

1944

JAMES WALTER GRAVESTOCK..... APPELLANT;

*Feb. 28.

*March 10.

AND

GEORGE W. PARKIN AND FRANK-
LIN L. WELDON..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Appeal—Jurisdiction—Appeal to Supreme Court of Canada—Supreme Court Act (R.S.C. 1927, c. 35), s. 38—Judgment appealed from “made in the exercise of judicial discretion”—Exception in s. 38 of “proceedings in the nature of a suit or proceeding in equity * * *”.*

On motion to quash an appeal to this Court from the judgment of the Court of Appeal for Ontario, [1944] O.R. 49, which (reversing an order of Mackay J.) denied to the present appellant a mandamus to compel the warden and the treasurer of a county to execute and deliver a tax deed of land of which the present appellant had become the purchaser at a tax sale:

Held: Motion to quash granted. One ground on which the judgment appealed from was based was that in the circumstances the discretion of the Court should be exercised against allowing the mandamus; and therefore the judgment was one “made in the exercise of judicial discretion” and appeal was barred by s. 38 of the *Supreme Court Act* (R.S.C. 1927, c. 35); the case did not fall within the exception in s. 38 of “proceedings in the nature of a suit or proceeding in equity * * *”: while power resided in the Court of Chancery in England and now exists in the Supreme Court of Ontario to grant mandatory injunctions in suits or proceedings in equity, such jurisdiction was not and is not exercised against public officers to compel them to do their duty.

MOTION to quash, for want of jurisdiction, an appeal to this Court from the judgment of the Court of Appeal for Ontario (1), which (reversing an order of Mackay J.) dismissed the present appellant’s motion for a mandamus to compel the warden and the treasurer of the County of Victoria to execute and deliver a tax deed of certain land, of which the present appellant had become the purchaser at a tax sale; and also MOTION by the appellant for special leave to appeal, if in the opinion of the Court such leave was necessary. (Leave to appeal to this Court had been refused by the Court of Appeal for Ontario.)

J. E. Anderson K.C. for the motion to quash and against the motion for special leave to appeal.

E. G. Gowling against the motion to quash and for the motion for special leave to appeal.

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

THE COURT.—In accordance with the Ontario Rules of Practice, J. W. Gravestock applied, by originating notice of motion, for a prerogative mandamus to compel the Warden and Treasurer of the County of Victoria to execute and deliver a tax deed of certain lands of which he had become the purchaser at a tax sale. The mandamus was granted by the judge of first instance but the Court of Appeal dismissed the application. So far as appears from the judgments, the lands are of very little value but, if jurisdiction exists in this Court, Gravestock is entitled to proceed with the appeal he has launched from the order of the Court of Appeal and the motion to quash should not be granted.

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The reasons for judgment of the Court of Appeal were given by Mr. Justice Kellock and concurred in by the Chief Justice and Mr. Justice Gillanders. It was therein determined that one Wood, who appears to have had no interest in the lands but who had paid to the Treasurer the amount necessary to redeem the lands, was a person entitled to redeem within the meaning of the phrase "any other person" as used in section 177 of *The Assessment Act*, R.S.O. 1937, chapter 272. If Gravestock decided to institute an action for a mandamus, he would be faced with this decision. However, he is also met with the objection that his appeal to this Court is barred by section 38 of the *Supreme Court Act* because Mr. Justice Kellock proceeded to declare that in the circumstances the discretion of the Court should be exercised against the applicant and the prerogative mandamus refused.

Section 38 reads as follows:—

38. No appeal shall lie to the Supreme Court from any judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the province of Quebec.

The judgment of the Court of Appeal is based on two distinct grounds, neither of which may be treated as *obiter*, and is therefore a judgment made in the exercise of judicial discretion. While power resided in the Court of Chancery in England and now exists in the Supreme Court of Ontario to grant mandatory injunctions in suits or proceedings in equity, such jurisdiction was and is not exercised against public officers to compel them to do their duty. This case, therefore, does not fall within the exception in sec-

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tion 38 of "proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the province of Quebec".

The motion to quash is granted with costs. Even if special leave to appeal could be given, this is not a case where it should be granted and the motion therefor is dismissed with costs.

Motion to quash granted with costs.

*Motion for special leave to appeal
dismissed with costs.*

Solicitors for the appellant: *Frost & Frost.*

Solicitors for the respondents: *McLaughlin, Fulton, Stinson & Anderson.*
