JAMES T. BAIN (PLAINTIFF).....APPELLANT; 1898

AND *Mar. 11.
*May 14.

ANDERSON & CO., AND THE ANDERSON FURNITURE COMPANY (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Master and servant—Contract of hiring—Duration of service—Evidence—Dismissal—Notice—Appeal—Assuming jurisdiction.

Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year is a question of fact to be decided upon the circumstances of the case.

A business having been sold the foreman, who was engaged for a year, was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but was then informed that if he desired to remain his salary would be considerably reduced. Having refused to accept the reduced salary he was dismissed, and brought an action for damages claiming that his retention for the month was a re-engagement for another year on the same terms.

Held, affirming the judgment of the Court of Appeal (24 Ont. App. R. 296) which reversed that of Meredith C. J. at the trial (27 O. R. 369) that as it appeared that the foreman knew that the business before the sale had been losing money and could not be kept going without reductions of expenses and salaries, as he had been informed that the contracts with the employees had not been assumed by the purchaser and as upon his own evidence there was no hiring for any definite period but merely a temporary arrangement, until the purchaser should have time to consider the changes to be made, the foreman had no claim for damages, and his action was rightly dismissed.

Where the jurisdiction of the Supreme Court of Canada to entertain an appeal is doubtful the Court may assume jurisdiction when it has been decided that the appeal on the merits must be dismissed. *Great Western Railway Company of Canada* v. *Brai* (1 Moo. P. C. N. S. 101) followed.

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

1898

BAIN.
v.
ANDERSON
& Co.

By 60 and 61 V. c. 34 s. 1 s.s. (*c*), no appeal lies from judgments of the Court of Appeal for Ontario unless the amount in controversy *in the appeal* exceeds $1,000, and by subsec. (*f*), in case of difference, it is the amount demanded, and not that recovered which determines the amount in controversy.

Held, per Taschereau J., that to reconcile these two subsections, paragraph (*f*) should probably be read as if it meant the amount demanded upon the appeal. To read it as meaning the amount demanded in the action, which is the construction the court has put upon R. S. C. c. 135 s. 29 relating to appeals from the Province of Quebec, would seem to be contrary to the intention of Parliament. *Laberge* v. *The Equitable Life Assurance Society* (24 Can. S.C.R. 59) distinguished.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Meredith C. J. at the trial (2) in favour of the plaintiff.

The facts of the case are sufficiently stated in the above head-note.

Gibbons Q.C., for the appellant.

Osler, *Q.C.*, and *S. H. Blake*, *Q.C.*, for the respondents.

The judgment of the court was delivered by

TASCHEREAU J.—Objection to our jurisdiction in this case was taken by the respondent *in limine*, on the ground that the amount demanded does not exceed the sum of $1,000 as required by 60 and 61 V. ch. 34 (D). The amount claimed by the action exceeds $1,000, but the amount awarded to the plaintiff by the court of first instance is only $408. Upon appeal by the defendants, the Court of Appeal dismissed the action *in toto*, and now upon this appeal by the plaintiff, all he claims is that the original judgment in his favour for $408 be restored. And that being so, the respondent argued that as the amount demanded does not exceed $1,000, the case is not appealable under paragraph "*f*," of section 1 of said statute, the amount de-

(1) 24 Ont. App. R. 296. (2) 27 O. R. 369.

manded, in that section, meaning as he contended, the amount demanded upon the appeal.

We held that under the ruling in *Laberge* v. *The Equitable Life Assurance Society* (1), it is the amount demanded originally by the action, not the amount demanded upon the appeal, that governs where the right to appeal is dependent upon the amount in dispute, and the case proceeded upon the merits. As no reference has been made to paragraph "*c*" of the same section of the statute, it was taken for granted that the enactments in *pari materia*, as to Quebec appeals, were the same as those now existing by the said statute for the Ontario appeals, but since, upon reference to the statutes, I find that for the Quebec appeals, it is the *amount in controversy* that governs, whilst for the Ontario appeals it is the amount in controversy *in the appeal.* So that to reconcile paragraphs "*c*" and "*f*" of section 1 of this statute, 60 & 61 V. c. 34, we should perhaps read paragraph "*f*" as if it meant the amount demanded upon the appeal. However, as we are to dismiss the appeal upon the merits, it is unnecessary in this case to rehear the parties on this question of jurisdiction, or to further consider it. And what I say of it now is a mere expression of my personal opinion upon the question, as at present advised. I may add, again speaking for myself, that it clearly appears by the preamble of this last Dominion statute, that the intention of Parliament was to confirm the Ontario Acts on the subject. Now, these Acts (2) clearly restrict the right of appeal to cases where the amount in controversy *in the appeal* exceeds $1,000. So that to apply the ruling in *Laberge* v. *The Equitable Life Assurance Society* to Ontario appeals would seem to be contrary to the intention of Parliament.

(1) 24 Can. S. C. R. 59.

(2) R. S. O. [1887] Ch. 42. sec. 2, and 60 Vict. Ch. 14, sec. 1.

1898

BAIN. v. ANDERSON & Co.

Taschereau J.

On the merits, assuming that we have jurisdiction, (*The Great Western Railway Company of Canada* v. *Braid* (1),) we are of opinion the appeal should be dismissed.

The learned judge who tried the case found that the appellant had been dismissed without reasonable notice, and was entitled to damages (2). The Court of Appeal, however, held that upon the evidence there was no definite engagement of appellant, but merely a temporary employment, and dismissed his action. It cannot at the present day be contended that, as a rule of law, where no time is limited for the duration of the contract of hiring and service, the hiring has to be considered as a hiring for a year. The question is one of fact, or inference from facts, the determination of which depends upon the circumstances of each case. Here, we think, with the Court of Appeal; first, that it was to appellant's knowledge that the Hay Company's business had before May, 1895 been a losing concern, which it was impossible to keep going without reductions of expenses and salaries; secondly, that on the 18th May, in the only interview between Anderson and appellant that took place, there was upon appellant's own evidence no hiring for any definite period, but merely a temporary arrangement until Anderson should have time to consider the changes to be made after the new organization was completed. Appellant was expressly told by the foreman that Hay's contracts with his employees had not been assumed by Anderson, and he had to admit in his examination that he anticipated there would be changes. On the 22nd of August, they notified him that his salary thereafter would be reduced to $600 if he desired to remain in the service of the new company. Now, under all the circumstances, this is

(1) 1 Moo. P. C. N. S. 101. (2) 27 O. R. 369.

1898

BAIN.
v.
ANDERSON & Co.

Taschereau J.

nothing but the notice he must have expected every morning since the first of the month. There is nothing in the evidence which justified him in thinking that he would not be subject to the reductions to be made in the salaries. I feel certain that if on the 18th of May or at any time afterwards, he had told Anderson that he did not intend to remain in the service of the new company if not paid $1,500 a year, as he had been by the old company, Anderson would have immediately told him he could not be re-engaged.

Appeal dismissed with costs.

Solicitors for the appellant: *Gibbons, Mulkern & Harper.*

Solicitors for the respondents: *Finkle & Mullen.*