THE ROYAL INSTITUTION FOR THE ADVANCEMENT OF LEARNING..... } PLAINTIFFS;

AND

GEORGE BARRINGTON *et al* (INTERVENANTS..... } APPELLANTS;

AND

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY (DEFENDANTS)..... } RESPONDENTS.

1890
*Oct. 24.
1891
*Feb. 10.

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

Appeal—Order for a new trial—When not appealable—Supreme and Exchequer Courts Act, secs. 24 *(g.)* 30 *and* 61.

Where a new trial has been ordered upon the ground that the answer given by the jury to one of the questions is insufficient to enable the court to dispose of the interest of the parties on the findings of the jury as a whole, no appeal will lie from such order which is not a final judgment and cannot be held to come within the exceptions provided for by the Supreme and Exchequer Courts Act in relation to appeals in cases of new trials. See Supreme and Exchequer Courts Act secs. 24 (*g*), 30 and 61.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal side) affirming the judgment of the Superior Court in Review ordering a new trial.

The facts and pleadings of the case are given in the judgment of the Chief Justice of the Supreme Court.

Doherty Q.C., *Kavanagh* with him, moved to quash the appeal on the ground that the judgment appealed from was not a final judgment.

Trenholme Q.C. for appellants *contra*.

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

1891

BARRINGTON v. THE SCOTTISH UNION AND NATIONAL INS. CO.

Ritchie C. J.

Sir W. J. RITCHIE C. J.—This was an action brought by the Royal Institution for the Advancement of Learning, against the respondents to recover the amount of a policy of insurance for $4000 issued to George Barrington & Sons, the loss having by endorsement been made payable to the Royal Institution, who are the mortgagees of the insured property.

The defendants set up a number of pleas to the action, alleging misrepresentation of interest, and the breach of several conditions, and a special plea alleging that, at the time of the institution of the action and before, any injury and damage that may have been caused by fire to the property in question had been completely repaired without loss, cost or expense to plaintiffs, and the said property put in as good, and in fact better, condition than it was previous to the date of the fire, whereby the security of the plaintiffs and the value of the premises had been increased and the plaintiffs completely indemnified from any possible loss resulting from said fire, and that by reason of the premises the plaintiffs had no interest in the loss, nor was the amount of it payable under the policy.

George Barrington & Sons intervened alleging that as mortgagors of the premises they had an interest in the suit and in having the amount of the policy recovered from the defendants.

The case came on for trial before Mr. Justice Davidson and a jury. A number of questions were put and answered by the jury, most of them directly in favor of the plaintiffs. One specially related to the alleged repair of the premises, viz:

Question No. six. "Previous to the institution of the present action had the injury and damage done to the said property by the said fire been repaired without cost or expense to the plaintiffs, and was said property put in the same condition as previous to the occurance of the said fire, and plaintiffs indemnified of any possible loss resulting therefrom?"

To this question the jury answered: "Impossible to say."

Before the Court of Review the plaintiffs moved for judgment in their favor upon the verdict of the jury. The intervenants moved that judgment be rendered according to said verdict in favor of the plaintiffs and the intervenants, and that the intervention be maintained. The defendants moved for judgment *non obstante veredicto* dismissing intervention. And the defendants also moved for a new trial. The court granted the defendants' motion for a new trial, and set aside the verdict of the jury with costs.

They seem to have been influenced in coming to this conclusion by the belief that the answer to the sixth question was insufficient to enable them to dispose of the interests of the parties on the findings of the jury as a whole.

The Court of Queen's Bench affirmed this judgment of the Court of Review with costs.

A motion has been made on behalf of the respondents to quash this appeal for want of jurisdiction, on the ground that the judgment in question is not a final judgment, which it clearly is not, and cannot be brought within any of the exceptions provided for by the act in relation to cases of new trial. The question, in fact, seems very similar to the one raised in the case of *The Accident Insurance Company* v. *McLachlan*, (1) and involves a consideration of the same provisions of the Supreme Court Act, viz.:—

Sec. 24, sub-sec. (*d.*) [An appeal will lie] From the judgment upon any motion for a new trial upon the ground that the judge has not ruled according to law.

Sec. 30. Nothing in the three sections next preceding shall in any way affect appeals in Exchequer cases, cases of rules for new trials and cases of mandamus, *habeas corpus* and municipal by-laws.

In Halifax Street Railway v. *Joyce* (2), this court held

(1) See p. 627.

(2) 17 Can. S. C. R. 709.

1891

BARRINGTON v. THE SCOTTISH UNION AND NATIONAL INS. CO.

Ritchie C.J.

that sec. 24 (*d.*) of Supreme Court Act which provides for an appeal from a judgment ordering a second trial applies only to cases which have been tried by a jury and that no appeal would lie under that section from an order granting a new trial in an non-jury case, the expression "that the judge has not ruled according to law," having reference to the directions given by a judge to the jury.

STRONG J.—I am also of opinion that the appeal should be quashed. It is clear that there is no final judgment, so that the jurisdiction of the court would have to be rested, not on the final judgment clause of the statute, but upon the clauses relating to new trials. An appeal under these clauses is not general but is limited to two cases of new trials. One is confined to the case of where the judge has not ruled according to law, and the other where the verdict is against the weight of evidence. This appeal does not come within either of these categories. It is quite evident that it is within the power of a court to send a case back for re-trial by a jury in order that the facts may be further investigated. This was the course pursued in the present case. Mr. Justice Cross, giving the judgment of the court says: "It is a complicated case. The order of the court below was for a new trial. I would be ready to give plaintiff judgment on his motion, because I think the obstacles are all removed, and the jury decided the case according to the facts; but as it is only for a new trial and points of importance may be cleared up on both sides by a further investigation, I concur with my colleagues that it is the exercise of the discretion of the court; we are not disposed to disturb the judgment of the Superior Court in Review, and therefore the appeal will be dismissed

with costs of appeal, the other costs to follow the event of a new trial."

I think these observations accurately state the reasons for the judgment of the Court of Queen's Bench, and, therefore, that court did what it had a perfect right to do in the exercise of its discretion without subjecting its judgment to be reviewed on appeal to this court. The appeal should be quashed.

TASCHEREAU J.—This case is now before us on a motion to quash the appeal for want of jurisdiction. I am of opinion to allow this motion. This is not an appeal from a final judgment, but from a judgment granting a motion for a new trial. Now, an appeal lies in such a case by way of exception only where the motion is allowed upon the ground that the judge at the trial has not ruled according to law.

In this case a new trial has been ordered by the Court of Appeal, confirming the order made by the Court of Review, but simply upon the ground that the verdict of the jury was an imperfect verdict, inasmuch as they had not answered the sixth of the questions or assignment of facts put to them. Art. 414 C.C.P. enacts that when there is an assignment of facts the verdict must be special and articulated upon each fact submitted and be explicitly affirmative or negative. To the sixth question the jury had answered "impossible to say." This is clearly not an appealable judgment under the statute. The appellant, it is true, had moved for judgment upon the verdict, and that motion was dismissed. But that judgment is also an interlocutory judgment. It is clearly not a final judgment in the case. A judgment refusing a motion is not a final judgment. *South Eastern* v. *Lambkin* (1). In fact, on this point, the appellant's grievance is that the court below

(1) 21 L. C. J. 325.

1891

BARRINGTON v. THE SCOTTISH UNION AND NATIONAL INS. CO.

Taschereau J.

did not give a final judgment. The judgment dismissing his motion for judgment upon the verdict was the necessary consequence of the judgment ordering a new trial upon the motion of the defendants. They form but one judgment. Both motions under Art. 422 of the code of procedure formed but one issue. We could not entertain an appeal in the case upon the appellant's motion were it otherwise appealable, without at the same time entertaining the appeal on the judgment ordering a new trial upon which no appeal clearly lies. This, it seems to me, is conclusive against the appellant's contentions.

It is true that if the appeal was entertained the appellant would be admitted to contend that his motion for judgment should be granted, and that this court would have to give the judgment that, in their opinion, ought to have been given in the court below. But that is not the criterion of the jurisdiction of this court. That is mistaking the exit door for the entrance door of the court. The appellant must first show that he has a right to come into this court and it is not by the judgment that he would have a right to get when the case would have been won in this court, that we are to be guided as to our jurisdiction, but purely and simply by the nature of the judgment appealed from. We must look at the judgment that was given, not to any judgment that should have been given, or that we would or might give. A case in point and in which, in my opinion, the decision is unimpeachable, is the *South Eastern* v. *Lambkin* (1). In that case the Superior Court had entered judgment upon the verdict for $7,000. The Court of Appeal reversed that judgment and ordered a new trial. Upon an application for leave to appeal to the privy council, Dorion C.J. for the court, refusing the application, said :

(1) 22 L.C.J. 21

But it is said that by the judgment of this court the respondent has been deprived of the benefit of the final judgment which he had attained in the court below, and that, therefore, his appeal ought to be allowed as from a final judgment. The appeal to the privy council is not from the court below, but from the judgment by this court and the judgment rendered by this court is a judgment ordering a new trial and is merely interlocutory.

The privy council in that case did later on entertain an appeal (1), but on special leave, in virtue of the prerogative of the crown and not at all, as the misleading summary of the report gives it, on the ground that the Court of Appeal in Montreal had erred in refusing the leave to appeal.

FOURNIER, GWYNNE and PATTERSON JJ. concurred.

Appeal quashed with costs.

Solicitors for appellants: *Trenholme, Taylor & Buchan.*

Solicitor for respondents: *H. J. Kavanagh.*

(1) 21 L. C. J. 325.