THE MUTUAL RESERVE FUND LIFE ASSOCIATION (DEFENDANTS)..... APPELLANTS;

AND

ELIZABETH DILLON (PLAINTIFF).....RESPONDENT.

1903
*Nov. 16.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—New trial—Alternative relief.

Where the plaintiff obtains a verdict at the trial and the defendant moves the Court of Appeal to have it set aside and judgment entered for him or in the alternative for a new trial, he cannot appeal to the Supreme Court if a new trial is granted.

APPEAL from a decision of the Court of Appeal for Ontario (1) setting aside a verdict for the plaintiff at the trial and ordering a new trial of the action.

The plaintiff, as widow of one John Dillon, brought an action on a policy held by the latter in the defendant company at the time of his death. At the trial, after the evidence was all in, counsel for the defendants moved to have the case withdrawn from the jury and the action dismissed, contending that the uncontradicted evidence prevented the plaintiff from recovering. This was refused and the case went to the jury who answered all the questions submitted in favour of the plaintiff and judgment was entered for her accordingly. Defendants then appealed to the Court of Appeal asking for judgment or a new trial. The Court of Appeal ordered a new trial and the defendants appealed to the Supreme Court for the greater relief previously demanded.

* PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ.

(1) 5 Ont. L. R. 434.

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Lucas (*Wright* with him) for the respondent, moved to quash the appeal on the ground that the judgment appealed from was not final and that the discretion of the Court of Appeal in granting one of the two remedies sought could not be reviewed.

Aylesworth K. C. contra, contended that the judgment was final as the case would be at an end if the appeal was successful. Also, that if the appeal was from the order for a new trial it was clearly given in the Act.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—The respondent moves to quash this appeal upon the ground that the judgment appealed from is not a final judgment within the meaning of the Supreme Court Act Under section 24 of the said Act an appeal is given from final judgments only, and section 2, subsection "*e*" enacts that the expression "final judgment" means any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

The action is one brought by the respondent against the appellants to recover the sum of $2,000 on a policy of insurance.

Upon the findings of the jury, the presiding judge having previously refused appellants' application for the dismissal of the action, judgment was directed to be entered for the respondent for the sum of $1,905.24.

From that judgment the present appellants appealed to the Court of Appeal for Ontario and in their reasons of appeal reiterated their contention that there was no case for the jury, and that the action should be dismissed, and, in the alternative, that a new trial should be granted. The court ordered a new trial.

The respondent, though she loses thereby the benefit of the verdict that she had recovered, does not appeal from that judgment, as she undoubtedly would have had the right to do since the amendment to the Supreme Court Act of 1891, 54 & 55 V. c. 25, sec. 2. But singular to say, it is the appellants who, though they obtained from the Court of Appeal one of the alternatives they prayed for, would now contend that they are aggrieved by that judgment, because, they argue, the court should have granted the other of their alternative demands, and should have dismissed the respondent's action. They, on the one hand, hold on to the judgment granting them their demand for a new trial, and, on the other hand, would ask us to set it aside, but upon condition that we should enter a judgment dismissing the action, and that should we dismiss their appeal, they retain the benefit of the order for a new trial.

We are of opinion that this is not an appeal from a final judgment within the meaning of that word under the Supreme Court Act. No appeal lies from a judgment simply refusing to dismiss or to nonsuit plaintiff. There is no final determination whatever in the judgment of the Court of Appeal, that the appellants complain of. See *Bostwick* v. *Brinkerhoff* (1); *Grant* v. *Phœnix Ins. Co.* (2); *St. Louis Iron Mountain and Southern Rd. Co.* v. *The Southern Express Co.* (3); *Ex parte Norton* (4); *McGourkey* v. *Toledo & Ohio Central Railway Co.* (5); *Murphy* v. *Spaulding* (6); *St. Clair County* v. *Lovingston* (7). They cannot and do not appeal from the judgment ordering a new trial.

True, it is, that if we allowed the appeal and dismissed the motion, that would put an end to the litigation.

(1) 106 U. S. R. 3.
(2) 106 U. S. R 429.
(3) 108 U. S. R. 24.
(4) 108 U. S. R. 237.
(5) 146 U. S. R. 536.
(6) 46 N. Y. 556.
(7) 18 Wall. 628.

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The Chief Justice.

But, as we said in *Barrington* v. *The Scottish Union and National Ins. Co.* (1), that is not the criterion of the jurisdiction of this court; that is mistaking the exit door for the entrance door of the court. Our jurisdiction does not depend upon the judgment that we might possibly give, but upon the judgment that has been given by the court appealed from.

The appeal is quashed; no costs, as the respondent should have moved *in limine*.

Appeal quashed without costs.

Solicitors for the appellants: *MacMurchy, Denison & Henderson.*

Solicitors for the respondent: *Lucas, Wright & McArdle.*

(1) 18 Can. S. C. R. 615.