1899

*Mar. 17.
**May 31,
June 1.
**Oct. 24.

JOHN FARQUHARSON (PLAINTIFF).....APPELLANT;

AND

THE IMPERIAL OIL COMPANY (DEFENDANT) ..... } RESPONDENT.

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

Appeal—Divisional court judgment—Appeal direct—R. S. C. c. 135, s. 26 s.s. 3—Appeal from order in chambers—Rivers and streams—Driving logs—Obstruction—Dam—R. S. O. (1887) c. 120, ss. 1 and 5.

Held, per Strong C.J. and Gwynne J., (Taschereau and Sedgewick JJ. contra,) that under sec. 26, subsec. 3, of the Supreme and Exchequer Courts Act, leave to appeal direct from a judgment of a divisional court of the High Court of Justice for Ontario may be granted in cases where there is no right of appeal to the Court of Appeal.

By R. S. O. (1887) ch. 120, sec. 1, all persons are prohibited from preventing the passage of saw-logs and other timber down a river, creek or stream by felling trees or placing any other obstruction in or across the same.

Held, reversing the judgment of the Queen's Bench Division (29 O. R. 206), that placing a dam on a river or stream by which the supply of water therein was diminished so as to interfere with the passage of logs was an obstruction under this Act.

APPEAL from a decision of the Queen's Bench Division of the High Court of Justice (1) affirming the judgment of Boyd C. at the trial.

R. S. O. (1887) ch. 120, sec. 1 contains the following provision:

"All persons shall, subject to the provisions in this Act contained, have, and are hereby declared always

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* PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and Girouard JJ.

** PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

(1) 29 O. R. 206.

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

to have had, during the spring, summer and autumn freshets, the right to, and may float and transmit saw-logs and all other timber of every kind, and all rafts and crafts, down all rivers, creeks and streams; and no person shall by felling trees or placing any other obstruction in or across any such river, creek or stream, prevent the passage thereof."

The defendant maintained two dams on Bear Creek, in the County of Lambton, Ont., for using water in its business of refining oil. The dams diminished the water in the creek so as to injure plaintiff who was accustomed to use it for floating his logs down. The question for decision on this appeal was whether or not the dams constituted an obstruction under the above section and entitled plaintiff to maintain an action for damages against the company for the loss suffered by hindrance to his business.

The Chancellor who tried the case held that the dams were not an obstruction under the Act, and his judgment was confirmed by the Divisional Court.

The appellants applied to the Registrar, sitting as a Judge in Chambers, for an order granting leave to appeal direct from the latter judgment which was refused. On appeal to Mr. Justice Gwynne in Chambers the order was granted.

His Lordship's judgment on said appeal was as follows:

GWYNNE J.—This is an appeal from the decision of the Registrar in Chambers upon a motion made by the plaintiff for leave to appeal, and for approval of the bond in appeal. The learned registrar refused the motion partly on the ground that in his judgment this court has no jurisdiction to entertain the appeal under the circumstances appearing, and further that if it has

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

such jurisdiction, it ought not to be exercised in the present case.

By the Supreme Court Act, 38 Vict. ch. 11, sec. 17, it is enacted as follows:

> Subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from all final judgments of the highest court of final resort whether such court be a court of appeal or of original jurisdiction, now or hereafter established in any province of Canada in cases in which the court of original jurisdiction is a Superior Court. Provided that no appeal shall be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value of the matter in dispute does not amount to two thousand dollars, and the right to appeal in civil cases given by this Act shall be understood to be given in such cases only as are mentioned in this section, except Exchequer cases and cases of mandamus, habeas corpus or municipal by-laws, as hereinafter provided.

In view of this section in connection with sections 11 and 23 it was by a judgment of this court rendered on the 16th of April, 1879, in *Danjou* v. *Marquis* (1), held by the court, Fournier and Henry JJ. dissenting, that the appeal given in cases of mandamus under sec. 23, is restricted to decisions of the highest court of final resort in the province, and that an appeal did not lie from any court in the Province of Quebec but the Court of Queen's Bench, and consequently the appeal which was from the judgment of the Superior Court of the District of Rimouski was quashed.

The learned registrar was of opinion that the case now under consideration was concluded by the judgment in the above case.

By an Act passed on the 15th May, 1879, intituled "An Act further to amend the Supreme and Exchequer Courts Act," 42 Vict. ch. 39, it was enacted in sec. 5 as follows:

> Except as hereinafter provided for no appeal shall lie to the Supreme Court but from the highest court of last resort having jurisdiction in

(1) 3 Can. S. C. R. 251.

the province in which the action, suit, cause, matter or other judicial proceeding was originally instituted, whether the judgment or decision in such action, suit, cause, matter or other judicial proceeding may or may not have been a proper subject of appeal to such highest court of last resort.

The exception provided for in this section 5 is thus stated in sec. 6 :

An appeal shall lie to the said Supreme Court by leave of the said last mentioned court or a judge thereof from any decree, decretal order, or order made or pronounced by a superior court of equity or made or pronounced by any equity judge or by any superior court in any action, cause, matter or other judicial proceeding in the nature of a suit or proceeding in equity, and from the final judgment of any superior court of any province other than the Province of Quebec in any action, suit, cause, matter or other judicial proceeding originally commenced in such superior court without any intermediate appeal being had to any intermediate court of appeal in the the province.

By the Ontario Judicature Act of 1881, 44 Vict. ch. 5, the several Superior Courts then in existence in Ontario were consolidated together under the name of the Supreme Court of Judicature for Ontario, which court was declared to consist of two permanent divisions, one of which, consisting of the Courts of Queen's Bench, Chancery and Common Pleas, to be called "The High Court of Justice for Ontario," and that the Court of Appeal should constitute the other division, which court the Act declared should continue to have all the jurisdiction which the said court theretofore had save as varied by the Act. The Act then provided for appeals from the divisional courts to the Court of Appeal. This Act assumed to control the jurisdiction of the Supreme Court of Canada by the following section no. 43 :

43. No appeal shall lie to the Supreme Court of Canada without the special leave of such court or of the Court of Appeal unless the title to real estate or some interest therein, or the validity of a patent is affected ; or unless the matter in controversy on the appeal exceeds the sum or value of $1,000, exclusive of costs or unless the matter in

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights.

In *Clarkson* v. *Ryan* (1), and in other cases, this court held this section to be simply nugatory as being *ultra vires* of the provincial legislature to enact. Then by the Ontario Statute, 58 Vict. ch. 13, it was enacted in sec. 2 that there should be no more than one appeal in the Province of Ontario from any judgment or order made in any action or matter save only at the instance of the Crown in a case in which the Crown is concerned, and save in certain other cases in the Act specified.

By sec. 10 it was enacted that:

The Queen's Bench, Chancery and Common Pleas Divisions of the High Court shall not sit or give judgments as such divisions (except for the purposes of the Criminal Code, 1892,) and there shall not be divisional courts of any of the said divisions; but the divisional courts shall be divisional courts of the High Court without reference to the said divisions.

And these Divisional Courts were made Courts of Appeal as well as courts of original jurisdiction by sec. 11 which enacted that

an appeal shall lie to a divisional court of the High Court instead of as heretofore provided by any statute or rule of court.

Here follow twelve enumerated cases including item 3:

From any judgment or order of a judge of the High Court in court.

Then by sec. 13 it was among other things enacted in sub-sec. 2:

In case after this Act goes into effect a party appeals to a divisional court of the High Court in a case in which an appeal lies to the Court of Appeal, the party so appealing shall not be entitled to afterwards appeal from the said divisional court to the Court of Appeal, but any other party to the action or matter may appeal to the Court of Appeal from the judgment or order of the divisional court.

(1) 17 Can. S. C. R. 251.

Then the jurisdiction of the Court of Appeal was retained by sec. 14 which enacted that:—

Subject to the exceptions and provisions contained in this Act, an appeal shall lie to the Court of Appeal from every judgment, order or decision of the High Court, whether the judgment, order or decision was that of a divisional court or of a judge in court, and including cases tried with a jury, where the appellant complains of the judgment and asks in the alternative for a new trial.

The secs. 11, 13 and 14 of this Act appear also in identical language in secs. 71, 72 and 73 of the Judicature Act of 1895, passed on the same day as 58 Vict. ch. 12.

Now by 59 Vict. ch. 18, sub-sec. 3 of above sec. 73, identical with sec. 14 of 58 Vict. ch. 13, was amended so as to read as follows:

Except where an appeal lies under the preceding clause from a divisional court to the Court of Appeal, an appeal shall not lie from a judgment or order of a divisional court pronounced on an appeal in a cause or matter in the High Court to such divisional court except by special leave first obtained on application to such divisional court or to the Court of Appeal or to a judge thereof.

Then all of the above sections with the above amendment as made by 59 Vict. ch. 18 are consolidated as secs. 75, 76 and 77 of the Judicature Act R. S. O. (1897) ch. 51, and as so consolidated the result as it appears to me is this.

By sec. 75 appellate jurisdiction is given to divisional courts in the following cases:

1. From any judgment or order of a judge of the Hight Court in court, whether at the trial or otherwise.

2. From the Master in Ordinary.

3. From County Courts.

4. From Surrogate Courts,

and in five other enumerated cases.

By sec. 76 the jurisdiction of the Court of Appeal is retained subject to the exceptions and provisions in the Act mentioned,

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

from every judgment, order or decision of the High Court whether the judgment, order or decision was that of a Divisonal Court or of a judge in court, including cases tried with a jury where the appellant complains of the judgment and asks for a new trial.

Now the present case is that of an action brought by the plaintiff in the High Court of Justice for Ontario in which action judgment was rendered against the plaintiff, and his action was dismissed by a judge of the High Court in court. It was a case, therefore, in which the Court of Appeal and a divisional court of the High Court had co-ordinate appellate jurisdiction. The plaintiff elected to appeal from the judgment of a judge of the High Court in court pronounced in an action commenced in the High Court, to a divisional court, which court dismissed his appeal and affirmed the judgment of the High Court dismissing the action; the case therefore comes within the second sub-section of sec. 77 of ch. 51 R. S O. (1897).

58 Vict. ch. 13 was passed as its title shows for the purpose of diminishing appeals in the Ontario Courts and the first sub-sec. of sec. 13 of that Act, and the first sub-sec. of sec. 73 of 58 Vict. ch. 12, which are identical, are consolidated as sec. 74 of R. S. O. (1897), ch. 51, which enacts as follows:

> There shall not be more than one appeal in this province from any judgment or order made in any action or matter, save only at the instance of the Crown in a case in which the Crown is concerned; and save in certain other cases hereinafter specified.

Then sec. 75 prescribes the cases in which the divisional courts shall have appellate jurisdiction, that is to say, in ten enumerated cases, the first of which is the present case, namely from a judgment pronounced in an action pending in the High Court by a judge of that court in court. The other nine cases are cases in which no direct or co-ordinate appeal is given.

to the Court of Appeal, and in which therefore a party desiring to appeal has no choice as to which court he should appeal, namely, whether to the Court of Appeal or to a Divisional Court, but must appeal to a Divisional Court if he appeals at all. Then sec. 76 defines the jurisdiction of the Court of Appeals and gives it, subject to the exceptions and conditions contained in the Act, appellate jurisdiction

> from every judgment, order or decision of the High Court whether the judgment, order or decision was that of a divisional court or of a judge in court, and including cases tried with a jury where the appellant complains of the judgment and asks in the alternative for a new trial.

This section, therefore, gives to the Court of Appeal co-ordinate jurisdiction in appeal with the divisional courts, over judgments coming within item no. 1 of sec. 75, and absolute jurisdiction in appeal from all judgments pronounced by a divisional court in appeal in the nine other items enumerated in sec. 75.

Then in sub-section 2 of sec. 77 is stated the first exception subject to which jurisdiction is given by the Court of Appeal by sec. 76, and this exception, in my opinion, is absolute and imperative, and itself is subject to no qualification whatever, and its effect is that a party appealing to a divisional court instead of to the Court of Appeal in a case in which he might have appealed direct to the Court of Appeal (as is the present case) shall have no appeal whatever to the Court of Appeal from the judgment of the divisional court, the tribunal in appeal of his own selection. In such a case the judgment of the divisional court in appeal, is absolutely final and conclusive and is the judgment of the only court of final resort which under the circumstances had jurisdiction within the Province of Ontario in the particular case in which such judgment was rendered, save only that in such

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

a case any other party to the action or matter so appealed to a divisional court then the appellant therein shall have an appeal to the Court of Appeal from the judgment of the divisional court in appeal, such "other party" is the only person to whom any appeal to the Court of Appeal is given in the case put in sub-section 2

Sub-section 2 of sec. 77 having thus provided absolutely for the case of a party appealing to a divisional court in a case in which instead of so appealing he might have appealed to the Court of Appeal, the sub-sec. 3 of the sec. 77 states the second exception to which the jurisdiction given to the Court of Appeal by sec. 76 is subjected, namely, that with the exception of the appeal given by sub-sec. 2 to a party other than the appellant to a divisional court in the case there put there shall be no appeal to the Court of Appeal from any judgment whatever of a divisional court of the High Court in appeal without leave first obtained either from the divisional court pronouncing the judgment in appeal, or from the Court of Appeal or a judge thereof, and so no appeal to the Court of Appeal without special leave first so obtained, even in cases of appeal enumerated in sec. 75 in which subordinate and not co-ordinate jurisdiction in appeal is given to divisional courts.

Sub-sec. 3 of the sec. 77 does not profess to give an appeal in a case not already provided for, but to prescribe limitations within which the right of appeal to the Court of Appeal already given by the Act shall be exercised. That sub-section cannot, in my opinion be construed as giving by implication a further appeal to the Court of Appeal from the judgment of a divisional court in appeal to a person who, having had the right to elect to which court as a court of final resort he should appeal, namely, to the Court of Appeal or to a

divisional court, had selected the latter, and in which case the immediately preceding sub-section 2 had unequivocally declared that such person should have no further appeal. Upon the whole therefore, the jurisdiction of the Court of Appeal as prescribed by sec. 76 is qualified by these exceptions and provisions, namely, that in a case wherein co-ordinate jurisdiction in appeal is given to divisional courts and to the Court of Appeal, and a party thereto having the option to appeal to either elects to appeal to a divisional court there shall no appeal lie from the judgment of such divisional court in appeal save at the suit of some other party than the appellant to the action or matter so appealed, and that with the exception of the appeal so given to such other party, there shall be no appeal to the Court of Appeal from any judgment of a divisional court in appeal in any matter wherein appellate jurisdiction is given to divisional courts by sec. 75 "except by special leave first obtained," &c., &c.

In short sub-sec 2 provides for cases in which the appellate jurisdiction of divisional courts is co-ordinate with the jurisdiction of the Court of Appeal, and sub-sec. 3 for cases in which the jurisdiction of divisional courts in appeal is subordinate.

The plaintiff in the action, however, who had so appealed to the divisional court applied to a judge of the Court of Appeal for leave to appeal to that court from the judgment of the divisional court in appeal; that learned judge refused to grant such leave for the reason that in his opinion the judgment of the divisional court in appeal was quite right and the Court of Appeal refused to interfere with such judgment of the learned judge upon the ground as is said, that the granting leave to appeal was wholly a discretionary matter and that the court would not interfere in a matter in which a learned judge had proceeded in the

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

exercise of his discretion. In the view which I have taken as already explained, neither the learned judge to whom the application was made nor the Court of Appeal had jurisdiction to grant to the plaintiff any further appeal in the case. The plaintiff now appeals to this court upon the ground, first, that the judgment of the divisional court in appeal was, under the circumstances of this case, a final judgment rendered by a court of final resort in the Province of Ontario having jurisdiction in the case within the meaning of the Revised Statutes of Canada, ch. 135, sec. 24, s.s. *a*, and secondly, that at any rate an appeal lies to this court under sec. 26, ss. 3 of said ch. 135.

In my opinion the contention of the plaintiff is well founded and an appeal lies in the present case under both of those sections, and the judgment in *Danjou* v. *Marquis* (1) does not apply to the present case which rests upon legislation subsequen tto the judgment in that case.

It cannot be questioned that the legislature of Ontario had jurisdiction to make one court the court of final resort within the Province of Ontario in one class of cases, and another court the court of final resort in another class of cases. This is just what I think has been done by the sections of the Ontario Statutes of 1895, which are consolidated in R. S. O. of 1897, ch. 51, sections 74, 75, 76 and 77, above extracted and the judgment of the divisional court to which the plaintiff appealed from the judgment of a judge of the High Court in court was a final judgment of the highest court of final resort within the Province of Ontario in the particular case under consideration within the meaning of R. S. C. ch. 135, sec. 24, s s. *a*.

Then as to the application of sec. 26, s.s. 3, of said ch. 135, that section has never been repealed or altered and it still remains in full force and effect. The

(1) 3 Can. S. C. R, 251.

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

statute of the Parliament of Canada, 60 & 61 Vict. ch. 34, has no application to the present case for that statute applies only to "appeals from any judgment of the Court of Appeal for Ontario," and not to appeals from a judgment of a divisional court in appeal which this is. The court designated in the act by the title "the Court of Appeal for Ontario" is the court which has been known under that name ever since the passing of the Ontario Statute, 39 Vic. ch. 7, s. 22. which enacted that "The Court of Error and Appeal shall hereafter be called the Court of Appeal." That statute therefore has no operation whatever as regards a judgment of a divisional court of the High Court and the judgment of the divisional court in the present case although pronounced in the exercise of appellate jurisdiction comes, in my judgment, within the Dominion statute, R. S. C. ch. 135, sec. 26, s.s. 3, which gives an appeal by leave of this court or a judge thereof

from the final judgment of any superior court of any province other than the Province of Quebec in any action, suit, cause, matter or other judicial proceeding originally commenced in such superior court without any intermediate appeal being made to any intermediate court of appeal in the province.

Now the judgment in the present case from which the plaintiff desires to appeal is a final judgment of the High Court of Justice in Ontario pronounced by a Divisional Court of such High Court in a suit commenced in such High Court, which is a Superior Court. The jurisdiction given by that section applies in my opinion to the present case and it is, I think, a proper case for granting leave to appeal if such be necessary for the case appears to be one of considerable importance and without expressing any opinion whatever as to the correctness or the reverse of the judgment of the Divisional Court, it will, if left to stand, deprive the plaintiff for all time in a very essential degree of the use of the stream for floating down

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

timber thereon obstructed as it is by a dam across it, the construction and maintenance of which the judgment pronounces to be perfectly lawful and right, and that no action lies at the suit of the plaintiff whatever may be the magnitude of the loss and damage occasioned to him by the obstruction which the dam occasions to his floating timber down the stream. That is a case in which it is but reasonable I think, that the plaintiff should have leave to take the opinion of this court, and as I think sec. 26, s.s. 3 of ch. 135, R S. C. has never been repealed or altered. I am of opinion that leave to appeal should be granted if such leave be necessary, although as I have already said, I think the plaintiff has a right to appeal to the Supreme Court under sec. 24 without special leave.

I have gone at this length into the case, tracing all the legislation upon the subject, because the parties expressed an intention to appeal to the court from my judgment, whatever it might be, and because in cases of this kind in the nature of appeal from the judgment of the registrar, the court have expressed the opinion that the judge hearing the appeal in such case should express his own opinion instead of referring the case to the court, and so leave it to the parties to elect whether they should appeal to the court or not. The form of the order will be to discharge the order of the registrar, costs to be costs to the plaintiff in any event of the cause, and to approve the bond in appeal and to allow the appeal to the Supreme Court.

Osler Q C. for the respondent moved by way of appeal before the full court,—(The Chief Justice and Taschereau, Gwynne, Sedgewick and Girouard JJ.)—from the order of Mr. Justice Gwynne.

Aylesworth Q. C. for the appellant, contra.

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

The court, without expressing any opinion on the main question involving the right of appeal direct from the divisional court, held that leave to appeal having been granted by Mr. Justice Gwynne the discretion exercised by him could not be reviewed and the motion was dismissed with costs.

After the decision on the merits in the following term the following judgments on the question of jurisdiction were handed down.

THE CHIEF JUSTICE.—This is an appeal from a judgment of Mr. Justice Gwynne sitting in Chambers granting leave to appeal to the plaintiff in this action from a judgment of the Queen's Bench Division of the High Court of Ontario immediately to this court without any intermediate appeal being had to the Court of Appeal.

The action was tried before the Chancellor who entered judgment for the defendants. The plaintiff appealed to the Queen's Bench Division who upon grounds distinct from those on which the first judgment had proceeded dismissed the appeal. From this judgment the plaintiff who is by an Ontario statute debarred from having recourse to an appeal to the Court of Appeal of the province sought leave to appeal under section 26, subsection 3 of the Supreme and Exchequer Courts Act, R. S. C., chapter 135. Subsection 1 of section 26 is as follows:

Except as otherwise provided in this Act or in the Act providing for the appeal no appeal shall lie to the Supreme Court but from the highest court of last resort having jurisdiction in the province in which the action, suit, cause, matter or other judicial proceeding was originally instituted, whether the judgment or decision in such action, suit, cause, matter or other judicial proceeding was or was not a proper subject of appeal to such highest court of last resort.

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

The Chief Justice.

In the case of *Danjou* v. *Marquis* (1), which was an appeal to this court from a judgment of the Court of Review in the Province of Quebec, instituted before the original Act had been amended by the addition of the provision now contained in sub-section 3 of section 26, it was held that the words "highest court of last resort" were to be construed as meaning the highest Court of Appeal having jurisdiction generally in the province, and not as referring to the highest Court of Appeal in the particular case sought to be appealed; thus excluding jurisdiction in a case in which the Court of Review was by provincial legislation made the court of last resort in the province.

The law in this respect has since been altered as regards the Province of Quebec by the provision that appeals shall lie immediately from the Court of Review although no appeal may lie to the Court of Queen's Bench in cases where an appeal would lie against a judgment of the Court of Review directly to the Privy Council.

Another amendment having reference to appeals from provinces other than Quebec was contained in the following clause (2):

> Provided also that an appeal shall lie to the Supreme Court by leave of such court or a judge thereof * * * * from the final judgment of any Superior Court of any province other than the Province of Quebec in any action, suit, cause, matter or other judicial proceeding originally commenced in such Superior Court without any intermediate appeal being had to any intermediate Court of Appeal in the province.

It is under this section and on its application to the present case that there can alone be any jurisdiction to grant leave to appeal in the present case.

So long as the party had a right of appeal to the Court of Appeal in the Province of Ontario it cannot

(1) 3 Can. S. C. R. 251. (2) R. S. C, ch. 135 s 26 ss. 3.

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

The Chief Justice.

be disputed that this court or a judge had jurisdiction under the preceding amendment to grant leave to a party to appeal directly to this court without resorting to an intermediate appeal to the Provincial Court of Appeal.

By the Ontario Act 58 Vict. cap. 13, sec. 13, subsec. 2, it was enacted:

> In case after this Act goes into effect a party appeals to a divisional court of the High Court in a case in which an appeal lies to the Court of Appeal, the party so appealing shall not be entitled to afterwards appeal from the said divisional court to the Court of Appeal, but any other party to the action or matter may appeal to the Court of Appeal from the judgment or order of the divisional court.

The effect of this legislation was to make the divisional court an appellate tribunal co-ordinate in jurisdiction with the provincial court of appeal, in the cases to which the section applied, and also to make it a court of last resort in cases in which its appellate jurisdiction under this section might be exercised.

Then the question is raised whether this had the effect of doing away with the jurisdiction of this court or a judge thereof (under the Act 38 Vict. cap. 11, sec. 11, now Supreme Court Amendment Act, sec. 26, subsec. 3, before set forth) to grant leave to appeal to this court directly from a judgment of the divisional court in a case in which owing to the change in the law by the provincial statute referred to, there could be no appeal to the Court of Appeal.

I am clearly of opinion that this change in the procedure and jurisdiction of the provincial courts has effected no alteration in the competence of this court to exercise the powers conferred by section 26, subsec. 3 of the amended Supreme Court Act. The language of that section is just as applicable to the case of an appeal directly from a division of the provincial High Court as it ever was. It was beyond the power

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

The Chief Justice.

of the Provincial Legislature to take away any jurisdiction which Parliament had conferred on this court. The new provincial law giving an alternative right of appeal to the divisional court or to the Court of Appeal at the election of the parties, does not imply any intention on the part of the Ontario Legislature to take away a right of appeal to this court even if it had the power to do so. There is no reason why the suitor who elects to take his appeal to a divisional court should be considered as abandoning his rights of ulterior appeal to the federal jurisdiction; on the contrary it might reasonably be assumed that he ought to be in exactly the same position in that respect whichever tribunal he selected.

The case is therefore clearly, one in which it was competent to a judge to give leave to appeal and in the present case I am of opinion that the power was properly exercised inasmuch as the case is one of great general importance involving as it does the construction of a number of statutes relating to rivers and streams conferring rights on the public which ought to be ascertained and defined by the courts with all possible exactitude.

The appeal is dismissed with costs.

TASCHEREAU J.—This appeal should be quashed. It is an appeal from the divisional court, appellant having, it is conceded, under the Ontario Statutes, ch. 51 R. S. O. 1897, secs. 74 et seq. and 62 V. (2 Sess.) ch. 11, sec. 27, no right of appeal *de plano* to the Court of Appeal, and leave to appeal thereto having been refused to him. Now, no appeal lies in this court from the judgment of the divisional court, except *per saltum*, upon special leave under subsec. 3 of sec. 26 of the Supreme Court Act (ch. 135 R. S. C.), which special leave can be granted however only in cases

where an intermediate appeal does lie to the Court of Appeal, but where the appellant desires upon special grounds to pass over that court and come direct here. The appellant here has, it is true, obtained from a judge in chambers an order purporting to have been granted under that said subsec. 3 of sec. 26, giving him leave to appeal. But a judge in chambers had not the power to grant such leave in this case, because there being no right of appeal to the Court of Appeal, there is no *per saltum* at all, in allowing appellant to appeal direct from the divisional court. "*Per saltum*,—by a leap; passing over intermediate objects." Taylor's Law Glossary. The words

without any intermediate appeal being had to any intermediate Court of Appeal in the province,

at the end of that subsection mean clearly, it seems to me, that it is only the case *when such an intermediate appeal lies*, as in *Moffatt* v. *The Merchants Bank* (1) for instance, that the enactment is restricted to. Appellant would strike these words out of the statute. That cannot be done. The words would be entirely superfluous if an appeal to this court could be allowed when there is no appeal in the province, and we cannot so treat them.

Respondent appealed to the court from that order granting leave to appeal, but we held that we could not entertain such appeal from the exercise of a discretionary power, assuming that the judge had jurisdiction to grant that order. The point had not been noticed in *Bartram* v. *Village of London West* (2). See *Ex parte Stevenson* (3); *Re Central Bank of Canada* (4), and *ratio decidendi* in *Lane* v. *Esdaile* (5). Respondent should then have moved to quash the appeal;

(1) 11 Can. S. C. R. 46.
(2) 24 Can. S. C. R. 705.
(3) [1892] 1 Q. B. 394.
(4) 17 Ont. P. R. 395.
(5) [1891] A. C. 210.

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

Taschereau J.

The Ontario and Quebec Railway Co. v. *Marcheterre* (1). But his failure to do so cannot, of course, give us jurisdiction. In every case, we have to see, *in limine*, if we have power to entertain the appeal, whether the point is noticed at bar or not.

The appellant further contends that assuming the leave to appeal granted to him in Chambers to be of no avail, yet this court has jurisdiction because, he having no right of appeal to the Court of Appeal, the Divisional Court from which he now appeals, is, in his case, the highest court of last resort in the province under section 24, subsec. *a*, and section 26, subsec. 1 of the Supreme Court Act. But that contention cannot prevail. It was the contention raised in *Danjou* v. *Marquis* (2), and *Macdonald* v. *Abbott* (3), but declared unfounded by the court.

In Quebec, a party who is dissatisfied with the judgment of the Superior Court may either appeal to the Court of Review or to the Court of Appeal, but if he elects to appeal to the Court of Review, and the judgment is confirmed, he has no right to appeal further to the Court of Appeal. Though in such a case, the Court of Review was the court of final resort in the province, yet we held in those cases that no appeal could then be taken therefrom to this court, as that court was not the highest court of final resort in the province. Now, the divisional court is likewise not the highest court of final resort established in the Province of Ontario. See also *Chevalier* v. *Curillier* (4). By an amending Act, 54 & 55, V. c. 25 (D), an appeal now lies from the Quebec Court of Review in certain cases, but until a similar legislation is extended to the divisional court of Ontario, no appeal lies from that court.

(1) 17 Can. S. C. R. 141.
(2) 3 Can. S. C. R. 251.
(3) 3 Can. S. C. R. 278.
(4) 4 Can. S. C. R. 605.

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

Taschereau J.

No subsequent legislation to the cases I have referred to has altered the Supreme Court Act in that respect. In fact, *Danjou* v. *Marquis* (1), is re-asserted as law, but for the amending Act above cited, as late as 1895 in *Barrington* v. *The City of Montreal* (2).

The contention that the Ontario Legislature could not indirectly do what it cannot do directly, take away the right of appeal to this court, has been answered in *City of Ste. Cunégonde* v. *Gougeon* (3), where the learned Chief Justice said for the court.

That the Provincial Legislature may limit appeals to the Court of Appeal of the province must be admitted, although the effect of so doing may be to take away in such cases a further appeal to the Supreme Court.

The appellant would contend that though by the Dominion Act, 60 & 61 V. c. 34, no appeal, with certain exceptions, lies to the Supreme Court from any judgment of the Court of Appeal for Ontario, where the amount in controversy in appeal does not exceed one thousand dollars, yet an appeal would lie from the Divisional Court where by the Ontario statute the judgment of that court is final, even when the amount in controversy is less than one thousand dollars. Such an anomaly was not intended. Parliament of Canada, must have assumed that no appeal lies from Ontario in ordinary cases, but from the Court of Appeal, the highest court of final resort in the province. The Ontario Legislature likewise, since 1881, by ch. 49, R. S. O. (1897) sec. 2, has assumed that to be the law. And though, prior to the recent legislation on the subject, the divisional court's judgment by the Act of 1881 was final in cases under $500, where the judgment was unanimous, yet, I do not know of a single attempt during that period to bring any of those cases to the Supreme Court, though, if appellant's con-

(1) 3 Can. S. C. R. 251. (2) 25 Can, S. C. R. 202.
(3) 25 Can. S, C. R. 78.

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

Taschereau J.

tention here prevailed, all of them would have been appealable. That is not, *per se*, conclusive, but it shows the novelty of the present appeal The consensus of the profession and of the Federal and Provincial Legislative authorities deserves consideration.

The order granted in Chambers as to this second point cannot give us jurisdiction. If the appeal direct was given by the statute, no order would be necessary. If it is not given by the statute, no order can give it. The case, on this point, is precisely as it the registrar had received the appeal *de plano*. The question of jurisdiction would still then be open to the respondent, with or without motion to quash, and, would have, upon his failure to do so, to be taken by the court.

GWYNNE J. took no part in the judgment on the appeal from his order in chambers.

SEDGEWICK J.—I concur in the judgment of my brother Taschereau.

GIROUARD J.—I concur in the dismissal of this appeal from the order made in chambers.

In the following term the case was heard on the merits before a differently constituted court, Mr. Justice King being present, and Mr. Justice Sedgewick not sitting.

Aylesworth Q.C. and *Shaunessy* for the appellant, referred to *Little* v. *Ince* (1).

Osler Q.C. for the respondent, The only remedy given by the Act is that of removing the obstruction, and no other is open to appellant. Hardcastle on Statutes, 2 ed. pp. 259-261. *Lamplugh* v. *Norton* (2); *Cockburn* v. *Imperial Lumber Co.* (3).

(1) 3 U. C. C. P. 528. (2) 22 Q. B. D. 452.
(3) 26 Ont. App. R. 19.

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

Gwynne J.

The judgment of the court was delivered by:

GWYNNE J.—The appeal before us is from a judgment of the Queen's Bench Division of the High Court of Justice for Ontario, dismissing an appeal of the plaintiff from the judgment of the trial judge dismissing his action, the short material substance of which as set out in his statement of claim was a complaint that he being a person engaged in the business of floating logs of timber down a stream called Bear Creek during the season of freshets suffered damage from certain logs of his which during the freshet seasons of the years 1895, 1896 and 1897 he was floating down the stream having been obstructed and delayed by two several obstructions which the plaintiff alleges had been made by the defendants across the stream and were used by them for the purpose of damming up the water of the said stream so as to hold the same during the dry season of the year when little water was in the stream, and from which since the construction of the obstructions the plaintiff alleges that the defendants have drawn and still do draw the water by a large iron pipe to an oil refinery which they operate several miles away.

This judgment of the Divisional Court appears to me to have proceeded upon a too limited and too technical construction of the plaintiff's statement of claim. The court in pronouncing their judgment say:

> The plaintiff does not put his case upon the ground that the defendants having the right to construct the dams in question negligently constructed them, nor alleging that there was a duty upon them to construct the said dams with aprons or slides therein on the ground of the neglect of such duty, but he puts it solely upon the ground that the defendants although not riparian proprietors or in anywise entitled to any right, property or interest in the said stream or creek apart from other members of the public wrongfully erected the said dams. Woodley was undoubtly the owner of the land on each side of

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

Gwynne J.

the creek, and *primâ facie* the owner of the soil which formed the bed of the creek at the point at which he constructed his dam, and as such owner had as we have seen the right to construct the said dam. At the point at which the defendants constructed their dam one Fairbanks owned the land on the west side of the creek and the soil which formed the bed of the creek to the centre of the creek, and Fitzgerald and Fellows together owned the land on the east side of the creek and *primâ facie* the soil which formed the bed of the creek to the centre of the creek so that at this point Fairbanks, Fitzgerald and Fellows together owned the land on each side of the creek and were *primâ facie* owners of the soil which formed the bed of the creek, and it was under their leave, license and authority that the defendants constructed their dam, and they had therefore the right to do so.

If this was the proper construction to put upon the statement of claim, then instead of dismissing the plaintiff's appeal upon the ground stated the proper course to have been pursued would have been for the court to have exercised the powers vested in the Ontario courts by statute, and which they are not only authorized but required to exercise at any stage of the action and not only upon, but without the application of any of the parties, and to have made all such amendments as might be necessary to determine the rights and interests of the respective parties, and the real question in controversy between them, and which was in point of fact brought to trial and tried, and best calculated to secure the giving of judgment according to the very right and justice of the case; but the sentence in the statement of claim from which the Divisional Court have extracted a part continues to express clearly enough, as it appears to me, that the gist of the plaintiff's statement of claim, as alleged in the 4th paragraph, and the wrongfulness therein complained of consisted in the defendant having erected

two certain obstructions in said stream, one being about three fourths of a mile further up the stream than the other by laying timber, stones, stakes, earth and other substances firmly jointed and very difficult of removal across the full width of the said stream at those

two points, of a sufficient height to intercept the flow of the water in the stream even in high water, and to catch and obstruct saw-logs and timber floating down the stream.

Then the statement of claim in its 5th, 6th and 7th paragraphs proceeds to allege the repeated obstructions of the plaintiffs caused by these obstructions in the years 1895, 1896 and 1897, and the difficulty he had in getting the logs freed from the jams thereby caused and the damage occasioned him thereby. Then in the 8th paragraph was inserted another cause of action to which the language cited from the statement of claim by the Divisional Court as to the defendants "although not riparian proprietors," &c., &c., seems to relate; that cause of action is thus stated in paragraph 8.

The plaintiff is a riparian proprietor on the said stream below the said obstructions, and he has suffered and is suffering great damages by the withdrawal of the said water from the said stream by said defendants by reason of loss of water for cattle and other domestic purposes.

Now that the defendants never had any doubt that the gist of the plaintiff's complaint, as alleged in the first seven paragraphs of the statement of claim, consisted in the damage alleged to have been suffered by him by reason of his logs having been wrongfully impeded and jammed together in coming down the streams by two obstructions alleged to have been constructed by the defendants across the stream of a character capable of impeding, and which did impede plaintiff's logs floating down the stream without having any slide therein whereby the logs could descend the obstructions or dams, appears by the defendants statement of defence, and by the evidence and course of proceedings at the trial. The defendants in their statement of defence:—1. Plead a general denial of all the allegations in the statement of claim except those in the 1st paragraph.

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

Gwynne J.

2. They deny that the said obstructions ever prevented the passage or ever caused the logs or timber of the plaintiff to become jammed as alleged.

3. The obstruction referred to in the statement of claim did not catch and obstruct the said logs and timber of the plaintiff floating down said stream as alleged, but on the contrary the said obstructions, if any, raised the water of the stream above them, thereby rendering it more convenient and possible at certain times, when otherwise it would have been impossible, to float logs and timber on the shallow parts of said stream above said obstructions.

4. That if any such obstructions existed as alleged, (which the defendants do not admit but deny) the plaintiff was well aware thereof before putting his logs and timber in the stream as alleged and the plaintiff could, as he lawfully might with little or no expense, have removed the said obstructions complained of and have thereby avoided the jams that he alleges (but which the defendants deny) occurred.

5. The right claimed of by the plaintiff in respect of the use of the said stream for floating logs and timber, (and which right the defendants deny) is, if any, a statutory right acquired under ch. 120 of the Revised Statutes of Ontario, and the defendants plead and claim the benefit of sections 5 and 6 of said Act.

Then as to the cause of action in the 8th paragraph of the statement of claim the defendants pleaded a defence covering also the allegation in the 4th paragraph that the defendants "although not riparian proprietors," &c., &c., did the act complained of for the purpose of drawing off water, &c., &c., to their oil refinery in which defence they say:

6. That they are and have been during all the times complained of, lessees and in possession of a part of lot number fourteen in the twelfth concession of the Township of Enniskillen, now in the town of Petrolia, abutting on the said stream, and as such are and have been during said times entitled to the rights of riparian proprietors, and that if they withdrew any water from the said stream to be used in their said manufactory as alleged (which, however, they do not admit) the same was a reasonable use of the said stream and did not cause any damage to the plaintiff as alleged, and the said water, if any was taken, was returned to the said stream by the defendants above the lands of which the plaintiff claims to be a riparian proprietor.

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

Gwynne J.

Issue having been joined on these defences the parties went down to trial and there the main contention was as to the amount of damage, if any, sustained by the plaintiff by reason of his logs having been interrupted and delayed in their progress by the obstructions complained of. In the course of the inquiry into this matter it appeared in evidence that the upper dam was constructed by one Woodley upon his own property, and the learned trial judge held that although it appeared that the defendants assisted in the construction thereof by giving some material therefor, and although they derived a benefit from the dam by arrangement with Woodley to have a pipe in the dam enabling them to draw off water to their oil refinery, still, that Woodley was the only person who, if any, was responsible to the plaintiff for any damage by him sustained by reason of his logs having been obstructed by that dam, and he held as a matter of fact upon the evidence before him that the plaintiff had not sustained any damage which was attributable to the lower dam which was built by the defendants and for the above reasons he gave judgment dismissing the plaintiff's action. He pronounced no judgment upon the defence raised by the 5th paragraph of the statement of defence, the contention of the parties in respect of which was—on the part of the plaintiff—that all persons who hinder or delay the floating of logs down a stream by the erection therein of any dam or other obstruction are responsible to the person suffering damage from his logs being thereby obstructed unless they show that they had erected a sufficient slide to enable the logs to float over the dam and so float down the stream, and the contention of the defendants being that the right of riparian proprietors to construct a dam across a river is absolute subject only to the right of persons floating logs down

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

Gwynne J.

the river to construct at their own cost a sufficient slide in such dam. As the Divisional Court although not adjudicating upon this point have expressed an opinion upon the question involved in this paragraph of the defence, and as the question is a very important one, it is necessary to deal with it under the defence contained in the 5th paragraph of the statement of defence. The question is certainly one of some apparent difficulty which arises from the manner in which divers Acts and sections of Acts of Parliament are re-enacted in divers sections of one chapter of the edition of the statutes—called the Revised Statutes of Ontario. Thus, the first section of ch. 120 R. S. O., 1887, is the consolidation of the first section of 47 Vict. ch. 17, passed in 1884, and secs. 11 to 22, both inclusive, of the said ch. 120, are severally and continuously the consolidation of secs. 2 to 13, both inclusively, severally and in continuous order of the said ch. 17 of 47 Vict., while secs. 2 to 10, both inclusively of said ch. 120, are severally the consolidation of sections of like numbers in ch. 115 R. S. O., 1877, and this ch. 115 is in like manner the consolidation of certain parts of two other Acts, namely, chs. 47 and 48 C. S. U. C. which are in like manner the consolidation of other previous Acts, but it is unnecessary for my purpose to go farther back than C. S. U. C. The first and second sections of said ch. 115 are respectively the consolidation of secs. 15 and 16 of ch. 48, C. S. U. C. intitled "An Act respecting mills and mill dams," while secs. 3 to 8, both inclusive of said ch. 115, are respectively the consolidation of secs. 1 to 6, both inclusively, and in continuous order of ch. 47 C. S. U. C.

Now every edition of the Revised Statutes of Ontario is subjected to an Act of the Legislature, intituled "An Act respecting the Revised Statutes of Ontario," pre-

scribing the manner in which the revised statutes shall be construed, and enacting

> that the said revised statutes shall not be held to operate as new law, but shall be construed, and have effect as, a consolidation and as declaratory of the law as contained in the said Acts or parts of Acts so repealed, and for which the said revised statutes are substituted.

In accordance with this direction sec. 5 of ch. 120 R. S. O. 1887 cannot be construed as anything more than a section in consolidation of sec. 5 of said ch. 115 R. S. O. 1877, and as declaratory merely of the law as contained in such last mentioned section now repealed, and that the said section 5 of said ch. 115 was while in force in like manner a consolidation merely of sec. 3 of ch. 47 C. S. U. C. For the purpose therefore of construing sec. 5 of the R. S. O. 1887, ch. 120, it is necessary to refer back to this ch. 47 C. S. U C., and to determine the purport and intent of the sec. 3 thereof. This ch. 47 C. S. U. C. imposed in its first section penalties upon persons who should, except as therein authorised, fell any trees into certain large navigable rivers therein mentioned, and in its second section imposed penalties on all persons who should throw into any river, rivulet or water course, "*excepting those hereinafter mentioned,*" any substance therein mentioned, or should fell or cause to be felled in or across such river, rivulet or water course any timber or growing or standing trees, and should suffer them to remain in or across such river, rivulet or water course.

Then sec. 3 enacts as follows:

> This Act shall not apply to any dam, weir or bridge erected in or over any such river, rivulet or water course, &c., &c.

And sec. 4 names the rivers excepted from such section 2 of the Act under the words "excepting these hereinafter mentioned," namely: The Rivers St. Lawrence and Ottawa, and all rivers or rivulets

1899

FARQUHARSON v. THE IMPERIAL OIL CO.

Gwynne J.

"wherein salmon, pickerel, black bass or perch do not abound."

It appears therefore to be clear that sec. 5 of the ch. 120 cannot be read as new law or as anything else than a qualification of the penal clauses 3 and 4 which are but the consolidation of the penal clauses in ch. 47 C. S. U. C. It cannot therefore be construed as having any effect in qualification of sec. 1 of ch. 120, which is a consolidation of sec. 1 of 47 Vict. ch. 17. Indeed so to construe it would be to contradict in most plain terms that section which declares that it is and always has been the right of all persons during spring and autumn freshets to float logs, timber, &c., &c., down all rivers, creeks and streams, and that no person shall by felling trees *or placing any other obstruction* in or across any such river, creek or stream prevent the passage thereof, and in case of any such obstruction being caused it is declared to have been always lawful for the persons floating logs, &c., down the stream to remove the obstruction if necessary, and to construct such apron, slide, &c., &c., &c., or other work necessary for the purpose aforesaid that is, for removal of the obstruction. Now there can be no doubt that in order to construct an apron or slide for the purpose of removing the obstruction caused to floating timber it is plain that such works must needs be constructed for the purpose of removing the obstruction caused by a dam across the whole width of a stream. There can be no pretence therefore for saying that a dam across a river which obstructs the floating of logs, &c., &c., is not an obstruction within the first section of ch. 120, R. S. O., 1887. As all persons have a legal right to float logs, &c., &c., down every river or stream in Ontario the obstruction of that legal right is necessarily a wrong and gives a good cause of action for recovery of damages for the injury sustained thereby,

but the statute gives a further remedy which enables the party suffering the injury to abate the nuisance by removal of the obstruction subject to this qualification that if the obstruction be a dam across a river which may be lawfully constructed for many useful and lawful purposes the person requiring to use the river for floating down logs therein may not remove the dam if it have an apron or sluice in it sufficient to enable the logs, &c., to float down; the remedy by removal of the obstruction can only serve to prevent a recurrence of the injury—an action affords the only remedy for an injury suffered from the obstruction prior to its removal.

The question before us must then turn upon the judgment of the trial judge and we think that the evidence sufficiently established such a connection of the defendants in the erection of the upper dam and in its maintenance, that they are answerable in an action at the suit of the plaintiff for any damages caused by the obstruction to his floating his logs.

We think that the appeal must be allowed with costs and that the whole question of the damage whether caused by the upper or the lower obstruction should be referred to the master of the High Court of Ontario to inquire and report to the court. The appellant will have the costs of this appeal and of his appeal to the Divisional Court and the costs of the action up to and inclusive of the trial; subsequent costs must be reserved until after the master's report.

Appeal allowed with costs.

Solicitors for the appellant: *Pardee & Shaunessy.*

Solicitors for the respondent: *Moncrieff & Gausby.*