THE ONTARIO AND QUEBEC RAILWAY CO..... APPELLANTS;

AND

MAURICE MARCHETERRE.....RESPONDENT.

1889
Nov. 5.
1890
*Jan. 27.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Application to give security for costs—Supreme and Exchequer Courts Act, Sec. 46—Appeal—Jurisdiction—Judgment, interlocutory or final—Art. 1116 C.C.P.—Amount in controversy not determined—Supreme and Exchequer Courts Act, secs. 28 and 29.

1. A judgment of the Court of Queen's Bench for Lower Canada (appeal side), quashing a writ of appeal on the ground that such writ had been issued contrary to the provisions of Art. 1116 C.C.P. is not "a final judgment" within the meaning of section 28 of the Supreme and Exchequer Courts Act. (*Shaw* v. *St. Louis*, 8 Can. S.C.R. 387 distinguished).
2. The Supreme Court has no jurisdiction under sec. 29 of the Supreme and Exchequer Courts Act, upon an appeal by the defendant where the amount in controversy has not been established by the judgment appealed from.

(Gwynne J. reserving his opinion on this point).

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) quashing an appeal to that court from the judgment of the Court of Review, by which the appellants' demurrer to respondent's action for damages was dismissed and the case was referred back to the Superior Court to ascertain the amount of damages.

The appellant in this case first applied to a judge of the Court of Queen's Bench for an order to settle the case and give the proper security. This application

*PRESENT:—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

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was refused, and thereupon the appellant made another application to Mr. Justice Strong in chambers for an order allowing security to be given on his appeal in accordance with the provisions of section 46 of the Supreme and Exchequer Courts Act.

Upon this application and after having heard the parties the following judgment was delivered :—

STRONG J.—This application is made by the Ontario and Quebec Railway Co. who were the appellants in an appeal to the Court of Queen's Bench and the defendants in the court of first instance, to allow them to pay $500 into court as security for costs and for the due prosecution of the appeal pursuant to the 46th section of the Supreme and Exchequer Courts Act. The judgment of the Superior Court was in favor of the plaintiff, but it directed a reference to ascertain the amounts of damages which the plaintiff had sustained. By his action the plaintiff claimed damages to the amount of $5,000. The Court of Queen's Bench held that this was not a final, but a mere interlocutory judgment, and, therefore, not appealable without special leave, which had not been obtained.

Although I have determined to grant the application, I have great doubts as to the competence of the Supreme Court to entertain the appeal, and my object in making the order asked for is to give the parties an opportunity of having the question of jurisdiction decided by the full court. As the delay for appealing prescribed by the Statute, and which I have no power to enlarge will elapse before the sitting of the court, this can only be done by allowing the security to be put in now, for otherwise, the appellant will be foreclosed by lapse of time before the court sits. I therefore, make the order asked for allowing the deposit of $500 in court as security pursuant

to section 46 of the statute, and I would suggest to the parties that they should bring the case before the court as soon as possible and before incurring any expense in printing the record or factums. I may add that my doubt upon the point of jurisdiction is founded on the 29th section of the statute. It appears to me that at present it cannot be said that the matter in controversy in this action for damages amounts to the sum or value of $2,000 and it is not pretended that a question coming within any of the several categories specified in the sub-sections to section 29 is involved in the appeal. Before the rule laid down in *Joyce* v. *Hart* (1) was displaced (as I consider it has been) by *Allan* v. *Pratt* (2), it would according to the former authority have been sufficient to give jurisdiction that the damages claimed in the conclusions of the action amounted to $2,000. The decision of the Privy Council in the case last referred to, however, establishes that in an appeal by a defendant, the amount of the damages in which the appellant has been condemned affords the test to be applied in ascertaining the question of competence. The enactment under which *Allan* v. *Pratt* (2) arose being identical with that of section 29 of the Supreme Court Act it appears to me that the same interpretation must be applied to the last mentioned section also. It may be remarked here that this 29th clause differs entirely in its wording from section 2311 of the Revised Statutes of Quebec, which is an express enactment that the competence of a case for appeal whenever that depends on the amount in dispute is to be ascertained from the amount demanded and not from that recovered by the judgment if they are different. Without at present expressing any decided opinion I am inclined to think that it is a proper inference to be drawn from the case of *Allan* v. *Pratt* (2) that

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when a defendant in an action for damages or other money demand seeks to appeal to the Supreme Court he must be able to show from the judgment that the amount in controversy is not less than $2,000, in other words he must establish that a judgment to that amount at least has been rendered against him, and, as at present advised, it appears to me not to be sufficient to say, that although no amount has been actually ascertained by the judgment rendered, yet the proceeding ordered by that judgment may result in h e condemnation of the defendant in damages to the amount of $2,000. It was also contended by Mr. Abbott on behalf of the appellant that if he proceeded to execute the judgment by taking part in the reference ordained by it, he would be precluded by acquiescence from objecting to it hereafter in case he should appeal from the final judgment, even though the damages when ascertained should amount to $2,000 or upwards, and that thus on an appeal from the final judgment he would be restricted to the question of damages and altogether debarred from impugning the principle of the present judgment establishing the defendant's liability in the action. And for this position *Shaw* v. *St. Louis* (1) was cited as an authority. As the judgment sought to be appealed against has been held by the Court of Appeals to be interlocutory and not final, this objection does not at present appear to me to be conclusive, and I should probably so hold if I now undertook to decide the point which, however, I expressly refrain from doing.

As both the points taken are worthy of consideration I think it better instead of taking it upon myself sitting alone in chambers to decide such important questions of jurisdiction relating to appeals from the province of Quebec, to give the parties an opportunity of

(1) 8 Can. S.C.R. 385.

obtaining the opinion of the court, and, therefore, for that reason, and for that reason alone, I allow the proposed security to be given.

Archambault Q.C. moved to quash the appeal on two grounds: 1. That the judgment appealed from was not a final judgment; 2. That it does not appear by the judgment appealed from that the matter in controversy amounts to $2,000.

H. Abbott Q.C. *contra.*

Sir W. J. RITCHIE C.J. concurred with Taschereau J.

STRONG J.—I am of opinion that this motion to quash the appeal for want of jurisdiction ought to be granted.

The appellants do not bring themselves within the 29th section of the Supreme Court Act, inasmuch as they do not establish that the matter in controversy amounts to $2,000.

My reasons for this conclusion are the same as those intimated in the note of my judgment in chambers to which it is sufficient to refer without repeating them here.

It also appears to me that the judgment appealed from is not a final judgment. The learned judges of the Court of Queen's Bench have so held, and their decision upon a question of procedure, such as this undoubtedly is, would be conclusive to me, even if my own individual opinion was different which, however, it is not. It is true that according to French procedure a judgment referring the estimation of damages to experts appears to be considered a definitive and not a mere preparatory or interlocutory judgment, but there are doubtless good reasons why the practice in the province of Quebec should be held otherwise as it always has been.

The supposed difficulty founded on the decision in

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Shaw v. *St. Louis* (1) and which, if well founded, would virtually deprive suitors of an appeal to this court in all cases where a preliminary judgment of reference, like that in the present case, might be pronounced, seems to me chimerical and not to follow from that decision. It is sufficient for me to say that it is entirely disposed of by the reasons given in the judgment of my brother Taschereau, in which I concur.

TASCHEREAU J.—This case is before us on a motion to quash the appeal. The respondent's action is one in damages for $5,000 for bodily injuries by him suffered, as he alleges, by the negligence of the company appellant. The Superior Court dismissed the action, but the Court of Review reversed that judgment, admitting the respondent's right of action, but referred the case back to the Superior Court to ascertain the amount of damages.

From this judgment of the Court of Review the company appealed to the Court of Queen's Bench, but that court on motion by the respondent, before any other proceeding on the appeal, quashed the writ of appeal on the ground that it had been issued *de plano* and not with the permission of the court, as required by Art. 1116 of the Code of Procedure.

The appeal here is from this judgment of the Court of Queen's Bench on that motion. The respondent moves to quash the appeal on two distinct grounds upon which the parties were heard :

1st. That the judgment appealed from is not a final judgment.

2nd. That the matter in controversy does not amount to $2,000. I think both of these grounds well founded.

The judgment of the Queen's Bench is purely and

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simply on a question of procedure, which finally determines nothing but that the writ of appeal as issued was illegal and voidable. It does certainly put an end to that writ, but that is not sufficient to bring it within the interpretation of the words "final judgment" in sec. 28 of the Supreme and Exchequer Courts Act. If the Court of Queen's Bench had dismissed the respondent's motion instead of granting it the respondent could have appealed to this court, yet the judgment would not have put an end to his motion. To give to the words "final judgment" in the Supreme Court Act the wide interpretation contended for at the argument by the appellant here in answer to the respondent's motion, would be to render appealable all judgments of the Court of Queen's Bench by which a motion or any proceeding in that court would be dismissed or finally disposed of. We cannot give that construction to these words. The judgment quashing the writ of appeal, on an interlocutory proceeding, though final as to that appeal is an interlocutory judgment in the cause. The appellant argued, referring to *Shaw* v. *St. Louis* (1), that he might eventually find himself precluded from appealing to the court. Whether that is so or not, a point which of course we have not to determine here, that will be simply because the statute does not provide for an appeal in such a case. In that case of *Shaw* v. *St. Louis* (1), speaking for the court, I cautiously refrained from expressing any opinion on the point whether Shaw, in that case, could have appealed to this court from the judgment of 1880; and Mr. Justice Fournier, I am sure, though he expressed an opinion on it, did not intend to give a decision not necessary for the determination of that case.

The appellant's attempt to establish by the decision of this court in that case of *Shaw* v. *St. Louis* (1) that the

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judgment of the Court of Review in the present case was not an interlocutory but a final judgment cannot succeed. There is no analogy whatever between the two cases. The gist of our decision there was that a judgment of a court of appeal, *passée en force de chose jugée*, which is partly interlocutory and partly final, binds the Superior Court and the Court of Appeal itself, if the case comes up a second time, as to all of it that finally determined the issues between the parties or any of these issues, and we held the judgment in that case to have been partly a final judgment, though the case was referred to ascertain the amount the plaintiff was entitled to, but only in the sense that the maxim "*l'interlocutoire ne lie pas le juge*" did not apply to such a judgment. Here, we are asked to determine that the judgment of the Court of Review, certainly interlocutory for part, is not interlocutory in the sense given to this word in Art. 1116 of the Code of Procedure, a totally different question. Now we could not do so without unsettling a constant and long established jurisprudence in the province, a conclusion we could not come to, in any case, but with great hesitation and particularly so where on a question of practice and procedure, as we have often said, as a general rule we cannot interfere. This Art. 1116 C. C. P., moreover, as I read it, to express my own opinion on it, must apply to others than mere *jugements préparatoires ou d'instruction*, as it extends in express words to cases where the judgment in part decides the issue, or orders the doing of anything which cannot be remedied by the final judgment. In *Shaw* v. *St. Louis* (1) in express terms, referring to the case of *Wardle* v. *Bethune* (2) I refrained from expressing any opinion on the question as to what class of judgments Art. 1116 of the Code of Procedure applied.

(1) 8 Can. S. C. R. 385.

(2) 6 L. C. Jur. 220.

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The second ground against the appeal is also well taken. It is now a settled point that upon an appeal to this court by the defendant the amount awarded by the judgment appealed from, and not the amount demanded by the declaration, is to be considered as the matter in controversy under sec. 29 of the Supreme and Exchequer Courts Act, where the jurisdiction of the court depends upon the amount. Now, here the defendants, appellants, have not yet been condemned to any sum or amount whatever. How can it be said that the matter in controversy now amounts to $2,000? The plaintiff's demand, so far as the amount goes, is in abeyance. The defendants, appellants, may eventually be condemned to $500 or $1,000 only. This court has no jurisdiction in a case of the kind, where the amount in controversy, upon an appeal by the defendant, is not yet established.

To refer again to *Shaw* v. *St. Louis* (1) it must be remembered that, at that time, the jurisprudence of the court was that the amount demanded was the amount in controversy on the appeal to this court.

GWYNNE J.—I rest my judgment simply upon the point that the Court of Appeal in the province of Quebec, from whose judgment the present appeal is taken, in substance and effect merely quashed the appeal *de plano* as an irregular procedure according to the practice of the court of the province of Quebec, and did not render any judgment either approving or disapproving the judgment of the Court of Revision upon the point raised and argued before it. I desire to reserve my opinion upon the question raised as to there not being in the present case the sum of $2,000 in controversy so as to warrant an appeal to this court, until a case arises which must necessarily be tested and determined upon that question.

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Where judgment has been rendered in favor of a plantiff for a sum awarded by a judge or jury, the amount so awarded is the amount in controversy regulating the right of appeal to this court; but where a plaintiff brings an action claiming in his statement of claim, say $5,000 or any sum exceeding $2,000, and a final judgment on the merits is rendered for the defendant in the Superior Court of the province of Quebec, which judgment is reversed by the Court of Revision whose judgment is sustained by the Court of Appeal in that province upon an appeal duly instituted, then in such a case the defendant's right of appeal against the judgment reversing the final judgment in his favor must, in my opinion, (as at present advised) be regulated, so far as the amount in controversy is concerned, by the amount claimed in the statement of claim,—the plaintiff insisting on his right to recover that amount, and the defendant denying any such right,—otherwise the result, in my judgment as at present advised, would be absurd, namely, that a defendant has no right of appeal to this court in a case where he is not liable to any judgment being rendered against him; but here the Court of Appeal in the province of Quebec reverses a final judgment in his favor upon the merits, and erroneously remits the case to be tried over again, or to have damages assessed against him in the Superior Court. The case of *Allan* v. *Pratt* (1), in the Privy Council is, in my opinion, no authority for any such conclusion.

PATTERSON J.—Concurred with Taschereau J.

Appeal quashed with costs.

Solicitors for appellants: *Abbotts, Campbell & Meredith.*

Solicitors for respondent: *Archambault & Pellissier.*

(1) 13 App. Cas. 780.