JOHN HYDE (PLAINTIFF)-.....APPELLANT ;

AND

THOMAS LINDSAY (DEFENDANT).....RESPONDENT.

1898

*Oct. 24.
Nov. 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Right to, in Ontario cases—60 & 61 *V. c.* 34—*Application to pending cases.*

The Act 60 & 61 Vict. ch. 34, which restricts the right of appeal to the Supreme Court in cases from Ontario as therein specified, does not apply to a case in which the action was pending when the Act came into force although the judgment directly appealed from may not have been pronounced until afterwards.

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

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MOTION for approval of a bond for security for costs on appeal referred to the court by King J. in Chambers.

The application to the Judge in Chambers to have the security approved was opposed on the ground that the judgment for the plaintiff at the trial, which was reversed by the Court of Appeal, was for less than $1,000, and the case did not fall within any of the provisions of 60 & 61 Vict. ch. 34, which limits the right of appeal to the Supreme Court from judgments of the courts in Ontario. The plaintiff contended that the Act did not apply, as the proceedings in the cause were pending when it came into force.

The writ in the cause was issued in April, 1897. The trial was concluded and judgment reserved by the trial judge on June 25th, 1897, and the Act, 60 & 61 Vict. ch. 34, received the Royal assent on June 29th.

The trial judge pronounced judgment in favour of the plaintiff on August 3rd. The case then went to the Court of Appeal where judgment was given reversing the decision of the trial judge on May 10th, 1898.

The question for the determination of the court on the motion was whether or not the plaintiff was deprived of his appeal by the said Act.

Belcourt in support of the motion. This court has decided that the Act 54 & 55 Vict. ch. 25, which extended the right of appeal in Quebec cases to judgments of the Court of Review, did not apply to cases which were pending when it came into force. See *Hurtubise* v. *Desmarteau* (1); *Couture* v. *Bouchard* (2); *Williams* v. *Irvine* (3); *Cowen* v. *Evans* (4.).

If that is the case with respect to an Act granting a right of appeal *a fortiori* must it be so in regard to the

(1) 19 Can. S. C. R. 562.
(2) 21 Can. S. C. R. 281.
(3) 22 Can. S. C. R. 108.
(4) 22 Can. S. C. R. 331.

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Act in question here by which such right is taken away.

Pratt, contra. The plaintiff applied to the Court of Appeal for special leave to appeal to this court under the Act which leave was refused and he cannot now obtain such leave indirectly.

The Act 60 & 61 Vict. ch. 34, is, by its terms, an enactment by Parliament of legislation previously passed in Ontario and cannot be treated as a new Act.

The judgment of the court was delivered by:

TASCHEREAU J.—Motion for leave to put in security for costs. The respondent opposes the application on the ground, 1st. That the appellant has made an application to the Court of Appeal in Ontario for special leave to appeal under section 1 (*e*) of 60 & 61 Vict. ch. 34, which application has been refused. 2nd. That the case is for less than $1000, and not appealable under that section, sub-secs. a, b, c, d. The appellant's answer is that this statute has no application, because the case was pending before it was passed

The dates are: Writ issued April 10th, 1897; trial, 25th June, 1897; judgment reserved and rendered August 3rd, 1897; judgment in Court of Appeal, May 10th, 1898. The statute in question, 60 & 61 Vict. ch. 34, was sanctioned on the 29th June, 1897.

We have to hold under the decisions of this court that the case is appealable, and that the statute does not apply to cases then pending (on June 29th, 1897), though the judgment of the Court of Appeal has been rendered since. If we were not fettered by authority, I, personally, would hold that the statute applies to all cases in which the judgment of the Court of Appeal has been given since it was sanctioned, but I am not at liberty to give effect to my individual opinion. In

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Hurtubise v. *Desmarteau* (1), and *Couture* v. *Bouchard* (2), the judgments of the Quebec Court of Review appealed from were given, or held to have been given, on the very same day that the Act giving the right to appeal from that court was sanctioned. The appeals were quashed. The decisions on those cases, however, do not directly apply here, though it might perhaps be said that it was assumed in both that if the judgments appealed from had been rendered after the passing of the statute, they would have been appealable. Strong J. (now Chief Justice) gave his opinion that even in that case the judgments would not have been appealable. However, the subsequent decisions of the court on the matter leave no room for doubt.

In the case of *Williams* v. *Irvine* (3), the action had been instituted in 1890, tried in June, 1891, and judgment reserved, subsequently given on the 17th November, 1891. Judgment in Review appealed from 29th February, 1892. The statute giving an appeal from the Court of Review had been sanctioned on September 30th, 1891. The appeal was quashed, because when the action was instituted there was then no right of appeal from the Court of Review. In *Mitchell* v. *Trenholme* (4), the action was for $5,000; the judgment in first instance given on the 27th September, 1890, granted $300 to plaintiff. The Court of Appeal confirmed that judgment on the 28th February, 1893. The statute which enacted that when the right to appeal is dependent upon the amount in dispute, the amount demanded is thereby meant, was passed on the 30th September, 1891. The appeal was quashed, as when the action was instituted it was the amount granted that governed, and as the amount granted by the judgment appealed from was

(1) 19 Can. S. C. R. 562.
(2) 21 Can. S. C. R. 281.
(3) 22 Can. S. C. R. 108.
(4) 22 Can. S. C. R. 333.

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under $2,000 the case was not appealable. In *Cowen* v. *Evans* (1), the judgment in the Superior Court, dismissing an action for $3,050, had been rendered on the 5th December, 1891. The judgment of the Court of Appeal on 28th February, 1893, had reversed the judgment of the Superior Court, and granted $880 to plaintiff. The defendant's appeal to this court was quashed, because the statute passed on September 30th, 1891, giving the right to appeal in cases where the amount granted was less than $2,000, if the amount demanded had been $2,000 or over, did not apply to cases pending *en délibéré* before the Superior Court on that day. The words *en délibéré* in the report of that case seem to have crept in by error, for, on the same day, in *Mills* v. *Limoges* (2), the appeal was quashed in a similar case, where the judgment of the Superior Court had been given in April, 1891, five months before the statute, though the judgment appealed from had been rendered over twelve months later.

A similar case, *The Montreal Street Railway* v. *Carrière* (3), is noted as a foot note, at page 335. Here, upon this application, we have the converse of these cases. There, it was a statute giving the right of appeal that was held not to apply to cases pending before the statute, though the judgments appealed from had been rendered since the statute had been enacted. Here we have the question presented under a statute taking away the right of appeal in cases where it existed previously. But I cannot see that it alters the result. If the statute in the former cases does not apply to pending cases, I do not see upon what principle we could hold that the statute in the present case does apply to pending cases.

(1) 22 Can. S. C. R. 331. (2) 22 Can. S. C. R. 334.
(3) 22 Can. S. C. R. 335.

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In the objection taken by the respondent that the appellant's application should be refused because he had unsuccessfully applied for special leave to the Court of Appeal in Ontario before coming here, there is nothing. The mistake he made of his rights cannot deprive him of those rights, or constitute a waiver thereof.

Motion allowed with costs taxed at $25.

Motion allowed with costs.

Solicitors for the appellant: *Belcourt & Ritchie.*

Solicitors for the respondent: *Pratt & Pratt.*