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*Feb. 8.
*March 3.

IN THE MATTER OF THE GREAT NORTHERN CONSTRUCTION COMPANY (IN LIQUIDATION).

JOHN T. ROSS (CONTESTANT) ..... APPELLANT;

AND

ROSS, BARRY & McRAE (CLAIMANTS) ..... } RESPONDENTS.

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

Appeal—Jurisdiction—Winding-up proceedings—Time for appealing—Amount in controversy—Construction of statute—"Supreme Court Act," R.S.C., 1906, c. 139, ss. 46, 69, 71—"Winding-Up Act," R.S.C., 1906, c 144, ss. 104, 106—Practice—Affirming jurisdiction—Motion in court—Discretionary order by judge.

Per Fitzpatrick C.J. and Idington and Brodeur JJ. (Duff and Anglin JJ. *contra*).—The appeal to the Supreme Court of Canada given by section 106 of the "Winding-Up Act," R.S.C., 1906, ch. 144, must be brought within sixty days from the date of the judgment appealed from, as provided by section 69 of the "Supreme Court Act," R.S.C., 1906, ch. 139. After the expiration of the sixty days so limited neither the Supreme Court of Canada nor a judge thereof can grant leave to appeal. *Goodison Thresher Co.* v. *Township of McNab* (42 Can. S.C.R. 694), and *Hillman* v. *Imperial Elevator and Lumber Co.* (53 Can. S.C.R. 15), followed; *Grand Trunk Railway Co.* v. *Department of Agriculture of Ontario* (42 Can. S.C.R. 557), distinguished.

Per Duff J. (dissenting).—Under section 106 of the "Winding-up Act," the application for leave to appeal may be made after the expiration of sixty days from the date of the judgment from which the appeal is sought and, whether it be made before or after the expiration of the sixty days, lapse of time should be considered by the judge applied to and acted on by him, in the exercise of discretion, according to the circumstances of the case.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

Per Anglin J. (dissenting).—On such an application for leave to appeal, the provisions of section 71 of the "Supreme Court Act" apply and an extension of the time for appealing may be obtained thereunder.

Per Idington J.—There is no authority under which an application for an order affirming the jurisdiction of the Supreme Court of Canada to entertain an appeal can be made to the court; the proper and only course is by application to the registrar acting as judge in chambers. *Per* Duff J.—Although not strictly the proper procedure, the objection to such an application may be waived.

Per Duff J.—Section 106 of the "Winding-Up Act" imposes a further condition of the right of appeal over and above those imposed by sections 69 and 71 of the "Supreme Court Act"; an applicant, having obtained leave after the expiration of the time limited for appealing, is still obliged to satisfy a judge of the court appealed from that special circumstances justify an extension of time, and it is the duty of that judge to exercise proper discretion in making such an order on his own responsibility. *Attorney-General* v. *Emerson* (24 Q.B.D. 56), and *Banner* v. *Johnston* (L.R. 5 H.L. 157), referred to.

Per Brodeur J.—In the case of appeals from judgments rendered under the "Winding-Up Act" the jurisdiction of the Supreme Court of Canada is determined by section 106 of the "Winding-Up Act" and is dependent solely upon the amount involved in the judgment appealed from and not upon the amount demanded in the proceedings on which that judgment was rendered.

MOTION for an order affirming the jurisdiction of the Supreme Court of Canada to entertain an appeal from the judgment of the Court of King's Bench, appeal side, varying the judgment of the Superior Court, District of Montreal, in favour of the claimants, by reducing the total amount awarded them to $144,094.

In the course of proceedings taken under the "Winding-Up Act," R.S.C., 1906, ch. 144, for the liquidation of the Great Northern Construction Company, the respondents filed a claim for $149,721.93, which they alleged to be owing to them by the company, for $33,000 of the company's bonds and also for a large amount of common and debenture stock of the

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company. The appellant, being the holder of twenty shares in the company, contested this claim and contended that the claimants were not entitled to any amount whatever nor to rank as creditors. By the judgment of the Superior Court the claimants were awarded, for principal and interest on the first item of their claim, the sum of $102,217 and, in addition, $33,000 for their claim on the bonds, forming together a condemnation for $155,017. On an appeal to the Court of King's Bench, by judgment rendered on the 2nd November, 1915, this judgment was affirmed in respect of the first item and the judgment in regard to the bonds was varied, thus reducing the whole condemnation to $144,094.

On 10th January, 1916, the claimant applied, under the provisions of the 106th section of the "Winding-Up Act," to Mr. Justice Anglin, a judge of the Supreme Court of Canada, in Chambers, for an order granting leave to appeal from the judgment so rendered by the Court of King's Bench, and, on that application, leave to appeal was granted on terms that the usual security for costs should be given within ten days and a motion to affirm the jurisdiction to entertain the appeal brought on for hearing at the then next session of the Supreme Court of Canada. The reasons for the order so made were as follows:—

ANGLIN J. (in Chambers).—The contestant, Ross, applies for leave to appeal from a judgment rendered by the Court of King's Bench, confirming, with a modification, a judgment of the Superior Court in favour of the claimants in the course of a liquidation under the Dominion "Winding-Up Act." Upon the merits I think the issue which the contestant seeks to

raise is of sufficient importance to warrant leave being granted.

The claimants, however, assert that leave cannot be granted because section 69 of the "Supreme Court Act" applies and, the application for leave having been made after the expiry of sixty days from the date of the judgment a judge of this court has not jurisdiction to grant leave. *Goodison Thresher Company* v. *Township of McNab*(1). They also maintain that the interest of the contestant in the judgment for $109,545.10, as a shareholder of the company in liquidation against which it was rendered, is not shewn to amount to $2,000.

I am disposed to think that "the amount involved in" the proposed appeal (section 106 of the "Winding-Up Act") is to be measured by the amount of the judgment against which it is sought to appeal, because, if the appeal be wholly successful, that judgment will be reversed. If this were the only objection to the jurisdiction I should probably make the order asked for.

But the question as to the application of section 69 of the "Supreme Court Act" to appeals in winding-up cases is so important that, if at liberty to do so, I should refer this motion to the full court. That, however, I have not the power to do. I hesitate to make an order which might prove embarrassing to other members of the court who may hereafter have to deal with such applications. Should I refuse the present motion the contestant cannot proceed further in this court, as no appeal would lie from the order, and there is no provision for leave being obtained from the

(1) 42 Can. S.C.R. 694.

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court *a quo* such as is made by section 48(*e*) of the "Supreme Court Act." On the other hand should I grant leave unconditionally, upon the hearing of the appeal the court might, upon application, or *suâ sponte* hold that section 69 applies and precludes an appeal not brought within sixty days from delivery of the judgment appealed from, and the costs of printing would be lost.

Reasons may be suggested why it is desirable that there should be power in winding-up cases to grant leave to appeal after the expiry of sixty days from the pronouncing of the judgment below. The effect of that judgment may not be fully perceived until the winding-up proceedings have further developed. On the other hand it is most desirable that there should be no undue delay in liquidations.

The applicant relies upon the decision of this court in *Grand Trunk Railway Co.* v. *Department of Agriculture*(1), in support of his contention that section 69 of the "Supreme Court Act" does not apply to appeals under the "Winding-Up Act," because the right to appeal is conferred by section 106 of the "Winding-Up Act," and he contends that section 69 of the "Supreme Court Act" should be restricted in its application to cases in which the right of appeal is conferred by the "Supreme Court Act." *Grand Trunk Railway Co.* v. *Department of Agriculture*(1), however, is distinguishable in more than one respect from the case now being dealt with—notably in this, that by virtue of sub-section 7 of section 56 of the "Railway Act," appeals from the Board of Railway Commissioners are subject to the rules and practice governing appeals from the Exchequer Court.

(1) 42 Can. S.C.R. 557.

In order to give the parties an opportunity to obtain the opinion of the court upon both questions of jurisdiction, I think the proper course will be to make an order granting leave to appeal (without prejudice —if such a saving proviso is not superfluous—to the right of the claimants to contest the jurisdiction of the court) upon the contestant undertaking to put in the usual security for costs within ten days and to launch and bring on before the court at its February sittings a motion to affirm jurisdiction. The question of the applicability of section 69 can be thus finally and satisfactorily disposed of before the expense of printing is incurred.

The costs of the present motion should be costs in the appeal.

On the 1st February, 1916, the required security was taken and acknowledged before Mr. Justice Trenholme, one of the judges of the court appealed from. On the 8th February, 1916, the present application was made to the Supreme Court of Canada.

G. G. Stuart K.C. for the motion, cited *Grand Trunk Railway Co.* v. *The Department of Agriculture of Ontario*(1); *Coté* v. *The James Richardson Co.* (2); *Robinson, Little & Co.* v. *Scott & Son*(3).

R. C. Smith K.C. contra, cited *Flatt* v. *Ferland* (4); *Kinghorn* v. *Larue*(5); *Stephens* v. *Gerth*(6); *Lachance* v. *Société de Prêts et de Placements de Québec*(7); *Toussignant* v. *County of Nicolet*(8); *Fréchette* v. *Simmoneau*(9); *Canada Mutual Loan and Investment Co. v. Lee*(10).

(1) 42 Can. S.C.R. 557.
(2) 38 Can. S.C.R. 41.
(3) 38 Can. S.C.R. 490.
(4) 21 Can. S.C.R. 32.
(5) 22 Can. S.C.R. 347.
(6) 24 Can. S.C.R. 716.
(7) 26 Can. S.C.R. 200.
(8) 32 Can. S.C.R. 353.
(9) 31 Can. S.C.R. 12.
(10) 34 Can. S.C.R. 224.

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THE CHIEF JUSTICE.—I am of opinion that section 104 of the "Winding-Up Act" only applies to appeals referred to in sections 102 and 103 and has no application to appeals to the Supreme Court of Canada provided for by section 106. I have already so held in an application (not reported) before me some time ago under the same Act.

I am also of opinion, an appeal having been given in winding-up cases by virtue of section 43 of the "Supreme Court Act" and the "Winding-Up Act" (R. S.C., 1906, ch. 144), that sections 69 and 71 of the "Supreme Court Act" apply to this case, which sections provide as follows:—

Sec. 69.—Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from.

Sec. 71.—Notwithstanding anything herein contained the court proposed to be appealed from, or any judge thereof, may, under special circumstances, allow an appeal although the same is not brought within the time hereinbefore prescribed in that behalf.

2. In such case, the court or judge shall impose such terms as to security or otherwise as seems proper under the circumstances;

3. The provisions of this section shall not apply to any appeal in the case of an election petition.

In the case of *Goodison Thresher Co.* v. *Township of McNab*(1) it was held that where an application for leave to appeal from the Court of Appeal for Ontario, under section 48, was made, this court had no power to grant leave after 60 days have expired, although the court below had attempted by its order to extend the time for appealing to the Supreme Court. The same view was expressed by this court in the recent case of *Hillman* v. *Imperial Elevator and Lumber Co.*(2), where the leave asked for in this court was under section 37 of the "Supreme Court Act."

(1) 42 Can S.C.R. 694. (2) 53 Can. S.C.R. 15.

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I think the principle of these cases must also apply to motions for leave under section 106 of the "Winding-Up Act" and as the application admittedly comes after the sixty days have expired this court has no power to grant the leave asked for.

The motion to affirm jurisdiction should be dismissed with costs.

IDINGTON J.—The appellant seeks an order affirming the jurisdiction of this court. I am unable to find any authority founded on statute, or rule having force of statute, or otherwise governing the practice of this court, or recognized jurisprudence of the court relative to practice, for such a motion being made to the court.

The reason appellant gives for such a course is that the expenses of printing case and proceeding to hearing would be heavy.

To avert that the rules numbers 1 to 5 were passed and I think should have been followed. An application to the registrar is the only means of getting an order affirming the jurisdiction. The application is there thrashed out before a competent officer in such a way that if there is any wish to appeal from his decision the parties come before the full court knowing exactly wherein the respective difficulties lie and we have then the benefit of the registrar's judgment in writing.

An opportunity is thus given each of us before the hearing to understand what is involved. This new method involves, to begin with, a waste of time to ourselves and those concerned in probably more substantial business for our consideration.

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It seems to me for this, if for no other reason, the motion should be dismissed.

There can be no harm done, however, in our expressing an opinion, now that the argument has been heard so long as it is understood the doing so is not to be adopted as a precedent.

Two questions are raised as to the jurisdiction to hear the appeal which is sought against a judgment dismissing an appeal to the Court of King's Bench in Quebec under the "Winding-Up Act."

One is that the "matter in controversy" does not amount to the sum or value of "two thousand dollars."

It seems that the appellant was recognized as having a status to represent the rights of the company in the winding-up proceedings by virtue of his being a shareholder in the company being wound up thereby. By section 85 of the Act a shareholder or creditor is put in the same class as the liquidator for the purpose of contesting claims against the company.

He was not seeking to assert any claim to recovery of his shares or the possible proceeds actually coming to him as result of the winding-up proceedings. Hence the question of the amount of his shares or right by virtue thereof to a dividend of what might become distributable amongst shareholders never was in question. How then can that consequential result of these proceedings ever be considered as a test of what is in controversy?

Nearly all the decisions cited by the respondent are in principle against this contention. Many of them, indeed the greater part of them, are founded upon a distinction between the direct and the consequential results and decide that it is the direct and not the consequential results that must govern.

For the purposes of testing this appellant's right to appeal as representing his company the matter in controversy was the claim made by the contractors against the company which was being wound up and it was resisted by the appellant standing upon the status given him by section 85.

Indeed, no court seems to have considered the question of what amount was likely to come to him.

For aught that may appear he may own the entire shares of the company or a single share.

If the appeal had been made by the contractors certainly they would not want this right of appeal tested in such a way as now contended for by them.

It is the matter in controversy that is in issue, to which we must look. Sometimes that may coincide with what an appellant personally is to reap, but not always.

Suppose the liquidator had appealed instead of this appellant surely it could not be his personal interest that is to be the test.

Yet he and the shareholders and creditors are put by section 85 on the same footing.

The next question is whether the leave to appeal was and by law must be within the sixty days limit fixed by section 69 of the "Supreme Court Act."

Clearly that is *primâ facie* the limit of our power and unless by some clear statutory extension which does not exist in the "Winding-Up Act" must govern us.

I think that the general purview of that part of the "Winding-up Act" bearing upon appeals indicates that the right of appeal must be exercised within the limits of whatever power exists in the court appealed

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to. At all events it has not expressed the contrary and hence we must act upon section 69 I refer to.

The decision of this court in the case of *Grand Trunk Railway Co.* v. *The Department of Agriculture* (1) does not touch the question raised herein.

The questions of law and jurisdiction of the Board in that case were so blended in what was submitted that if we should conclude to answer in the negative, as I did, what was submitted as question of law, then the further question allowed by a judge of this court to be appealed needed no answer.

The Board may have treated as question of law what was also in fact a question of jurisdiction. So long, however, as it chose to submit a question of law though involving a question of jurisdiction I felt we should answer it, for the Board could have so dealt with the matter as to get our opinion.

It was in such view competent for the Board to extend the time for submitting its question of law. It did so and I thought then, as appears from my opinion, they had then placed the matter in such a way as to become entitled to an answer.

In that view it was not necessary to consider the question of our jurisdiction to hear any further appeal allowed in that regard by one of ourselves.

That in fact never was in this aspect passed upon by this court.

I, therefore, conclude appellant was too late in his application to appeal.

I think the motion must be dismissed with costs.

DUFF J. (dissenting).—The proper construction of section 106 of the "Winding-Up Act" (ch. 144, R.

(1) 42 Can. S.C.R. 557.

S.C., 1906), is that it imposes a further condition on the right of appeal to the Supreme Court of Canada over and above the conditions imposed by sections 69 and 71 of the "Supreme Court Act" (ch. 139, R.S.C., 1906). So far I am in agreement with the point of view from which Mr. Smith discussed the effect of the provisions of the two statutes.

But it does not, I think, follow that the right of appeal under section 106 is subject to a time limit deduced from sections 69 and 71 of the "Supreme Court Act." The appellant must conform to the prescriptions of that Act, of course. In addition to that he must obtain leave under section 106. There is nothing expressly, and I can see no ground for holding that there is anything inferentially, imposing any restrictive condition as to the time within which the application for leave must be made. The intending appellant may apply within the sixty days or after the sixty days. Whenever the application is made, the judge is entitled to consider all the circumstances and among them, I must say, he is, I think, entitled to consider the lapse of time. Although the application be made within the sixty days I cannot, with respect, agree that it is not open to the judge to whom the application is made to refuse it on the ground of delay. It would not be easy to exaggerate the importance of expedition in winding-up proceedings and, finding nothing in the statute suggesting it, I will not suppose the legislature to have intended to exclude from the consideration of the judge the very important matter of delay on such an application.

But the intending appellant, having obtained leave, may have still another bridge to cross. If the judge of the Supreme Court has deemed it right to

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give leave after the expiration of sixty days the appellant has still to get his appeal allowed, and, in my judgment, section 71 applies in its entirety. He must satisfy the court to which application is made that there are special circumstances, and, in my judgment, the discretion of the court appealed from in respect of the allowance of the appeal is a discretion which it is its duty to exercise on its own responsibility. *Attorney-General* v. *Emerson*(1), at pages 56, 58, 59.

Where the sixty days has expired, therefore, the intending appellant must first satisfy the discretion of a judge of the Supreme Court of Canada, and having done that, he must satisfy the independent discretion of the court below that special circumstances exist justifying the allowance of the appeal notwithstanding the lapse of time.

On the whole the result is not unsatisfactory. I should have hesitated long before adopting a construction prohibiting an appeal after the expiration of sixty days; on the other hand, it is desirable that an appeal after sixty days should not be an easy thing; it is right there should be real obstacles.

I am unable to concur in Mr. Smith's construction of section 71. *Banner* v. *Johnston*(2) was decided in 1871 and all provisions relating to extension of time must be read in light not only of the decision, but of the observations of the Law Lords made in that case. The language of section 71 would in itself indeed be conclusive against Mr. Smith's contention; there is a multitude of decisions upon section 71 itself supporting that view. See Cameron S.C. Practice, pp. 436 and 437.

(1) 24 Q.B.D. 56.

(2) L.R. 5 H.L. 157.

It is clear, however, that the application to have jurisdiction affirmed is premature; the jurisdiction of this court is only consummated when the security has been allowed. If the intended appellant should succeed in satisfying the appropriate court in Quebec that special circumstances exist justifying the allowance of security at this stage, then the important question would still remain whether or not the condition of section 106 that the amount involved in the appeal shall exceed $2,000 is satisfied. The time has not arrived for expressing any opinion on that point.

Strictly, the application to affirm jurisdiction ought to be made to a judge of the Supreme Court or to the registrar exercising the powers of a judge in chambers; that is an objection, however, which in my opinion can be waived and I assume that Mr. Smith does not desire to insist upon it. I think the proper disposition of the motion at present is to direct it to stand over to give Mr. Stuart an opportunity to apply for the allowance of the appeal under section 71.

ANGLIN J. (dissenting).—I understand that a majority of the court takes the view that section 69 of the "Supreme Court Act" is fatal to the right of appeal in this case. While of the opinion that that section applies because the judgment of the court of appeal is appealable under the "Supreme Court Act" as a judgment of the court of last resort in the province in a proceeding instituted in a superior court, subject, of course, to the special conditions imposed by the "Winding-Up Act," I am, for the same reason, of the opinion that section 71 of the "Supreme Court Act" also applies and that an extension of time might be obtained thereunder.

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BRODEUR J.—We have to determine whether section 69 of the "Supreme Court Act" applies to appeals in winding-up cases.

The "Winding-Up Act" contemplates that the procedure in liquidation proceedings should be summary (sec. 133, ch. 144, R.S.C., 1906), and it provides that the appeal from the court of original jurisdiction be restricted to a limited number of cases (sec. 101, ch. 144, R.S.C., 1906). In that respect there is a departure from the right of appeal exercised under the Code of Civil Procedure (arts. 43 and 44, C.P.Q.). Besides it is provided also that the leave of a judge of the court from which there is an appeal has to be secured before a case might be brought before the Court of King's Bench (sec. 101, ch. 144, R.S.C., 1906).

There would be no appeal to the Court of Review because that court is not mentioned in the "Winding-Up Act" as one of the courts to which an appeal shall lie (sec. 102, ch. 144, R.S.C., 1906), though in ordinary cases an appeal would lie to that court from any final judgment of the Superior Court.

In our "Supreme Court Act" there is no specific reference to appeals from orders or proceedings under the "Winding-Up Act."

Section 46 of the "Supreme Court Act" declares that:—

> No appeal shall lie to the Supreme Court from any judgment rendered in the Province of Quebec in any action, suit, cause, matter or other judicial proceeding unless the matter in controversy
>
> (*a*) Involves the question of the validity of an Act * * *
>
> (*b*) Relates to any fee of office, duty, rent revenue or any sum of money payable to His Majesty or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound, or
>
> (*c*) Amounts to the sum or value of $2,000.

The section adds that if the right to appeal depends upon the amount in dispute such amount shall be the amount demanded and not that recovered if they are different.

That is the code of appeals affecting the Province of Quebec. Does it apply in winding-up proceedings? I do not think so because the "Winding-Up Act" has determined, in section 106, the cases in which there would be an appeal to this court. It says:—

> An appeal, if the amount involved therein exceeds $2,000 shall by leave of a judge of the Supreme Court of Canada lie to that court from
>
> (*b*) the Court of King's Bench in Quebec.

The differences between appeals in winding-up proceedings and those in the other cases are very numerous. First, there is no appeal *de plano* as in the judgments rendered by the provincial courts. The law requires leave from a judge of this court and, in considering the application, the judge must consider whether the case involves matters of public interest or some important question of law (*Re Montreal Cold Storage and Freezing Co.; Ward* v. *Mullin*(1)).

The amount involved in the appeal and not the amount demanded should determine the jurisdiction of this court.

In cases coming from Ontario the amount involved in the appeal should be $2,000, though in ordinary cases the sum of $1,000 would be sufficient to give us jurisdiction (sec. 48, "Supreme Court Act").

We may then conclude that our jurisdiction concerning cases originating in liquidation proceedings

(1) Cout. Cas., p. 341; Cam. S.C. Prac. (2 ed.).

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should be determined by the "Winding-Up Act" and not by the "Supreme Court Act."

Now the question is raised that this appeal should not be allowed because it was not under the provisions of section 69 of the "Supreme Court Act" brought within 60 days from the date of the judgment appealed from.

We find in the "Winding-Up Act" the first part of section 104 which declares that the appeals should be regulated as far as possible according to the practice in other cases of the court appealed to. Then section 69 of the "Supreme Court Act" applies. It reads as follows:—

> Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from.

As the application for obtaining leave admittedly comes after the 60 days have expired, I come to the conclusion that we have no jurisdiction to entertain this appeal.

The motion to affirm the jurisdiction of this court should be dismissed with costs.

Motion dismissed with costs.