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*June 10, 11.

GEORGE ARCHIBALD AMER AND LABAN AMER..... ..... } APPELLANTS;

AND

THE QUEEN..... .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR ONTARIO.

*Appeal*—38 *Vic., Ch.* 11, *Sec.* 49—*Conviction when unanimous.*

In Michaelmas Term, 1877, certain questions of law reserved, which arose on the trial of the Appellants, were argued before the Court of Queen's Bench for *Ontario*, composed of *Harrison*, C. J., and *Wilson*, J., and on the 4th February, 1878, the said Court, composed of the same judges, delivered judgment affirming the conviction of the Appellants for manslaughter.

The Court of Queen's Bench for *Ontario*, when full, is composed of a Chief Justice and two Puisne Judges.

The Appellants thereupon appealed to the Supreme Court under 38 *Vic.*, ch. 11, sec. 49.

*Held*,—That the conviction of the Court of Queen's Bench, although affirmed but by two judges, was unanimous, and, therefore, not appealable.

APPEAL from a judgment of the Court of Queen's Bench for *Ontario*, affirming the conviction of the Court of Oyer and Terminer and Gaol delivery for the District of *Algoma*.

At a special Court of Oyer and Terminer and general Gaol delivery in and for the provisional judicial District of *Algoma*, held on the 2nd October A. D., 1877, *George Archibald Amer* and *Laban Amer*, were tried for the wilful murder of *William Bryan*, and *George Archibald Amer* was found guilty of manslaughter, and *Laban Amer* was found not guilty. They were also

*PRESENT.—Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

tried for the murder of *Charles Bryan* and both found guilty. At the trial the learned Judge reserved certain questions of law for the consideration of the Court of Queen's Bench for *Ontario*, and thereupon the said questions of law were argued before the Court of Queen's Bench, *Harrison*, C. J., and *Wilson*, J., being the only judges then present. On the 4th February, 1878, the Court of Queen's Bench, the same judges being present, considered and adjudged that the conviction of the said *George Archibald Amer* and *Laban Amer* be and the same were thereby affirmed.

The said *George Archibald Amer* and *Laban Amer* appealed to the Supreme Court of *Canada* under sec. 49 of the Supreme Court Act.

The following statement of facts was agreed by counsel to be taken on the argument as part of the case :—

"The Court of Queen's Bench, when full, is composed of a Chief Justice and two Puisne Judges. Prior to the 13th November, 1877, the members of the said Court were the Honorable Chief Justice *Harrison* and the Honorable Justices *Morrison* and *Wilson*. Previous to the 3rd December, 1877, being the day upon which this case was argued in the Court of Queen's Bench, Mr. Justice *Morrison* was appointed Justice of the Court of Appeal for *Ontario*, by commission bearing date the 30th November, 1877, and had, previous to the said 3rd day of December, intimated his acceptance of the said office of Justice of the Court of Appeal, and had thereupon ceased to act as Judge of the Court of Queen's Bench. He did not, however, take the oath of office as Justice of the Court of Appeal until the 15th December, 1877. Mr. Justice *Armour's* commission as Judge, as aforesaid, also bears date the said 30th day of November, 1877, and previous to the said 3rd day of December, he had intimated his acceptance of the said office, but did

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not take the oath of office until the 4th day of December, 1877. His commission reached him on the 1st day of December, 1877.

"The judgment in this case in the Court of Queen's Bench was delivered on the 4th February, 1878. Mr. Justice *Armour* was in Court during the day upon which the said judgment was delivered, but not until subsequent to the delivery thereof. He took no part in such judgment."

Mr. *M. C. Cameron*, Q.C., for Appellant, and Mr. *Boyd*, Q.C., for Respondent.

RITCHIE, J.:—

The *Supreme and Exchequer Court Act* provides that any person convicted of treason, felony, or misdemeanor before any Superior Court, whose conviction has been affirmed by any Court of last resort, or, in the Province of *Quebec*, by the Court of Queen's Bench, on its appeal side, may appeal to the Supreme Court against the affirmation of such conviction; provided that no such appeal shall be allowed where the Court affirming the convictions is unanimous. It is not denied in this case that the Court appealed from was duly constituted and had full jurisdiction to hear the appeal, and that the Judges sitting in the Court and hearing the appeal were unanimous, and did affirm the conviction, but it is contended that there being one other Judge of that Court who might have sat in the Court, but did not, the Court was not unanimous; that the unanimity required by the Statute was not the unanimity of the Judges who composed the Court at the time of hearing the appeal, and who decided the case; but that an appeal existed, unless all the Judges of the Court were unanimous.

But I think the Court of last resort and the Court of

Queen's Bench of the Province of *Quebec*, named in the Statute, does not mean the individual Judges who may be authorized to sit in those Courts, but the tribunals from which the appeals are to come, or the respective Courts themselves, without reference to the number of Judges, provided always the Court be duly constituted by the presence of a sufficient number of Judges to make a legal Court, whatever number that may be, and if the Court so legally constituted affirms the conviction, and the Judges forming that Court and hearing the appeal shall be of one mind, that is agree in opinion, or determination, in respect to the affirmance of the conviction, in other words, if the Court, is unanimous in affirming the conviction, no appeal shall be allowed; but if, on the contrary, the Judges differ in opinion, the Court not being unanimous, then, and then only, may the person convicted appeal.

The Court, in this case having been unanimous, I think there is no appeal to this Court, and we are without jurisdiction.

STRONG, J.:—

I concur. It is impossible for us to come to the conclusion that there was a want of unanimity; and so long as there was no want of unanimity, this Court possesses no jurisdiction under the Statute. For the reasons assigned by Mr. Justice *Ritchie*, the appeal should be quashed.

TASCHEREAU, J.:—

The question, though not devoid of interest, in so far as the prisoners are concerned, seems, to my mind, so clear that I hardly can believe it possible to find a precedent to justify the application for an appeal to this Court. It has been said that in a doubtful case leniency

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should apply, or rather that the benefit of the doubt should be given in favor of the prisoners, but this humane principle should not blind us so as to make us lose sight of another principle, which is that no Court should take cognizance of an appeal when its jurisdiction is so doubtful. If, to extend mercy to the prisoners, we are to assume a jurisdiction which we do not possess, we would commit an act of injustice towards the crown and the community. That we have no jurisdiction is, to my mind, very evident. The Statute says in very clear terms that the appeal shall only be granted when a dissentient opinion is given in favor of the prisoner. That dissentient opinion is not to be found in the present case. The two learned Judges who expressed their opinion in the Court below composed the Court, and were unanimous, and so the case should end there. It is true that the Court may be composed of three Judges, but two of them form a competent Court. One of those three can also sit alone, and as such he forms the Court, and, as such, his decision would be final in the present cause. As Mr. Justice *Ritchie* very happily observed yesterday at the argument—this right of appeal may be looked upon as only granted when it happens that a dissent to the judgment appears.

The prisoners should have applied for the privilege of having the full Bench. No Judge would have refused such a request, I am sure ; but, having elected to submit their case before two Judges, and these two Judges forming the Court then sitting, I think the prisoners are precluded from their right of appeal to the Supreme Court.

FOURNIER, J., concurred.

HENRY, J. :

Looking at the Statute giving us jurisdiction, I found

that we have no jurisdiction where a Court properly constituted was unanimous. I must say, however, that I think the organization itself is defective. It does appear rather anomalous that one Judge should have power to decide a case of this kind, for it might be that the second decision would be by the same Judge who tried the case. Whether an amendment might be made by a change in the constitution in *Ontario*, or by an amendment to this Act, it is not for me to say. Nevertheless, an inconvenience must result to the public interest when one Judge could sit on a case of this kind, representing the full Court, and thus prevent an appeal to this Court. Still, I can only decide on the law as it is, and, after full consideration, I am bound to agree with the decision of the of my learned brethern.

*Appeal quashed.*

Solicitors for Appellants: *Cameron, McMichael & Hoskin.*