THE HULL ELECTRIC COMPANY (DEFENDANTS) ..... APPELLANTS; 1909 *Feb. 16. *March 29.

AND

PIERRE CLEMENT (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Appeal—Jurisdiction—Court of Review—Reduction of damages—Confirmation of Superior Court judgment—R.S.C. [1906] *c.* 139, *s.* 40.

There can be no appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, appeal side, quashing an appeal from the Superior Court, sitting in review, for want of jurisdiction. *City of Ste. Cunégonde* v. *Gougeon* (25 Can. S.C.R. 78) followed, Idington J. dissenting.

In an action for damages where the plaintiff obtains a verdict at the trial and the Court of Review reduces the amount awarded thereon the judgment of the Superior Court is confirmed and, therefore, no appeal lies to the Court of King's Bench, but there might be an appeal from the judgment of the Court of Review to the Supreme Court of Canada. *Simpson* v. *Palliser* (29 Can. S.C.R. 6) distinguished. Idington J. dissenting.

MOTION to approve security for costs and to affirm the jurisdiction of the Supreme Court of Canada to entertain an appeal from the judgment of the Court of King's Bench, appeal side, quashing an appeal from the judgment of the Superior Court, sitting in review, at Montreal, which had varied the judgment of the Superior Court, District of Ottawa, by reducing the amount of damages assessed in favour of the plaintiff.

The action was for damages for personal injuries and, in the Superior Court, the plaintiff's action was

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

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maintained with costs, the damages being assessed at $6,000. The defendants appealed to the Superior Court, sitting in review, at Montreal, and by the judgment of that court, the judgment of the court of first instance was varied by the reduction of the damages to the sum of $3,500. The defendants then sought a further appeal to the Court of King's Bench, where, on motion on behalf of the plaintiff, the appeal was quashed, as incompetent, on the ground that the judgment of the Court of Review was, in effect, a confirmation of the judgment of the Superior Court on the inscription for review by the defendants and that, under articles 43 of the Code of Civil Procedure, there could be no further appeal by the party so inscribing in review.

The application was first made before the Registrar, in Chambers, and was, by him, referred for decision by the court.

Aylen K.C. for the motion.

E. B. Devlin K.C. contra.

THE CHIEF JUSTICE.—This is an appeal from a decision of the Court of King's Bench for the Province of Quebec quashing, for want of jurisdiction, an appeal by the Hull Electric Co. from a judgment of the Superior Court, sitting in review.

The plaintiff (respondent) recovered judgment against the defendants (appellants) in the Superior Court for the sum of $6,000 and from this judgment the appellants inscribed in review and that court reduced the condemnation to the sum of $3,500.

The defendants then appealed to the Court of

King's Bench and, there, the appeal was dismissed, on the ground that the judgment of the Court of Review from which the appeal was taken was merely a confirmation of the judgment of the Superior Court (article 43 C.P.Q.). It was held that, in so far as it condemned the appellant to pay the amount of the judgment of the Superior Court, to the extent of $3,500, the judgment of that court was not, in that respect, revised or reformed, but confirmed in review; and that part of the judgment of the Superior Court so confirmed could not be modified in appeal. In this conclusion I agree.

The object of the article (43) is to limit appeals, and if the appellants are allowed to go from the Court of Review to the Court of King's Bench and from that court come here merely to get relief from the judgment of the Superior Court, then there would be three appeals from the judgment of the latter court, which is the very thing the statute was intended to prevent. The appellants should have come to this court from the Court of Review direct.

We were referred to the case of *Simpson* v. *Pallisser*(1), where the damages of the plaintiff had been increased on appeal to the Court of Review and, upon that ground, it was held here that an appeal lay to the Court of King's Bench, and not here. It will be seen that *Simpson* v. *Pallisser*(1) is not an authority on the point raised here. In that case the amount of the condemnation was increased in review; the judgment of the Superior Court was, therefore, not confirmed, and the party prejudiced by that increase was entitled to appeal to the Court of Appeal. Here, as I have said,

(1) 29 Can. S.C.R. 6.

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the appeal is taken from a judgment which does not revise or reform, but confirms *pro tanto* the judgment of the Superior Court. This judgment is in accordance with the settled jurisprudence of Quebec since *Beauchêne* v. *Labaie*(1), where it was held that there is no appeal from the Court of Review when the party appellant complains of a judgment in review which confirms in part the judgment appealed from, and by his appeal seeks to obtain redress against that part of the judgment of the Superior Court which is confirmed in review. The article of the Code of Procedure (43), formerly 1115 C.P.C., is not new. It was first enacted in 1867 and amended in 1874 by 37 Vict. ch. 6, sec. 1, and re-enacted in 1888 (R.S.Q. art. 6005), in 1891, by 54 Vict. ch. 48, par. 2, and, finally, in 1897, when the present code was promulgated. I would not disturb the construction put upon this article by the Court of King's Bench and never departed from since 1876. *Fraser* v. *Brunette*(2), is not an exception to the general rule. That case is reported also in 19 Revue Légale, at page 305, but in both places imperfectly. In *Fraser* v. *Brunette*(2) the plaintiff had obtained from the defendant a right of pre-emption with respect to two lots of land which in violation of this agreement the defendant afterwards disposed of; hence an action in which the plaintiff asked by his conclusions: 1st. that the defendant be condemned to give him a title to the lots in question within a fixed delay; 2ndly. by subsidiary conclusion that in default of a title the judgment of the court do avail to him as such. During the course of the proceedings the plaintiff amended his claim alleging that he had suffered damages as a result of the sale made

(1) 10 R.L. 115.

(2) M.L.R. 3 Q.B. 310.

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by defendants to the extent of $1,000, and that instead of being condemned to give him a deed to the property he prayed that the defendant be condemned to pay as damages, $1,000. The Superior Court, overlooking the amended pleadings, condemned the defendants to pass a title in accordance with the conclusions of the action as originally drafted, and in default that the judgment be equivalent to a title. The defendants thereupon appealed to the Court of Review where the original judgment was confirmed as to the right of pre-emption, but reformed by condemning the defendant to pay $1,000 as liquidated damages instead of returning the property. Hence the appeal to the Queen's Bench where the appeal was heard on the ground that the judgment was reformed by substituting a condemnation to pay $1,000 for a condemnation to return the property. This is not in principle a departure from *Beauchêne* v. *Labaie*(1). In *Fraser* v. *Brunette*(2), the part of the judgment in review complained of completely reversed the judgment of the Superior Court.

I would follow *City of Ste. Cunégonde* v. *Gougeon et al.*(3), where it was held that the Court of Queen's Bench having properly declined to exercise jurisdiction, no appeal lies to this court.

Application refused with costs.

GIROUARD J. agreed with the Chief Justice.

DAVIES J.—The right to appeal to this court from the judgment of the Court of King's Bench of Quebec quashing, for want of jurisdiction, an appeal by the Hull Electric Co. from the judgment of the Superior

(1) 10 R.L. 115.
(2) 3 M.L.R. K.B. 310.
(3) 25 Can. S.C.R. 78.

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Court, sitting in review, depends upon the construction to be put upon sub-section 4 of article 43 of the Code of Civil Procedure of Quebec.

The simple question is whether or not a judgment of the Court of Review reducing the damages awarded by the Superior Court from $6,000 to $3,500 can be held to be a confirmation of that judgment within the meaning of the above article of the Code of Procedure.

The question is largely one of procedure, and, as it appears to be the settled jurisprudence of Quebec, since *Beauchêne* v. *Labaie*(1), that a judgment reducing the damages only is a confirmation *pro tanto* of the judgment of the court of first instance, and so within the article referred to, I will not dissent from the judgment proposed refusing the right to appeal.

Had the question come before us untrammelled by decisions which, in questions of procedure, it is not the practice of this court to interfere with, I should have been prepared to allow the appeal on the ground that the reduction of the damages was not a confirmation of the judgment of the court of first instance within the meaning of the article of the Code of Procedure.

IDINGTON J. (dissenting).—I think the case of *Simpson* v. *Palliser*(2) ought to govern this application.

It is though, on the facts, the converse of this case, in principle identical. It simply was a case of increasing whereas the case at bar is a case of reducing the amount of the judgment.

This court held, contrary in principle to what the

(1) 10 R.L. 115.

(2) 29 Can. S.C.R. 6.

Court of Queen's Bench had previously held in *Beauchêne* v. *Labaie*(1), such a thing was not a confirmation, and, hence, an appeal would lie to the Court of King's Bench. That court has, in the case at bar, notwithstanding the holding of this court, refused to exercise its jurisdiction.

I am unable to understand how increasing, for and in respect of the same cause of action, the amount of damages, instead of merely diminishing them, can be more of a confirmation of the judgment in the one case than in the other.

The case of *The City of Ste. Cunégonde* v. *Gougeon* (2) does not touch the point. In that, the question raised was whether or not there could be an appeal to the Court of Queen's Bench and this court held there could not and, there being, therefore, no possible appeal from the court of final resort in the province, no appeal could lie here.

The Chief Justice, in disposing of that case, makes clear that it formed one of the numerous class of cases where no appeal is allowed by the provincial legislation to the final court of resort in the province and no legislation existed to permit an appeal here from a lower court, as to a limited extent is permitted in some Quebec cases, there could, therefore, be no appeal either here or to the Court of Queen's Bench.

Besides the former case is the last authority of this court on the subject.

In the recent case of *The C. Beck Manufacturing Co.* v. *Valin*(3), at page 528, I had occasion to fully consider the right of appeal when it turns on the

(1) 10 R.L. 115.
(2) 25 Can. S.C.R. 78.
(3) 40 Can. S.C.R. 523.

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question of a court having erroneously either asserted or refused to exercise its jurisdiction.

I concluded then and hold now that an appeal in such case is an appropriate remedy where the case is otherwise within any of the classes (and having the necessary pre-requisites) for which an appeal is provided.

The application should, I think, be granted.

DUFF J. agreed with the Chief Justice.

Motion refused with costs.

Solicitors for the appellants: *Aylen & Duclos.*

Solicitors for the respondent: *Brooke, Chauvin & Devlin.*