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*Dec. 2.

*Dec. 9.

THE ATTORNEY GENERAL FOR ONTARIO AND OTHERS..... } APPELLANTS;

AND

CORNELIUS SCULLY.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Special leave—60 & 61 *V. c.* 34 (*e*)—*Error in judgment—Concurrent jurisdiction—Procedure.*

Special leave to appeal from a judgment of the Court of Appeal for Ontario, under subsec. (*e*) of 60 & 61 Vict. ch. 34, will not be granted on the ground merely that there is error in such judgment.

Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused.

The Ontario courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney General. S. having been refused such fiat applied for a writ of mandamus which the Div. Court granted and its judgment was affirmed by the Court of Appeal.

Held, that the mandamus having been granted the public interest did not require special leave to be given for an appeal from the judgment of the Court of Appeal though it might have had the writ been refused.

The question raised by the proposed appeal is, if not one of practice, a question of the control of Provincial Courts over their own records and officers with which the Supreme Court should not interfere.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) which reversed the judgment of Falconbridge C.J. who refused the respondent a writ of mandamus to compel the Clerk of the Peace to furnish him

* PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Mills JJ.

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(2) 2 Ont. L. R. 315.

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a copy of the proceedings on a criminal charge in which he had been acquitted.

The only question involved in the judgment appealed from was whether or not the respondent Scully was entitled as of right to an exemplification of the record in the criminal proceedings or whether or not it could only be obtained on the fiat of the Attorney General which fiat had been refused. Scully having applied for a writ of mandamus it was refused by the Chief Justice of the King's Bench Division but granted on appeal to the Divisional Court whose judgment was affirmed by the Court of Appeal.

Cartwright K.C., Deputy Attorney General, moved for special leave to appeal under 60 & 61 Vict. ch. 34 (*e*) relying on *Lusty* v. *McGrath* (1); *Reg.* v. *Ivy* (2); *Hewitt* v. *Cane* (3).

Arnoldi K C. contra.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is a motion on behalf of the Attorney General for Ontario for leave to appeal under paragraph (*e*) of section 1, of 60 & 61 Vict. ch. 34 (*D.*) from a judgment of the Court of Appeal for Ontario. The history of the case is as follows:

In March, 1900, the respondent, Scully, was arrested upon an information laid by one Louis Peters charging him with having feloniously stolen forty-one sawlogs, the property of the said Peters. After trial in due course of law, the said Scully was acquitted by the jury. He thereupon brought an action against the said Peters claiming damages for malicious prosecution. It being necessary for him at the trial to have a copy of the indictment and of the record of his

(1) 6 O. S. 340.
(2) 24 U. C. C. P. 78.
(3) 26 O. R. 133.

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acquittal to prove the essential allegations of his said action, he applied for them to the Clerk of the Peace in whose custody they were. The Clerk of the Peace and Peter's solicitor happened to be one and the same person. That officer, prompted, it must be assumed, by what he believed to be his duty, refused to give them without the fiat of the Attorney-General, and that fiat was, subsequently, refused. Thereupon, Scully applied for a prerogative writ of mandamus to compel the said Clerk of the Peace to deliver him a copy of the said documents. This application was dismissed by Falconbridge C.J. (K.B.), but granted by the Divisional Court (1) upon an appeal by Scully. Upon an appeal to the Court of Appeal, on behalf of the Attorney-General, the judgment of the Divisional Court was affirmed (2). The Attorney-General now moves for leave to appeal from that last judgment.

The motion cannot be granted. This statute, 60 & 61 Vic. ch. 34 (*D.*), clearly takes away the right to appeal to this court from the Court of Appeal for Ontario in all the cases not coming within paragraphs (*a*), (*b*), (*c*) and (*d*) thereof. Now, when in paragraph (*e*) it allows an appeal in any other cases wherein the special leave of the Court of Appeal for Ontario or of this court to appeal to this court is granted, it seems evident that, to grant that special leave upon the ground only that the Court of Appeal has erred in the judgment attempted to be appealed from, would be to render the Act nugatory and to defeat the manifest intention of Parliament to restrict the right of appeal. There must be special reasons to support an application of this nature and none has been advanced in support of this application that cannot apply to the numerous cases where the unsuccessful party thinks that the judgment is wrong. What those reasons

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must be we have not to determine here. All that we hold is that in this case none has been given in support of the motion sufficient to justify us in granting it. Public interest might perhaps have justified us in granting special leave had the Attorney-General succeeded in establishing his contention that a right of action which the law gives to the subject is dependent upon the discretion of the law officers of the Crown. But as the judgment of the Court of Appeal rejects this contention of the Attorney-General, it cannot be contended that it is in the interest of the public at large that an appeal from that judgment should be granted.

I refer to the six cases in which motions of this nature have been made since the said Act came into force, not a single one of which has been granted, to shew that under our jurisprudence such leave cannot be granted upon the ground only that there may be error in the judgment of the Court of Appeal,

1898, May 20th; *Fisher* v. *Fisher* (1). Leave refused.

1901, March 6th; *Grand Trunk Railway Company* v. *Atchison*, (not reported). Leave refused.

1901, March 18th; *Grand Trunk Railway Company* v. *Vallee*, (not reported). Leave refused.

1901, October 1st; *Dominion Council of Royal Templars* v. *Hargrove* (2). Leave refused.

1901, October 29th; *Robinson* v. *Toronto Street Railway Co.* (not reported.) Leave refused.

1902, June 9th; *Town of Aurora* v. *Village of Markham* (3). Leave refused.

The application, by the statute, may also be made to the Court of Appeal itself. Now, no one would, I think, apply to that court for special leave to appeal to this court upon the ground only that the judgment is

(1) 28 Can. S. C. R. 494. (2) 31 Can. S. C. R. 385.
(3) 32 Can. S. C. R. 457.

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wrong. And what cannot support an application in that court cannot support it in a court of concurrent jurisdiction, as we are, in this matter.

There is another view of the case upon which this application should not be granted.

The controversy relates to what may be considered in a great measure but a question of practice. It is treated generally as such in most of the cases cited in the provincial courts. Then the contention of the Attorney-General is principally based upon rules of practice for the Old Bailey Court made by the judges in the year 16th Car. II. (1). In one aspect of the question the right claimed by the respondent may not, strictly speaking, fall exclusively within the words practice or procedure, but the control of the provincial courts of justice over their own records and their officers should not, as a general rule, be interfered with by this court. And, when the court of last resort in the province has passed upon a question of this nature, we should refrain from exercising the discretionary power as to Ontario appeals that the statute under which the application is made confers upon us.

Motion refused with costs.

Solicitor for the appellants: *John R. Cartwright.*

Solicitors for the respondent: *Arnoldi & Johnston.*

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(1) Kel. C. C. 3.