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*Oct. 28.

*Oct. 29.

JOHN O'DONOHOE (DEFENDANT).....APPELLANT;

AND

C. E. BOURNE AND ANOTHER (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Final judgment—Discretionary order—Default to plead—R. S. C. c. 135, ss. 24 (a), 27—R. S. O. c. 44, s. 65—Ontario Judicature Act, rule 796.

After judgment has been entered by default in an action in the High Court of Justice it is in the discretion of a master in chambers to grant or refuse an application by the defendant to have the proceedings re-opened to allow him to defend, and an appeal to the Supreme Court from the decision of the court of last resort on such an application is prohibited by sec. 27 of "The Supreme and Exchequer Courts Acts."

Quære. Is the judgment on such application a "final judgment" within the meaning of sec. 24 (a) of the Act?

MOTION to quash an appeal from a decision of the Court of Appeal for Ontario (1), dismissing the appeal of the defendant from the judgments of the Divisional Court and of Meredith J., respectively, which dismissed two appeals against the order of the Master in Chambers rejecting an application to set aside a judgment entered against him by default with costs.

The motion to quash the appeal was based on the grounds, first, that the order in question was not a final judgment within the meaning of the Supreme and Exchequer Courts Acts; and secondly, that the order was made in the exercise of the judicial discretion of the court appealed from under rule 796

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 17 Ont. P. R. 522.

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of the Supreme Court of Judicature of Ontario and was not appealable.

Latchford for the motion cited *Morris* v. *London and Canadian Loan and Agency Co.* (1); *Martin* v. *Moore* (2); R. S. C. c. 135, ss. 24 (*a*) and 27.

The appellant in person contra.

The judgment of the court was delivered by:

TASCHEREAU J.—This case is before us on a motion to quash, heard yesterday.

The respondent's action was begun on the 15th April, 1896, claiming possession, under a mortgage, of premises occupied by the appellant.

Upon the appellant not filing any statement of defence judgment was entered against him on the 7th May, 1896.

The appellant then moved before the Master in Chambers to have the said judgment set aside and for leave to defend the action. On the 27th May, 1896, the master dismissed that application. The appellant then appealed from the master's order to Mr. Justice Meredith, who, on the 8th of June, 1896, dismissed the appeal. Then, a further appeal was taken to the Divisional Court and likewise dismissed on the 24th of October, 1896 (3). An appeal to the Court of Appeal met with the same fate on the 30th June, 1897 (4). From this last judgment the defendant now brings this appeal.

The respondent's contentions are that this court cannot entertain it, 1st. Because there is no final judgment to be appealed from, within the meaning of the words "final judgment" in the Supreme Court Act; and 2ndly. Because the judgment appealed from was an

(1) 19 Can. S. C. R. 434.
(2) 18 Can. S.C.R. 634.
(3) 17 Ont. P. R. 274.
(4) 17 Ont. P. R. 522.

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order in the discretion of the court, and consequently not appealable to this court under section 27 of the Supreme Court Act.

The respondent relies upon the authority of *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.* (1), to support his contention that the judgment appealed from here is not a final judgment. That case, though not precisely a similar one, seems to strongly support his views. See *Maritime Bank* v. *Stewart* (2); *In re Cahan* (3); *McGugan* v. *McGugan* (4); *Williams* v. *Leonard* (5). *Gladwin* v. *Cummings* (6) is more directly in point. But if there were any doubt on this branch of respondent's argument, there seems none possible under the other point, as to the judgment falling under sec. 27 of the Act, which prohibits appeals in matters of discretion. That an order of this kind is a discretionary order is unquestionable. I refer to the cases cited in Holmsted & Langton under sec. 65 of the Judicature Act, and under rule 796; also to *Cusack* v. *London and North-Western Railway Co.* (7), and to the cases cited in Snow's Practice of 1896, p. 584. The giving leave to appear or plead after judgment has always been treated as a discretionary order, using the word "discretionary" always, of course, as not at all meaning "arbitrarily;" *Nelson* v. *Thorner* (8); *Collins* v. *Hickok* (9). I refer also to Mr. Justice Patterson's remarks on this point in the case of *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.* (1). If the Court of Appeal had granted the defendant's motion, the plaintiff would have had no right to appeal to this court. *Papay-*

(1) 19 Can. S. C. R. 434.
(2) 20 Can. S. C. R. 105.
(3) 21 Can. S. C. R. 100.
(4) 21 Can. S. C. R. 267.
(5) 26 Can. S. C. R. 406.
(6) Cass. Dig. 2 ed. p. 426.
(7) [1891] 1 Q. B. 347.
(8) 11 Ont. App. R. 616.
(9) 11 Ont. App. R. 620.

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anni v. *Coutpas* (1). Now, if giving leave to defend is a discretionary order, refusing it is likewise a discretionary order. The appellant cannot contend that he has a right to have it reviewed by this court whether the judgment of the Court of Appeal was a right exercise of a discretionary power. That would be repealing the statute. It would be giving the right to appeal from every discretionary order, and the statute enacts that there shall be none, except in certain cases of which this is not one.

Appeal quashed with costs.

Solicitor for the appellant: *Edward Meek.*

Solicitors for the respondent: *Martin & Martin.*

(1) W. N. [1880], 109.