THE ACCIDENT INSURANCE COMPANY OF NORTH AMERICA (DEFENDANTS) ..... APPELLANTS;

AND

WILLIAM McLACHLAN *et al.* (PLAINTIFFS) ..... RESPONDENTS.

1890
*Nov. 19.
1891
*Feb. 26.

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

Appeal—New trial ordered by Court of Queen's Bench suo motu—Final judgment—Supreme and Exchequer Court Act.

In an action tried by a judge and jury the judgment of the Superior Court in review dismissed the plaintiffs' motion for judgment and granted the defendants' motion to dismiss the action.

On appeal to the Court of Queen's Bench, the judgment of the Superior Court was reversed, and the court set aside the assignment of facts to the jury and all subsequent proceedings and *suo motu* ordered a *venire de novo* on the ground that the assignment of facts was defective and insufficient and the answers of the jury were insufficient and contradictory.

Held, that the order of the Court of Queen's Bench was not a final judgment and did not come within the exceptions allowing an appeal in cases of new trials, and therefore the appeal would not lie.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) setting aside a judgment of the Superior Court sitting in review, rendered on the 29th September, 1888, which rejected the plaintiffs' motion for judgment in their favor on the verdict and findings of the jury empanelled in the cause, and granted the motion of defendants for judgment in their favor, and dismissed the action of the plaintiffs with costs.

This was an action brought to recover the amount of a policy issued by the appellant company, insuring

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

1890

THE ACCIDENT INS. CO. OF NORTH AMERICA v. MCLACHLAN.

John S. McLachlan, William McLachlan, Francis W. Radford and Thomas Brophy as members of a firm doing business in Montreal under the name of McLachlan Brothers & Co. The plaintiffs alleged that by the policy the appellants undertook to pay, within ninety days after the death of any one of the persons named, to the surviving representatives of the firm, the sum of $10,000, upon satisfactory proof of the death of such member of the firm. The plaintiffs further alleged that on the 18th November, 1888, John S. McLachlan met his death by drowning, and that the policy was in full force and effect at the time of his death. On the 23rd December, 1886, as was further alleged, appellants were notified that Thomas Brophy had ceased to be a member of the partnership and by endorsement upon the policy one James E. Bizzey was substituted for him.

The defendants pleaded three exceptions to the action. By the first they admitted the making of the policy but alleged they were not indebted; that the firm of McLachlan Brothers & Co. was dissolved on the 10th April, 1886, and by the conditions of the policy the insurance thereby became null and void.

By the second exception it was alleged that at the time of the death of J. S. McLachlan he was not a member of the firm of McLachlan Brothers & Co., he having on the 10th April, 1886, retired from the said firm.

By the third exception it was pleaded that the action should have been brought by all the surviving members including Bizzey.

Bizzey subsequently intervened in the cause to meet the objection taken on the ground of his not being a party.

To the first plea the respondents answered that J. S. McLachlan never had retired from the firm, but that

his capital remained in it and he retained an interest in the profits ; that in September, 1886, when appellants substituted Bizzey for Brophy, by endorsement on the policy, the appellants had full knowledge that the two McLachlans, Bizzy and Radford had an interest in the insurance on the lives of each other as associated in the said business.

The trial of the action took place before a judge of the Superior court and a jury. Certain questions were put to the jury the questions and answers thereto being as follows :—

Question first (*a*). At the date of the policy, plaintiffs' exhibit No. one, did the defendants know that the only persons registered as interested in the firm of McLachlan Brothers & Co. were William and John S. McLachlan ?

Answer :—Yes, by the registration of declaration.

(*b.*) Were the defendants aware what business relations existed between the McLachlans, Francis W. Radford and Thomas Brophy ?

Answer :—Yes as shown by application for insurance.

(*c.*) Had Radford and Brophy to the knowledge of the company defendant an interest in the success and existence of the business of McLachlan Brothers & Co.

Answer:—Yes, as shown by application for insurance.

Question Second :—Did the defendant ever vary the terms of the policy excepting by consenting to a transfer of insurance from the person of Brophy to the person of James E. Bizzey ?

Answer :—No.

Question Third :—Were McLachlan Brothers & Co. dissolved on or about the 10th April, 1886 ?

Answer :—Yes, but J. S. McLachlan had a continued and active interest in the business.

Question Fourth:—Did McLaughlan Brothers & Co.

1890

THE ACCIDENT INS. CO. OF NORTH AMERICA v. MCLACHLAN.

in that month publicly advertise that John S. McLachlan had retired and that a new firm had been formed ?

Answer :—Yes.

Question Fifth, (*a.*)—On the 18th of November, 1886, was John S. McLachlan a member of McLachlan Brothers & Co ?

Answer :—No, but had an interest in profits.

(*b.*) Had Bizzey any interest in the firm ?

Answer :—No evidence.

Upon these findings both parties moved at the ensuing term of the court of review for judgment, with the result that the appellants' motion was granted and that of respondents refused, the effect being to dismiss the action.

Before the Court of Queen's Bench as before the Court of Review, respondents submitted that the answers of the jury warranted a judgment in their favor upon their motion for judgment ; appellants on the other hand contended for the judgment in their favor. The Court of Queen's Bench, however, rejected both motions made by the parties severally and *suo motu* ordered a new trial.

When the appeal came on for hearing in the Supreme Court the respondents took exception to the jurisdiction of the court on the ground that the judgment was not one from which an appeal would lie.

The question arising for decision is this : Assuming that the judgment, being a judgment ordering a new trial, is not a final judgment does it come within any of the provisions of the act providing for appeals from judgment not in their nature final, and more especially the provisions relating to new trials ?

The only provisions relating to new trials are the following : An appeal shall lie :

" Sec. 24, sub-sec. (*c.*) From the judgment upon any

motion to enter a verdict or non-suit upon a point reserved at the trial."

"(*d.*) 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 (secs. 27, 28 and 29) 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."

Section 27 provides there shall be no appeal from orders made in the exercise of judicial discretion, except in equity cases.

Section 28 provides that except as provided in the act appeals are to lie only from final judgments.

Section 29 is the section regulating and limiting appeals from the province of Quebec.

Section 61 also relates to new trials and is as follows: "On any appeal the court may, in its discretion, order a new trial, if the ends of justice seem to require it, although such new trial is deemed necessary upon the ground that the verdict is against the weight of evidence."

Dalton McCarthy Q.C., and *Hatton* Q.C. for appellants, and

Greenshields Q.C. and *H. Abbott* Q.C. for respondents.

SIR W. J. RITCHIE C.J.—(After reading the above statement of facts proceeded as follows): I think this is not a final judgment within the meaning of section 28, and does not come within any of the provisions of the sections relating to new trials, viz: sections 24 (*a*), 30 and 61, but the court of appeal in its discretion has ordered a new trial and consequently

1890

THE ACCIDENT INS. CO. OF NORTH AMERICA v. MCLACHLAN.

Strong J.

this is not an appealable case. As the objection was not taken by counsel but by the court after the case had been argued for two days the appeal will be quashed, but without costs.

STRONG J.—This is an appeal from an order for a new trial made by the Court of Queen's Bench in the exercise of its discretion for the purpose of eliciting further information as to the facts, and, therefore, for the same reasons as those assigned for the judgment in the preceding case of the *Barrington*, v. *Scottish Union* (1) it seems to me clear that no appeal lies in the present case. The objection to the jurisdiction of this court having been raised, not by the respondent, but by my brother Taschereau after two days' argument by counsel on the merits, I think no costs should be given. The appeal must be quashed.

TASCHEREAU J.—We have no jurisdiction in this case, in my opinion. Upon the findings of the jury both parties moved for judgment. There was no motion for a new trial. The Superior Court in review dismissed the plaintiffs' motion and granted that of the defendants' and dismissed the action. The Court of Appeal reversed that judgment, set aside the assignment of facts, and all the subsequent proceedings, and without adjudicating upon the merits ordered a *venire de novo* upon the grounds :—1st, That the assignment of facts was defective and insufficient; 2nd, That the answers of the jury thereto were so insufficient, contradictory and irregular that no judgment could be given thereon for either party. It is from this judgment that the company now appeals. Now this is clearly not a final judgment. Neither is it a judgment on a motion for a new trial upon the ground that the judge at the trial

(1) See p. 617.

has not ruled according to law, nor a judgment upon any motion to enter a verdict or non-suit upon a point reserved at the trial. Consequently it is not appealable. I refer to my remarks in *Molson* v. *Barnard* (1) and *Barrington* v. *Scottish Union* (2) on the question.

FOURNIER and PATTERSON JJ. concurred that the appeal should be quashed without costs.

Appeal quashed without costs

Solicitors for appellants: *Hatton & McLennan.*

Solicitors for respondents: *Greenshields, Guerin & Greenshields.*

(1) See p. 624.

(2) Pee p. 619.