THE GRIMSBY PARK COMPANY (DEFENDANTS) ..... } APPELLANTS;

1908

*Nov. 12.
*Dec. 15.

AND

WILLIAM H. IRVING (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Supreme Court Act—Duty or fee—Interest in land—Future rights.

Under a by-law of the defendant company every person desiring to enter the park was required to pay a fee for admission. An action was brought for a declaration as to the right of the company to exact payment of such fee from the lessee of land in the park.

Held, that the matter did not relate to the taking of a "customary or other duty or fee" nor to "a like demand of a general or public nature affecting future rights" under sub-sec. (*d*) of sec. 48 R.S.C. [1906] nor was "the title to real estate or some interest therein" in question under sub-sec. (*a*). There was, therefore, no appeal to the Supreme Court of Canada from the judgment of the Court of Appeal in such action (16 Ont. L.R. 386).

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment at the trial in favour of the plaintiff.

The plaintiff is lessee of certain land in Grimsby Park under a lease from the company and brought this action to have it declared that he is entitled to access to the premises demised without payment of the fee for admission exacted, under a by-law of the

*PRESENT:—Sir Charles Fitzpatrick, C.J. and Davies, Idington, Maclennan, and Duff JJ.

(1) 16 Ont. L.R. 386.

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company, from all persons desiring to enter the park. The trial judge and Court of Appeal held that the company could not compel him to pay such admission fee and the company sought to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal to that effect.

Shepley K.C., for the appellant on the question of jurisdiction being raised by the court, referred to *Chamberland* v. *Fortier*(1); *Rouleau* v. *Pouliot*(2); and *Larivière* v. *School Commissioners of Three Rivers*(3), contending that the matter in question related to "a customary or other duty or fee" and was appealable under sec. 48, sub-sec. (*d*), of R.S.C., [1906]. He claimed, also, that the appeal would lie under sub-sec. (*a*) as title to an interest in land was in question.

The court reserved judgment on the question of jurisdiction and the merits of the appeal were argued.

Kilmer K.C., appeared for the respondent.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Davies.

DAVIES J.—The appellant company, incorporated under the Ontario Companies Act, own and control a tract of land called "Grimsby Park," which they had sub-divided into lots according to a registered plan and upon which plan streets and avenues are laid out.

The respondent, plaintiff, is the assignee of the

(1) 23 Can. S.C.R. 371. (2) 36 Can. S.C.R. 26.
(3) 23 Can. S.C.R. 723.

lessee for 999 years of one of these lots and has his summer residence upon it. The lease was dated in 1885.

The park is surrounded by a fence, and access to it can only be had from outside through certain gates.

The company, claiming to act under a statute amending their charter enacted before the lease under which the plaintiff claims was granted, passed, in 1902, a by-law exacting the admission fee now in dispute which was in the nature of a toll at the gate or entrance to the park, and claimed that the plaintiff and his family were liable to pay such fee or toll.

At the close of the trial brought to test the claim,

> it was agreed on both sides that the whole question to be determined in this action is whether the plaintiff is entitled to an entrance at the place originally indicated in the plan or at the new entrance of Grand Avenue, or at some other place,

and, as I understand it, entitled to such entrance without payment of fees.

The question arises whether or not, in such a case, we have any jurisdiction to hear the appeal.

Two sub-sections of the section 48 of our "Supreme Court Act," R.S.C., 1906, ch. 139, defining the appeal to this court in cases from the Province of Ontario, were relied upon: First, where

> (*a*) the title to real estate or some interest therein is in question:—

Secondly, where

> (*d*) the matter in 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.

We were all of opinion at the argument that the right of appeal could not be maintained under sub-

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section (*d*). The fee in this case demanded as an admission fee was, obviously, not of a "general or public nature affecting public rights" within the meaning of those words in the Act. It was, on the contrary, simply an entrance fee to a private park, and stands on the same ground as fees charged for entrance to music halls and theatres or to athletic or sporting grounds or courses. Compare *Larivière* v. *School Commissioners of Three Rivers* (1), at p. 726.

The more serious question was whether it could be held as coming within the cases where the title to real estate or some interest therein was in question.

But, in this appeal, there was no question directly involving the title of either the plaintiff or defendant to the respective lands they claimed to own or of their interest in those lands.

The sole question was whether the defendant company was entitled, under the statute, to pass a by-law charging their lessees entrance or admission fees to their leased premises within the defendants' park.

Did the statute permit them to pass a by-law exacting such a fee and, on proper construction of the by-law they had passed, did it extend to the plaintiff?

Such questions, which are the substantial ones on this appeal, may involve indirectly a determination of the plaintiff's rights of access as a lessee to the lands leased to him. They could not, in my opinion, be fairly said to present a case where "the title to real estate or some interest therein was in question."

His right of access to his lands was not denied any more than his title. It was the right of the company, under the statute and by-law, to impose the burden of a fee upon that right of access.

(1) 23 Can. S.C.R. 723.

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I would quash the appeal for want of jurisdiction but, under the circumstances, no motion to quash having been made, without costs.

Idington J.

IDINGTON J.—The appellants seek, by virtue of alleged legislative authority given them, to prevent the respondent reaching a house he has in the appellants' park, unless he or those going there pay an entrance fee to help to support the keeping up of the park in which the respondent has, in common with others, some privileges.

The question is raised whether or not, when the Court of Appeal for Ontario has held the appellants' contention unfounded, an appeal will lie to this court.

The title of the respondent to the house is unquestioned.

It was held in this court, so long ago as the case of *Wineberg* v. *Hampson*(1), that the merely raising of a question of a right of servitude would not give it jurisdiction.

It was observed in coming to that decision that, in the earlier case of *Wheeler* v. *Black*(2), such a case had been heard, because no attention had been called to the question of jurisdiction.

This case raises a claim on the part of the respondent of free entry over another's land to reach his own and seems, therefore, to fall within the rule thus laid down so far as the right to appeal might be rested on sub-section (*a*) of section 48, which deals with title to real estate or interest therein.

It is true that the words "interest therein" did not appear in the same connection, in relation to appeals from Quebec definitely settled by the said decision, as

(1) 19 Can. S.C.R. 369. (2) 14 Can. S.C.R. 242.

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in this section, but I do not think, as used in this section, they cover or were intended to cover cases of servitude or easement.

Then, can the jurisdiction to entertain this appeal be rested on the ground that future rights will be bound?

The jurisdiction to entertain cases of servitude arising in Quebec was later (when the "Supreme Court Act" had been amended), recognized as falling within the amended words

and other matters or things where rights in future might be bound.

So long as the Act remained unamended and, in this regard read "on such like matters," etc., instead of, as now, "and other matters," etc., the prevailing rule was to reject appeals based on mere right or denial of right of servitude.

Since that small but important amendment was made, questions arising in Quebec and turning upon a right of servitude, have been held appealable as simply concerning "matters or things *where rights in future* might be bound."

But, can we, in Ontario cases, turn to and rest the right upon section 48, sub-section (*d*) of the "Supreme Court Act," where the language is so different? I do not think, having regard to the ruling in *Wineberg* v. *Hampson*(1), that section (*d*) helps the appellants.

We find therein the expression "or a like demand" which refers us to the preceding part of the sub-section as the key to what is intended. The sub-section reads as follows:—

48(*d*).—The matter in 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.

(1) 19 Can. S.C.R. 369.

Can we say this case raises a question of an annual or other *rent*? Or, can we assert it to be a claim of customary or other duty or fee?

It does not seem to fall, when we have regard to its origin, within any of these, and still less when we try to see if it is

of a like demand of a general or public nature affecting future rights.

The cases of local assessments, annuities and future financial results incidentally flowing from, but not directly the result of, a judgment seem to deny this. See, amongst others, the following: *O'Dell* v. *Gregory*(1); *McKay* v. *Township of Hinchinbrooke* (2); *Waters* v. *Manigault*(3); *Macdonald* v. *Galivan* (4); *Banque du Peuple* v. *Trottier*(5); *Raphael* v. *Maclaren*(6).

The words used are identical with those which define in R.S.O. [1897] ch. 48, sec. 1, the right to appeal to the Privy Council—certainly never meant to support such an appeal as this.

Our jurisdiction must be clear and, being statutory, must be made by the words of the statute to appear clear.

There is less reason to put a strained meaning on its words to give a jurisdiction in order to determine something fancied to be of great importance, when we find such ample provision as in sub-section (*e*) for appeal here by way of leave, either here or in the Ontario Court of Appeal.

It seems the appeal must be quashed, but without costs, as the objection was not taken earlier.

(1) 24 Can. S.C.R. 661.
(2) 24 Can. S.C.R. 55.
(3) 30 Can. S.C.R. 304.
(4) 28 Can. S.C.R. 258.
(5) 28 Can. S.C.R. 422.
(6) 27 Can. S.C.R. 319.

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MACLENNAN J.—I agree with Mr. Justice Davies.

DUFF J.—I concur in the judgment of Mr. Justice Idington.

Appeal quashed without costs.

Solicitors for the appellants: *Macdonald, Shepley, Middleton & Donald.*

Solicitors for the respondent: *DuVernet, Raymond, Jones, Ross & Ardagh.*