THE TOWN OF AURORA.....APPELLANT; 1902

AND *May 22,
*June 9.

THE VILLAGE OF MARKHAM.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—60 & 61 *V. c.* 34—*Quashing by-law—Appeal de plano—Special leave.*

The appeals to the Supreme Court from judgments of the Court of Appeal for Ontario are exclusively governed by the provisions of 60 & 61 Vict. ch. 34 and no appeal lies as of right unless given by that Act.

The Supreme Court will not entertain an application for special leave to appeal under the above Act after a similar application has been made to the Court of Appeal and leave has been refused.

MOTION for special leave to appeal from a judgment of the Court of Appeal for Ontario (1) quashing a by-law of the Town of Aurora.

The by-law in question provided for a bonus to persons proposing to establish an industry in the town and was assented to by the ratepayers. As the persons entitled to the bonus were, when it was passed, carrying on the same industry in the Village of Markham, that corporation moved the High Court of Justice for an order to quash it which motion was refused but, on appeal, the by-law was quashed by the Court of Appeal and the Town of Aurora sought to appeal from the judgment quashing it to the Supreme Court of Canada.

Aylesworth K.C. for the motion.

Raney contra.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Davies and Mills JJ.

(1) 3 Ont. L. R. 609.

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THE CHIEF JUSTICE.—The municipal council of the Town of Aurora passed a by-law granting a bonus to persons who proposed to establish a certain industry in that municipality. The by-law, having passed the council, was duly assented to by a majority of the ratepayers of the municipality according to the tenor of the Municipal Act. It appeared that, at the time of the passing of the by-law, the same persons had already established and were carrying on the same industry, which they proposed to establish in Aurora, in the Village of Markham. The High Court of Justice refused to quash the by-law in question, whereupon an appeal was taken to the Court of Appeal which court allowed the appeal and directed the by-law to be quashed.

The Town of Aurora now moves for leave to appeal to this court.

Upon the argument of the motion it was suggested that leave to appeal was not requisite inasmuch as it was open to the applicants to appeal *de plano*. We are of opinion that, as regards the Province of Ontario, there can be no appeal in the case of an application to quash a municipal by-law without leave so to do having been previously granted either by the Court of Appeal or by this court.

Under the Act originally constituting this court it was by section 24 authorized to entertain appeals

> in any case in which a by-law of a municipal corporation has been quashed by a rule or order of court.

By this Act no leave to appeal was required.

Subsequently, by statute 60 and 61 Vict. c. 34, Parliament enacted that no appeal should lie to the Supreme Court of Canada from any judgment of the Court of Appeal of Ontario except in certain enumerated cases amongst which proceedings to quash by-

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laws were not included. It then proceeded to provide that there might be an appeal

> in other cases where the special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last mentioned court is granted.

In the face of this provision it is manifest that the unqualified jurisdiction to entertain appeals in this class of cases conferred by the original act is restricted and is by it limited to those in which leave to appeal is first obtained either from the Court of Appeal or from this court.

It appears that in the case before us the Court of Appeal upon a motion made for the purpose has formally refused leave to appeal.

It is therefore now to be considered whether this court, which undoubtedly has jurisdiction to entertain this application, will or will not grant the leave already refused by the Court of Appeal.

I am of opinion that we ought not to sanction an appeal in a case such as the present. First, for the reason that leave has already been refused by the provincial court. Were we to do so we should be substantially but indirectly reviewing the discretion of the Court of Appeal in a matter in which no appeal is given, for it has been held by high authority in England that a decision granting or refusing leave to appeal is not itself the proper subject of an appeal. Parties have the election of making the application to either court and indeed, according to the words of the Act, to both alternatively, but it does not seem reasonable that having elected to make application to one court they should in case of failure be at liberty to resort to the other. Therefore upon this, treating it as a ground for refusing leave and not as an objection to the jurisdiction of this court, I think we ought to refuse this application.

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Further, the ground on which the Court of Appeal quashed the by-law is so clear and plain that, taking into consideration the probability or improbability of error being established in the judgment of the court below, (a matter always considered by the Privy Council on an application for leave to appeal,) it appears that the judgment cannot be otherwise than right. The sole question was as to whether a certain enactment of the municipal law controlling the granting of bonuses to persons or corporations who had already established the same industry in another place, was applicable, and if so whether it made any difference that the parties previously to applying for the bonus had determined to remove from their present site.

The enactment referred to is in these words (1):

No by-laws shall be passed by a municipality for granting a bonus to secure the removal of an industry already established in this province.

Surely it cannot be doubted that the intention of parties applying for a bonus of this kind to remove their establishment from its present seat ought not to be considered as making this provision inapplicable. This is the construction the Court of Appeal have placed upon the statute and it appears to me that any appeal against its decision could not possibly succeed.

The motion is refused with costs.

TASCHEREAU J.—When special leave has been asked of the Court of Appeal for Ontario and refused or granted the case is concluded. It is clearly concluded when granted. I do not see why it is not concluded if refused. If refused by this court in first instance, it could hardly be contended that the Court of Appeal for Ontario could subsequently grant leave. Yet that

(1) 63 V. c. 33 s. 9 (*e*) [Ont.].

would be the consequence if we should decide that a party having elected to ask leave from one of the two courts would, after being refused, have the right to apply to the other court.

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SEDGEWICK, DAVIES and MILLS JJ. concurred in the judgment dismissing the motion with costs.

Motion dismissed with costs.

Solicitor for the appellant: *T. H. Lennox.*

Solicitors for the respondent: *Mills, Raney, Anderson & Hales.*