IN THE MATTER OF THE ONTARIO SUGAR CO.

1911

*Aug. 3.
*Aug. 4.

McKINNON'S CASE.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Winding-up Act—Leave to appeal.

Leave to appeal to the Supreme Court of Canada from a judgment in proceedings under the "Winding-up Act" will not be granted, though the amount in controversy exceeds $2,000, if no important principle of law nor the construction of a public Act, nor any public interest is involved, especially if the judgment sought to be appealed against appears to be sound.

MOTION for leave to appeal from a decision of the Court of Appeal for Ontario affirming the judgment of Meredith C.J.(1), who sustained the refusal of a referee to place S. F. McKinnon on the list of contributories of the Ontario Sugar Co. in process of liquidation under the "Winding-up Act."

The facts are fully stated in the judgment of Mr. Justice Anglin on the application for leave.

W. N. Tilley for the motion.

Wallbridge, for McKinnon, contra.

ANGLIN J.—The liquidator applies under section 106 of the Dominion "Winding-up Act" for leave to appeal to this court from the judgment of the Court of Appeal for Ontario, affirming the judgment of Mere-

*PRESENT:—Mr. Justice Anglin in Chambers.

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dith C.J.(1), who dismissed an appeal by the liquidator from the refusal of the referee to place the name of Mr. S. F. McKinnon on the list of contributories in respect of a sum of $5,000 unpaid on certain shares of the insolvent company. To the liquidator's claim McKinnon has pleaded, *inter alia,* that it is *res judicata* that he is not the holder of these shares. This plea is based upon a consent judgment dismissing an action brought by the company, in 1902, to recover from McKinnon the same sum of $5,000 in respect of unpaid calls. To the company's claim he then answered that he was not a shareholder and, alternatively, that the calls sued upon had not been regularly made. He also brought in a third party against whom he claimed indemnity. The judgment dismissing the action provided for the withdrawal of the claim against the third party.

In reply to the plea of *res judicata* the liquidator urges that since irregularity in the making of the calls would, if established, have been a sufficient defence to the company's action, the record does not shew a determination in McKinnon's favour of the issue whether he was or was not a shareholder.

In the present proceedings the regularity of the calls is admitted. Referring particularly to this admission, the learned Chief Justice of the Common Pleas held that it was sufficiently established that

> the ground upon which the respondent succeeded in the action was that he was not a shareholder in the company.

In delivering the unanimous opinion of the Court of Appeal the learned Chief Justice of Ontario makes special mention of the withdrawal of McKinnon's claim against the third party as indicating that it was intended that there should be "an end to all

(1) 22 Ont. L.R. 621.

claims upon the shares." I do not, however, understand him to reject the grounds upon which Sir W. R. Meredith based his judgment, but rather to add to them another leading to the same conclusion.

Looking at all the circumstances of the former action including those which appear to have received special attention in the provincial courts, and also the conduct of the company and its officers in regard to the respondent's status as a shareholder from the date of the judgment in 1904 down to the commencement of the liquidation in 1908 — he did not receive notice of the meetings or other proceedings of the company — I see no reason to doubt the correctness of the judgment against which the liquidator seeks to appeal.

That a consent judgment will support a plea of *res judicata* is conceded. Although contested by counsel for the applicant, the proposition that the court may look beyond the judgment and the pleadings to ascertain what issue was actually determined in an action, is well established by the authorities which the learned Chief Justices cite. The facts proper to be considered in this case make it reasonably clear that by the consent judgment the parties meant to dispose finally of the issue whether the defendant was or was not a shareholder in the plaintiff company. The judgment of which the liquidator now complains—I say it with respect—seems to me to be plainly right. Leave to appeal might properly be refused on this ground. *Lake Erie and Detroit River Ry. Co.* v. *Marsh* (1).

But, whether right or wrong, that judgment merely decides that from particular facts the proper infer-

(1) 35 Can. S.C.R. 197.

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ence is that by the consent judgment dismissing the company's action it was determined that McKinnon was not a shareholder. The proposed appeal raises no question of public importance. *Dominion Council of Royal Templars of Temperance* v. *Hargrove*(1). The affirmance or reversal by this court of the judgment of the Ontario Court of Appeal would not settle any important question of law or dispose of any matter of public interest. *Whyte Packing Co.* v. *Pringle*(2). These usual grounds for seeking leave to appeal are therefore absent.

I have not overlooked the fact that in section 48 (*e*) of the "Supreme Court Act," under which the cases that I have cited were decided, "special leave" is mentioned, while in section 106 of the "Winding-up Act," "leave" is the term used. But "leave" must be granted in the exercise of judicial discretion. Matters other than the amount involved in the appeal must be considered — and amongst them those to which I have alluded. Notwithstanding Mr. Tilley's able argument, unless leave to appeal to this court should be given as a matter of course in every case in which a substantial amount is at stake, I find no reason for granting the present application. Having twice appealed unsuccessfully, the liquidator has certainly discharged his whole duty. Although he has carried his case to the court of last resort in the province, his contention has not been accepted by a single judge. In a further appeal I see no prospect of any advantage to the insolvent estate, but rather a very great probability of its being involved in useless additional heavy expense. This litigation has been

(1) 31 Can. S.C.R. 385. (2) 42 Can. S.C.R. 691.

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already prolonged. The respondent should not lightly be subjected to the worry and the cost of further proceedings, which, so far as I can see, would serve no good purpose. This seems to be eminently a case in which the judgment of the provincial Court of Appeal should be accepted as final.

The motion will be dismissed with costs fixed at the figure usual in this court — $50.

Motion dismissed with costs.