais pour les appels à cette Cour ne pouvaient plus être les mêmes que ceux des appels au Conseil Privé de Sa Majesté. Delà la necessité de les abréger. Le délai n'étant plus en vertu de notre Acte que de trente jours, il pouvait arriver que dans certains cas des parties désirant, de bonne foi, interjeter appel, n'auraient pu être prêtes à temps, et que sans le pouvoir discrétionnaire dont il est question dans la 26e section, ces parties auraient pu souffrir un tort considérable par la privation de leur droit d'appel. C'est sans doute pour venir à leur secours que cette disposition a été adoptée. Ainsi expliquée, il devient évident que cette section ne peut avoir d'application qu'aux causes jugées depuis la mise en force de la loi.

Une autre interprétation me parait impossible à cause des graves conséquences qu'elle entrainerait. En effet, si l'honorable Juge qui a rendu l'ordre dont il s'agit a eu raison de le faire dans le cas actuel, lui-même, et d'autres Juges n'en pourraient-ils pas faire autant dans des causes jugées depuis longtemps? Si ce pouvoir peut, comme on l'a fait dans cette cause, être appliqué aux jugements qui, par l'expiration des délais d'appel, ont acquis la force de chose jugée, quelle sera la limite où l'on s'arrêtera? Sera-ce un an, cinq ans, vingt ans, l'Acte n'en fixant aucune? D'après l'Appelant cette limite serait laissée à la seule discrétion du Juge Mais ne peut-il pas se trouver des causes jugées depuis longtemps, dans lesquelles, en exerçant cette discrétion, ce serait venir au secours d'une partie qui a été mal-à-propos condamnée, ou qui l'a été en vertu d'une jurisprudence admise alors par ces tribunaux, mais qui depuis a été reconnue comme incorrecte et contraire aux veritables principes qui devaient servir à la décision de telles causes. La chose est fort possible, et c'est bien là supposer le cas le plus favorable où cette discrétion pourrait être exercée quant au passé. Mais alors que deviendrait le principe du respect des droits acquis et de la *chose jugée?* Principe si protecteur de la paix et de la tranquilité des familles. Peut-on croire un instant que la loi a voulu le sacrifier pour introduire un principe qui serait un élement de trouble et de désordre, propre à bouleverser l'action des tribunaux depuis un temps illimité? Certainement non. Le législateur n'a pu vouloir une telle absurdité. Ceci seul ne suffirait-il pas à démontrer que l'intention n'était pas de permettre d'attaquer le passé, mais bien seulement de n'accorder cette discrétion que pour les causes dont le sort n'était pas finalement réglé lors de

la mise en force de la loi. A ce propos je citerai encore du même auteur, les paroles suivantes : "It is where "the enactment would prejudicially affect vested "rights, or the legal character of past acts, that the "presumption against a retrospective operation is "strongest. Every Statute which takes away or "impairs vested rights acquired under existing laws, "or creates a new obligation, or imposes a mere duty, "or attaches a new disability in respect of transactions "or considerations already past, must be presumed, out "of respect to the Legislature, to be intended not to have "a retrospective operation."

Cependant il en serait autrement si cette intention de donner un effet rétroactif était claire et formelle. "However, when the intention is *clear* that the Act "should have a retroactive operation, it must unques-"tionably be so construed, however *unjust* and *bad* the "consequences may appear." Cette règle d'interprétation est certainement correcte. Le devoir du Juge est de respecter la loi, de la faire exécuter quellequ'elle soit, ce n'est pas à lui de la juger. Mais dans la clause qu'il s'agit d'interpréter trouve-t-on qu'il y soit exprimée une intention *claire* qu'elle doit avoir un effet rétroactif ? Certainement non.

Maintenant je dirai un mot d'une autre proposition de l'Appelant. L'appel, dit-il, n'est qu'une procédure dans la cause, et la présomption contre l'interprétation rétroactive n'a pas d'application aux Actes qui n'affectent que la procédure et la pratique. Délà il conclut que la disposition doit avoir un effet rétroactif. Sa proposition n'est vraie qu'en partie. Le mode d'exercer un droit d'action peut-être affecté par les lois de procédure, mais le droit d'action lui-même ne peut pas l'être. La procédure peut être changée, mais le droit d'action doit être respecté.

"It does not follow that, because a suitor has a cause "of action, he has also a vested right to enforce it by "the course of procedure and practice which was in "force when he began his suit. He has only the right "of prosecuting it in the manner prescribed for the "time being, by and before the Court in which he sues. "And if an Act of Parliament alters that mode of pro- "cedure, he has no other right than to proceed accord- "ing to this altered mode."

Dans le cas actuel il n'est certainement pas correct de dire que l'appel n'était qu'une procédure dans la cause, puisque ce droit n'existait pas et n'avait jamais existé avant la date de l'ordre du 13 Avril, 1876, comme le font voir les sections précédemment citées. Ce droit d'appel est une création du Juge qui, en permettant un appel dans un cas où la loi n'en accordait pas, a excédé ses pouvoirs. Lorsque l'appel est permis par la loi le Juge en peut régler l'exercise, mais il ne peut pas le conférer quand il n'existe pas. La loi seule a ce pouvoir.

Il faut remarquer de plus que quant à l'effet des lois de procédure, l'appel ne peut être mis au même rang que les autres procédés, comme le fait voir la décision ci-après citée. Lors de la mise en operation du *Common Law Procedure Act of* 1854, il a été rendu sur des faits analogues à ceux de cette cause, une décision dont le principe est applicable à celle-ci ; c'est celle qui a été prononcée dans la cause de *Hughes* v. *Lumley* (1). Je me contenterai d'en citer ici la mention abrégée qu'en fait l'auteur que j'ai déjà cité (2) :—

"But the new procedure would be presumedly inapplicable where its application would involve a breach faith between parties. For this reason, those provi-

(1) 24 L.J., Q.B., 29; (2) Maxwell on Statutes, p. 202.

sions of the Common Law Procedure Act of 1854 which permit a writ of error to be brought on a judgment upon a special case, and give an appeal upon a point reserved at the trial, were held not to apply where the special case was agreed to, and the point was reserved before the Act came into operation. (*b*) Where a special demurrer stood for argument before the passing of the first Common Law Procedure Act, it was held that the judgment was not to be affected by that Act, which abolished special demurrers, but must be governed by the earlier law. (*d.*) The judgment was, in strictness, due before the Act, and the delay of the Court ought not to affect it."

Cette raison étant applicable à cette cause, ne doit-elle pas aussi y produire le même effet ?

La difficulté soulevée en cette cause intéressant également toutes les Provinces, quelque soit d'ailleurs la divergence de leurs lois, je crois devoir ajouter que les nombreuses autorités qui ont été compulsées et tirées des décisions des causes Anglaises, et des jurisconsultes Anglais, et qui ont été citées à l'appui du jugement qui va être rendu, ont, dans la Province de Québec, la même force et la même valeur que dans les autres Provinces. Pour mieux établir ce point, je citerai de feu Sir Louis H. Lafontaine quelques paroles résumant les règles d'interprétation sur la rétro-activité des lois, lesquelles sont en même temps très applicables à la question sous considération.

Dans une cause, Kierzkoski v. La Compagnie du Grand Tronc de chemin de fer (1), dans laquelle il s'agissait de priver un plaideur d'un droit acquis en vertu d'une loi antérieure, voici comment il s'exprimait : ' Pourqu'il en fut privé, il faudrait que la

(1) 10 vol., p. 52, des Décisions des Tribunaux du Bas Canada.

Législature eut porté à cette fin un décret formel, clair et précis, dont la disposition destinée à rétroagir sur le passé, ne pût permettre d'entretenir aucun doute sur son intention de législater ainsi avec effet rétroactif. Si l'on me présente une telle loi, je dois l'éxécuter ; car ce n'est pas à moi à juger la loi ; lorsqu'elle n'offre qu'un sens, et que ce sens ne pourrait être répudié par un Juge, si ce n'est en s'arrogeant les pouvoirs du législateur. Mais si la disposition n'est pas claire et précise, si elle est mal rédigée, si elle est ambigue, si elle est contredite par d'autres dispositions qui sont conformes à l'esprit et au but avoué du décret, tandis que la disposition dont il s'agit est contraire à cet esprit et contredit ce but, alors il y a lieu, pour le Juge, à interpréter la loi ; et dans cette interprétation, il ne doit pas perdre de vue que le respect des droits acquis est la première règle qu'il doit suivre."

Ce principe de la non-rétroactivité des lois si bien développé dans les paroles de l'Honorable Juge en Chef, ainsi que dans Mailher de Chassât (1) sur la rétroactivité des lois, est le même dans le droit Anglais que dans le droit Français, parcequ'il dérive d'une même source, le droit Romain.

Pour ces considérations, et pour beaucoup d'autres si savamment traitées par l'Hon. Juge en Chef, dans lesquelles je concours pleinement, j'en suis venu à la conclusion que cette Cour n'a pas juridiction pour décider l'appel qui lui a été soumis en vertu de l'ordre du 13 Avril 1876.

Appeal quashed.

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(1) Tome 1, p. 124.