DAMASE LANGEVIN (PETITIONER)..... APPELLANT ; 1890

*Nov. 25.

AND

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*Feb. 5.

LES COMMISSAIRES D'ECOLE POUR LA MUNICIPALITÉ DE ST-MARC, DANS LE COMTÉ DE VERCHÈRES (RESPONDENTS..... ..... RESPONDENTS.

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

Mandamus—Judgment on demurrer not final—Appeal—Supreme and Exchequer Courts Act, sec. 24 (g)—Secs. 28, 29 and 30.

Interlocutory judgments upon proceedings for and upon a writ of mandamus are not appealable to the Supreme Court under sec. 24 (*g*) of the Supreme and Exchequer Courts Act. The word "judgment" in that sub-section means the final judgment in the case. Strong and Patterson JJ. dissenting.

APPEAL from a judgment of the Court of Queen's Bench (appeal side) for lower Canada, reversing the interlocutory judgment of the Superior Court.

The appellant, a freeholder and ratepayer of the school municipality of the parish of St. Marc, applied to the Superior Court for a writ of mandamus against the respondents, in order to enforce the execution of a decree of the Superintendent of Education ordering the respondents to maintain school district No. 6 of their municipality and to erect thereon a school house.

The respondents filed four pleas to the petition and the appellants demurred to three of the pleas. The Superior Court maintained the appellant's demurrers,

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PRESENT.—Sir W. J. Ritchie C. J. and Strong, Fournier, Taschereau, and Patterson JJ.

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but on appeal the Court of Queen's Bench for Lower Canada reversed the decision of the Superior Court and declared that the respondents had the right to the allegation set forth in their pleas.

On appeal to the Supreme Court of Canada,—

Mr. Cornellier Q.C. and *Mr. Geoffrion* Q.C. for respondent moved to quash the appeal on the ground that the judgment appealed from was an interlocutory judgment, and that section 24 (*g*) and section 30 of the Supreme and Exchequer Courts Act did not give leave to appeal except from the final judgment in the case.

Mr. Lacoste Q.C., *contra*, relied on the case of *Danjou* v. *Marquis* (1) and sections 24 (*g*), 27, 28 and 30 of the Supreme and Exchequer Courts Act.

SIR W. J. RITCHIE.—I am of opinion that this is not a final judgment which can be appealed from. It is said that the case of *Danjou* v. *Marquis* (2) supports the view that an appeal can be entertained. The question before the court was not whether an appeal would lie in the case, but whether there could be an appeal from the Court of Review treating that as the court of final resort. That was the point in issue in that case, and the conclusion arrived at was that the appeal would only lie from the Court of Queen's Bench.

As I am of opinion that under section 24 (*g*) of the Supreme Court Act, allowing appeals in proceedings for or upon a writ of mandamus, the decision sought to be appealed from must be a final judgment and that the judgment in this case was not final, it follows that we have no jurisdiction. I therefore think the appeal should be quashed.

STRONG J.—I entirely dissent from the opinion arrived at in this case by the majority of the court,

(1) 3 Can. S..C.R. 251 (2) 3 Can. S.C.R. 251.

both upon the express words of the statute allowing appeals from the judgment in any case of proceedings for or upon a writ of mandamus (sec. 24 (*g*), and also upon this consideration that if an appeal in mandamus proceedings is confined to final judgments it would, under the Ontario system of procedure in such cases, be useless. The words of the statute are: (An appeal shall lie) "from the judgment in any case of proceedings for or upon a writ of *habeas corpus* not arising out of a criminal charge, and in any case of proceedings for or upon a writ of mandamus," nothing indicating that the legislature intended to limit it to an appeal from the final judgment on the writ of mandamus ; and we all know from experience that the final judgment in a mandamus case is seldom reached. To say that there must be a final judgment before there can be an appeal would imply that the return to the writ must be traversed, pleaded or demurred to and a final judgment given on such pleadings. If an appeal is to be confined to such a case, inasmuch as the proceedings seldom reach the stage of final judgment, there would be nothing left to appeal from.

I think the legislature in enacting the clause in question, intended that the appeal in such cases should be assimilated to appeals in equity cases, as provided in sub-section (*e*). In such cases appeals from interlocutory orders may be brought to this court, and from the nature of the proceedings in mandamus, it is reasonable to infer that the intention was to give an appeal in like cases.

The intention therefore (having regard to the express words of the statute) being to allow appeals from any judgment in proceedings for or upon a writ of mandamus, and not from the final judgment only, I am of opinion that the judgment appealed from in this case was a judgment upon a proceeding for a writ of man-

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damus, and, therefore, one coming exactly within the precise words of the Act. The motion to quash should therefore be refused with costs.

FOURNIER J.—Le jugement dont est appel a été rendu sur une défense en droit qui avait été maintenue par la Cour Supérieure et que la Cour du Banc de la Reine a renvoyé. Ce jugement n'a certainement aucune finalité et partant n'est pas appelable.

Mais l'appelant prétend que dans les causes de *mandamus* l'appel n'est pas limité, comme dans les autres, au jugement final. Il fonde cette prétention sur le langage de la ss. *g*. de la sec. 24 concernant les *habeas corpus*, *mandamus* et règlements municipaux où il est dit :—

An appeal shall lie, g. From the judgment in any case of proceedings for or upon a case of *habeas corpus*, not arising out of a criminal charge, and in any case of proceedings for or upon a writ of *mandamus*, and in any case in which a by-law, &c., &c., &c.

Cette disposition est-elle une exception au principe général émis en tête de la section 24, limitant l'appel au jugement final? Il est évident que le statut a voulu proscrire les appels devant cette cour sur les jugements interlocutoires dont on avait reconnu les inconvénients et qui avaient fini par être considérés comme une entrave à l'administration de la justice. Cette disposition me paraît fondée sur le principe qu'il est de l'intérêt public de mettre, le plus tôt possible, un terme aux procès. Elle doit s'appliquer aux affaires mentionnées dans la ss. *g*, à moins que les expressions employées ne fasse voir une différence que l'on ne pourrait méconnaître. N'y a-t-il pas autant, et plus encore, de motifs d'arriver promptement au jugement final dans ces causes que dans les autres ? Je ne vois pas de différence et les termes de la section n'en font pas non plus suivant moi.

C'est dans la section (24) n'accordant l'appel que du

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jugement final que se trouve cette disposition, et elle n'y forme pas une exception. L'appel n'y est donné que "du jugement," ce qui, sans doute, signifie le jugement final, comme dans les ss. *b*, *c* et *f*.

Il n'y a à cette signification qu'une seule exception, c'est celle faite par la ss. *e*. concernant les jugement des cours d'Equité. Mais là le langage est différent. Le législateur n'emploie plus comme dans les autres sous-sections l'expression "The judgment," mais au contraire, il se sert des termes "from any judgment" de tous jugements et non pas "du jugement," et les mots de "tous jugements" sont suivis d'une énumération de procédures (*decree, decretal order, or order in any action or suit*), qui fait voir que dans cette section l'appel n'est pas limité au jugement final et qu'il peut avoir lieu de jugements interlocutoires. Je vois dans cette disposition une exception bien formelle à celle qui n'accorde l'appel que du jugement final, mais cette exception n'existe pas dans les autres sous-sections. Conséquemment je suis d'avis que la motion doit être accordée et l'appel renvoyé.

TASCHEREAU J.—In this case, it is conceded by the appellant that the judgment he appeals from is merely interlocutory, but he contends that under sec. 24, sub-sec. (*g*) of the Supreme Court Act the appeal lies, because the case here is one upon a writ of mandamus, as to which, he contends, the right of appeal is not confined to the final judgment. I am of opinion that the statute does not bear that construction.

First, I cannot see why such a distinction would have been made. Why allow the right of appeal only from the final judgment, so as to prevent parties from multiplying appeals, as the statute clearly does, yet make an exception as to cases of *habeas corpus* and mandamus, and allow an unlimited number of appeals

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in every case of that nature? Would it be because, more so than in ordinary cases, a prompt judgment is desirable in such proceedings?

There is certainly, that I can see, no reason why the exception contended for by the appellent should have been made. And it has not been made, as I read the statute. The judgment in any case of proceedings upon a writ of *habeas corpus*, or mandamus, in sub-sec. (*g*) of sec. 24 of the act means the final judgment as the same words do in sub-secs. *b*, *c*, *d*, *f*. In sub-sec. (*e*) the statute makes an exception, but there, it says, any judgment, not the judgement. The appellant would read the words in sub-sec. (*g*) "an appeal shall lie from the judgment in any case of proceedings for or upon a writ of mandamus" as if they meant from any judgment; or from the judgment on any proceeding. Now "the judgment is not" any "judgment," and "in any case of proceedings" does not mean "*on* any proceeding." "The statute reads by simply reversing the sentence "in any case of proceedings upon a writ of mandamus an appeal shall lie from the judgment." Now, I repeat it, this means, it seems to me clear, the final judgment, not *any* judgment, nor the judgment upon *any* proceeding in a case of mandamus. Otherwise, a case on *habeas corpus* or mandamus may be brought up here on a motion for security for costs, for instance, or on any motion or interlocutory order or proceeding whatever in the case, and at any stage, and an unlimited number of times. I do not think that such is the law.

Sec. 30 of the act does not affect this case, and *Dan jou* v. *Marquis* (1) is no authority on this point. This question could not arise there at all, for the judgment appealed from was unquestionably a final judgment. The only point determined in that case was that an appeal does not lie from a judgment of the Superior Court.

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

I would quash this appeal. It is well settled law that an appeal never lies unless expressly given by statute. *Rex.* v. *Cashiobury* (1), *Rex.* v. *Hanson* (2), *The Queen* v. *Trustees of Warwickshire* (3).

Crompton J. says :—

The appeal is the creation of the statute and can only exist where it can clearly be collected from the language of the statute that it was the intention of the legislature to give the appeal.

Ex parte Chamberlain (4), Lord Campell C.J. says:

No appeal can be made except under an express enactment.

Attorney General v. *Sillem* (5), in the Exchequer Chamber and in the House of Lords (6) :

The creation of a right of appeal is plainly an act which requires legislative authority.

Lord St. Leonards :

Now it is clearly laid down that no right of appeal can be given except by express words.

And in *Chagnon* v. *Normand* (7) in this court. Sir W. J Ritchie C.J. for the court :

We think that an appeal which is unknown to the common law must be given by statute in such clear and explicit language that the right to appeal cannot be doubted.

We should, in my opinion, be careful not to assume jurisdiction where the statute does not clearly give it. I am against grasping at jurisdiction. We have gone too far already in that direction. In *Levi* v. *Reed* (8), for instance, amongst others, and *City of Montreal* v. *Labelle* (9), *Joyce* v. *Hart* (10), *Lord* v. *Davidson* (11), *Bender* v. *Carrier* (12), *The Ottawa* v. *Sheridan* (13) *Dorion* v. *Crowley* (14), in which we entertained the appeals,

(1) 3 D. & R. 35.
(2) 4 B. & Ald. 519.
(3) 6 E. & B. 837.
(4) 8 E. & B. 664.
(5) 2 H. & C. 581.
(6) 10 H. L. Cas. 704.
(7) 16 Can. S. C. R. 661
(8) 6 Can.S.C.R. 482.
(9) 14 Can. S.C.R. 741.
(10) 1 Can. S. C. R. 321.
(11) 13 Can. S.C.R. 166.
(12) 15 Can. S.C.R. 19.
(13) 5 Can. S.C.R. 157.
(14) Cassels's Dig.402.

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we have had since to determine that, in cases of that class, no appeal lies to this court (1).

PATTERSON J.—The appellant instituted proceedings in the Superior Court of the Province of Quebec, praying, for reasons set out in his petition, for the issue of a writ of mandamus commanding the school commissioners forthwith to carry out a decree of the superintendent of public instruction which ordered the formation of a new school district. The application was made to Judge Mathieu under article 1022 of the C. C. P. which authorises the issue of a writ commanding the defendant to perform the act or duty required or to show cause to the contrary on a day fixed.

The application was supported by affidavits as required by article 1023, and the judge, on the 24th of July, 1889, ordered the issue of a writ returnable on the first of August following. After the return of the writ the defendants filed pleas, the petitioner answered them; and the defendants replied, raising issues in law and in fact, and on the 21st of September, 1889, judgment was given by Mr. Justice Mathieu in favour of the petitioner. This entitled the petitioner to a peremptory mandamus under article 1025, but the commissioners appealed to the Court of Queen's Bench, and that court reversed the decision, holding, by a majority, that the petitioner had not established the duty which he asked to have enforced by the writ.

The question now is whether an appeal from that decision lies to this court.

The objection taken to our jurisdiction is that the judgment is not a final judgment.

Conceding, but only for the sake of the argument, that the judgment is not final within the definition of the term "final judgment" contained in the interpre-

(1) *Monette* v. *Lefebvre* 16 Can. S. C.R. 387.

tation clause of the Supreme and Exchequer Courts Act, I have no doubt that the right of appeal is given. I think that is the clear result of sections 24, 28 and 30.

That this is a judgment, and not a mere *ex parte* order such as that made on the 24th of July, is not and cannot be disputed. Section 24 enacts that an appeal shall lie in various cases specified in seven articles numbered from (*a*) to (*g*.) Mandamus is one of the subjects of article (*g*), and the enactment may be read thus: omitting all matters irrelevant to this subject:—

An appeal shall lie from the judgment in any case of proceedings for or upon a writ of mandamus.

The only reference to final judgments contained in the section is in article (*a*) which specifies final judgments of the highest court of final resort in any province. No restrictive words such as "final judgments only" are used. The article has no grammatical connection with the subsequent articles, and some of those subsequent articles specify judgments which obviously may not be final. Article (*d*) is one instance:

(*d*.) From the judgment upon any motion for a new trial upon the ground that the judge has not ruled according to law.

An order for a new trial is only interlocutory.

Now, while it is true that an appeal will lie only when given by affirmative enactment, and while article (*a*) specifies final judgments only, it is not laid down by section 24 as a general principle, either in terms or by implication, that an appeal will not lie from any judgment that is not final. As to *mandamus* and *habeas corpus*, it will be noticed that article (*g*) specifies proceedings *for* the writ as well as proceedings *upon* it.

The restriction of appeals to final judgments is found, not in section 24, but in section 28, which enacts that

Except as provided in this act or in the act providing for the appeal an appeal shall lie only from final judgments in actions, suits, causes matters and other judicial proceedings originally instituted in the Superior Court of the Province of Quebec, or originally instituted in a Superior Court of any of the provinces of Canada other than the Province of Quebec.

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We have here a two-fold restriction—first, to actions, &c., instituted in a Superior Court, and secondly to final judgments in those actions. Proceedings in cases of mandamus, being necessarily commenced in a Superior Court, would thus have come under the restriction that required a judgment to be final in order to be appealable, unless those cases were covered by the words "except as provided by this act." I am inclined to think they would be covered by those words; but section 30 puts the matter beyond question by enacting that

> Nothing in the three sections next preceding shall in any way affect appeals in Exchequer cases, cases of mandamus, *habeas corpus* and municipal by-laws.

Thus, on the assumption that the judgment in question is not a final judgment, the appeal is, in my opinion distinctly given by the statute.

I am not prepared, however, to concur in regarding this judgment as interlocutory. It concludes the controversy between the parties which was respecting the legal duty of the commissioners to do the act to enforce which the writ was prayed for. It is a final judgment just as any judgment dismissing an action is final. It would be equally so whether the peremptory writ were granted or refused. It has been refused, and the right to it is *res judicata*. If it had been granted the question of right could not have been again brought into contest by any return to the writ. All that would have remained to the commissioners would have been to do the act commanded, after which any attempt to appeal would have been labour lost.

For these reasons, I think we ought to hear the appeal.

Appeal quashed with costs.

Solicitors for appellant: *Lacoste, Bisaillon & Brosseau.*

Solicitor for respondents: *C. A. Cornellier.*