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Aug. 4.
Aug. 19.

JAMES J. RILEY (PLAINTIFF).....APPELLANT;

AND

CURTIS'S AND HARVEY (OF CANADA) LIMITED (IN LIQUIDATION) AND J. LEONARD APEDAILE (DEFENDANTS).....RESPONDENTS.

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

Appeal—Leave to appeal—"Winding-up Act", R.S.C. 1906, c. 144, s. 106.

Leave to appeal to the Supreme Court of Canada from a judgment in proceedings under the "Winding-up Act" will not be granted, though the amount in controversy exceeds $2,000, if no important principle of law nor the construction of a public Act nor any question of public interest is involved.

MOTION for leave to appeal from a decision of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of MacLennan J. and dismissing a claim made by the appellant for $50,000.

The facts are fully stated in the judgment of Mr. Justice Mignault on the application for leave.

Chauvin K.C. for the motion.
Elder contra.

MIGNAULT J.—This is a motion made before me by the appellant on August 6th, 1919, for leave to appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench (appeal side) of the Province of Quebec, of the 26th June, 1919, which unanimously affirmed the judgment of the Superior Court (MacLennan J.) of the 11th February, 1919, dismissing a claim made by the appellant against the respondents for $50,000.00.

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*PRESENT:—Mr. Justice Mignault in Chambers.

The litigation arose out of an agreement of the 13th March, 1917, between the appellant and Curtis's & Harvey (of Canada), Limited, whereby the latter, for the consideration therein stated, promised to pay the appellant the sum of $250,000,00, payable as follows:—$25,000.00 in ten days, $75,000.00 before the end of May, 1917, and $150,000.00 before the 15th July, 1917, with option to the company, in the event of its obtaining any new contract involving deliveries after the completion of existing contracts, that it might pay the last instalment of $150,000.00 in three amounts of $50,000.00 on the last days of July, August and September, 1917, with interest at 6%.

By clause 7 of the agreement, it was provided that until full payment of the sum of $250,000.00, the company would not deal with, dispose of or charge its assets, save in the ordinary course of its business operations, under a penalty of $50,000.00 payable to the appellant.

The company paid the two first instalments, and the condition provided for having happened, it made option to pay the balance of $150,000 in three instalments, and it paid the first of these instalments, $50,000.00, which became due on the 31st July, 1917. On the 18th August, 1917, practically the whole of the company's plant and materials at Dragon were destroyed by fire and explosions which prevented the continuance of the company's manufacturing operations, and it was decided that it was inadvisable to rebuild the plant.

The company had then an unfinished contract with the United States Government, entered into in July, 1917, for the manufacture of 10,800,000 pounds of refined trinitro-toluol, which contract was cancelled after the fire, and the United States Government

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made a new contract with Canadian Explosives Limited out of which a substantial percentage of profit was to be paid, and was paid, to the company.

A winding-up order was made against the company on the 5th October, 1917, on the petition of the secretary of the company in his capacity as shareholder, but at the request of the company which acquiesced in the winding-up order.

The appellant filed his claim with the liquidator for the balance of $100,000 then due to him, and also claimed the penalty of $50,000.00 on the ground that the company had violated clause 7 of the agreement. This latter claim was contested by the liquidator whose contestation was maintained by the Superior Court and by the Court of King's Bench.

It is stated in the reasons for judgment of Mr. Justice Martin, in the latter court, that the liquidator has since paid the appellant $75,000.00 and that there remains only due $25,000.00 on the $250,000.00 payable under the agreement.

With regard to the penalty of $50,000.00, both courts have held that the appellant cannot claim it under clause 7 of the agreement, the Superior Court because the company had not dealt with its assets in the manner provided against, and the Court of King's Bench mainly because by the happening of the fire of the 18th August, 1917, the condition of clause 7 no longer applied and the company was entitled to deal with its remaining assets in the manner in which it had done in the interest of the appellant and its other creditors.

Under these circumstances the appellant has applied to me for leave to appeal to this court from the judgment of the courts below. This appeal cannot be taken, under section 106 of the "Winding-Up Act"

(R.S.C. ch. 144), unless the amount involved exceeds $2,000.00, and unless leave be obtained from a judge of the Supreme Court of Canada.

Here the amount involved is sufficient to give jurisdiction to this court. The sufficiency of the amount is not however conclusive of the right of the appellant to appeal to this court. He must obtain leave, and the discretion to grant or refuse this leave must be exercised judicially, that is to say, for sufficient reason in the judgment of the judge to whom the application for leave to appeal is made.

The question as to the sufficiency of the reasons for granting leave to appeal is not now a new one, and certain rules have been laid down which I feel I should follow.

Thus in *Lake Erie and Detroit River Ry. Co.* v. *Marsh*(1), where special leave to appeal was applied for under sec. 48, sub-section e, of the "Supreme Court Act"—and I conceive that the same rule should be followed in cases arising under section 106 of the "Winding-Up Act"—Mr. Justice Nesbitt stated that:

> Where the case involves matter of public interest, or some important question of law, or the application of Imperial or domestic statutes, or a conflict of Provincial or Dominion authority, or questions of law applicable to the whole Dominion, leave may well be granted.

While the learned judge disclaimed the intention of laying down any rule which would not be subject to future qualification, I think his statement of the reasons why the discretion to grant leave should be exercised furnishes a convenient test for the guidance of the court or of its judges in a matter like this. And I would also think that where the only importance of a case is on account of the amount at issue, and where, however important the matter may be for the parties

(1) 35 Can. S.C.R. 197.

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to the litigation, the only question to be determined is the construction and effect of a private contract, leave to appeal to this court from the unanimous judgment of two courts should not be granted.

Moreover, *In re The Ontario Sugar Company (McKinnon's Case)*(1), Mr. Justice Anglin refused leave to appeal, under section 106 of the "Winding-Up Act," on the ground that the proposed appeal raised no question of public importance, and that the affirmance or reversal by this court of the judgment of the Ontario Court of Appeal would not settle any important question of law or dispose of any matter of public interest.

This is emphatically the case here. The proposed appeal would deal exclusively with the question whether there has been a breach on the part of the company of the obligation it assumed under clause 7 of its agreement with the appellant, entitling the latter to claim the penalty of $50,000.00, and the affirmance or reversal of the judgment of the Quebec Court of King's Bench would not settle any important question of law or dispose of any matter of public interest.

I can therefore see no reason why I should exercise the discretion given me by section 106 of the "Winding-Up Act" and grant leave to appeal from the judgment of the Court of King's Bench. The motion of the appellant is dismissed with costs.

Motion dismissed with costs.

(1) 44 Can. S.C.R. 659.