WILLIAM S. TUCKER (DEFENDANT)...APPELLANT; 1899

AND *Oct. 27.

WILLIAM YOUNG AND JOHN W. YOUNG (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Case originating in County Court—Transfer to High Court.

There is no appeal to the Supreme Court of Canada in a case in which the action was commenced in the County Court and transferred by order to the High Court of Justice in which all subsequent proceedings were carried on.

Per Gwynne J. contra. Where the cause is transferred because the pleas ousted the County Court of jurisdiction an appeal lies.

Leave to appeal cannot be granted under 60 & 61 V. c. 34 s. 1 (*e*), in a case not appealable under the general provisions of R. S. C. ch. 135.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the ruling of the Drainage Referee who dismissed the plaintiff's action.

The action was begun by a writ issued out of the County Court of the County of Lambton to recover damages for injury to plaintiffs land by water brought upon it from drains constructed by defendant on his own land. Defendant pleaded, *inter alia*, want of jurisdiction in the court and, as soon as issue was joined, the cause was transferred to the High Court of Justice by order of the County Court Judge exercising the jurisdiction of a local Judge of the High Court. The order of transfer states that the jurisdiction of the County Court was properly and *bonâ fide* brought in question.

At the trial a reference was ordered to the Drainage Referee who held that plaintiff had no cause of action, which holding was reversed by the Court of Appeal on appeal from his report.

PRESENT: Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

(1) 26 Ont. App. R. 162.

1899

TUCKER v. YOUNG.

On the appeal to the Supreme Court coming on for hearing, counsel for respondent moved to quash for want of jurisdiction, claiming that the action did not originate in a Superior Court.

Aylesworth Q.C. for the motion.

Riddell Q.C. contra, argued that the case did originate in a Superior Court, but if not, that leave to appeal should be granted under 60 & 61 Vict. ch. 34, sec. 1 (*e*).

THE CHIEF JUSTICE (oral).—Section 24 (*a*) of the Supreme and Exchequer Courts Act gives jurisdiction to this court to entertain appeals "from all final judgments of the highest court of final resort * * * in cases in which the court of original jurisdiction is a Superior Court." And section 28 gives jurisdiction in appeals from final judgments "in actions, suits, &c., originally instituted in a Superior Court of the Province of Quebec, or originally instituted in a Superior Court in any of the Provinces of Canada other than the Province of Quebec."

As we have no jurisdiction unless the case in appeal originated in the Superior Court, how can we entertain this appeal? The institution of a suit is the writ bringing the defendant into court, and the writ in this case issued out of a county court. This objection cannot be got over by saying that some subsequent proceeding in the cause was equivalent to what the Act requires. The appeal must be quashed.

TASCHEREAU J.—I am also of opinion that the appeal must be quashed as the case did not originate in a Superior Court.

As to the motion for special leave to appeal under subsec. (*e*), sec. 1 of 60 & 61 V. c. 34, it clearly cannot be granted. That enactment merely gives us the right to grant special leave in that class of cases which were previously appealable, but which are by that Act. 60 &

61 Vict. ch 34, decreed not to be thereafter appealable *de plano*, and this is not a case of that class.

GWYNNE J. (dissenting.)—I agree with Mr. Justice Osler that this case must be regarded as having originated in a Superior Court within the meaning of the section of the Act regulating appeals to this court from the judgments of a Superior Court. True it is that the plaintiff had commenced an action in the County Court of the County of Lambton to which the defendant pleaded pleas which ousted all jurisdiction of the County Court, whereupon all proceedings then had in the County Court were, by reason of the absence of jurisdiction in the County Court to entertain the matter, transferred to the High Court of Justice as the only court having jurisdiction in the matter under the provisions of section one hundred and eighty-six, R. S. O. (1897) ch. 51. Now it is from a judgment of the Court of Appeal for Ontario, pronounced in appeal from a judgment of the High Court of Justice in Ontario, that the present appeal is taken, and such appeal is from the judgment of the highest court of appeal in Ontario in a case in which the High Court of Justice, being a superior court, alone had original jurisdiction. That is a point which, as it appears to me, is concluded by the transfer of the case from the County Court for want of jurisdiction to entertain it. The appeal, therefore, in my opinion, lies, and the motion to quash should be dismissed with costs.

SEDGEWICK and KING JJ. concurred in the judgment of Mr. Justice Taschereau.

Appeal quashed with costs.

Solicitor for the appellant: *A. Weir.*

Solicitors for the respondents: *Kittermaster & Gurd.*