AARON WENGER (DEFENDANT) .....APPELLANT;

AND

ALLAN DONALD LAMONT AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1909
*May 6.
*May 7.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Amount in controversy—Reference to assess damages—Final judgment.

In 1905 L. and others purchased from W. his creameries on the faith of a statement purporting to be made up from the books and shewing an output for the years 1904-5 equal to or greater than that of 1903. Having discovered that this statement was untrue they brought action for rescission of the contract to purchase and damages for the loss in operating during 1906. The judgment at the trial dismissing the action was affirmed by the Divisional Court. The Court of Appeal reversed the latter judgment, held that rescission could not be ordered but the only remedy was damages and ordered a reference to assess the amount. On appeal to the Supreme Court of Canada:

Held, Girouard J. dissenting, that as it can not be ascertained from the record what the amount in controversy on the appeal was, or whether or not it is within the appealable limit, the appeal does not lie.

Held, per Idington J.—The judgment appealed against is not a final judgment.

Per Girouard J. dissenting.—It is established by the evidence at the trial, published on the record, and admitted by the respective counsel for the parties, that the amount in dispute exceeds $1,000. The court, therefore, has jurisdiction to hear the appeal.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of a Divisional Court which affirmed the verdict at the trial dismissing the action.

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

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Action for rescission of contract and for unstated damages was dismissed at the trial and by the Divisional Court. The Court of Appeal in setting aside the judgment for dismissal ordered a reference to assess the damages reserving further directions and costs. The defendants appealed.

Wallace K.C. moved to quash the appeal for want of jurisdiction.

Watson K.C. contra.

THE CHIEF JUSTICE.—I am of opinion that we cannot now hear this appeal because it is impossible for us to ascertain from the record in its present condition whether or not the amount in controversy is within the appealable limit.

GIROUARD J. (dissenting).—It is established by the evidence on record and admitted by both parties at the bar before us that the matter in controversy in this appeal exceeds the sum or value of $1,000. Following the decision as to the jurisdiction of this court in *The City of Toronto* v. *Metallic Roofing Co.*(1), I am of opinion that this court has jurisdiction to hear this appeal and that the motion to quash ought to be rejected.

IDINGTON J.—The statement of claim makes no demand for any stated amount of damages.

The judgment awards no sum or right of recovery whatever. Nor is it final, but merely reverses the judgment of the learned trial judge and directs an inquiry

(1) Cam. Pr. 17.

as to damages and reserves further directions and costs.

The case is distinguishable from that of *The City of Toronto* v. *The Metallic Roofing Co.*, cited in Cameron's Supreme Court Practice, at page 17, inasmuch as the statement of claim therein demanded a sufficient amount to render it appealable if that should be taken as a proper test of the amount in controversy, and also because more nearly a judgment awarding a recovery.

I cannot think that we can determine our jurisdiction, in a case of this kind, by means of affidavits respecting the amount of the claims in controversy which is the very thing yet undetermined, and directed by the judgment in question to be found.

Besides, I am unable to find a case overruling the case of *The Rural Municipality of Morris* v. *London & Canadian Loan & Agency Co.*(1), which held that an order for judgment which finally settled the rights of the parties and for all practical purposes might have been looked upon as final, yet was held not so within the "Supreme Court Act" as it had not been entered of record.

I cannot say that the form of judgment here of record at all approaches that in the *Morris Case*(1) in finality.

It may be contrary to my impression on argument that the case falls within what we laid down in the *Union Bank of Halifax* v. *Dickie*(2).

But of this I desire to reserve any opinion for the present. It may be that the appellants are, though in fact entitled to recover a much larger sum than the

(1) 19 Can. S.C.R. 434. (2) 41 Can. S.C.R. 13.

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limit assigned as appealable in Ontario cases, left without any right to appeal.

And it may be that in such cases as take the form of procedure apparent in this case leave to appeal must be got.

The result might if the practice became general give rise to a much more rational basis for appeal than mere amount fixes.

The doubt of our jurisdiction is so great we should refrain from entertaining the appeal, and I think the appeal ought to be quashed with costs of the motion, but no general costs of the appeal.

DUFF J.—The judgment is, in my opinion, not a final judgment. There is a reference to ascertain damages only; no order to pay the amount ascertained; and no adjudication of liability. I am of opinion that the appeal should be quashed.

Appeal quashed with costs.

Solicitor for the appellant: *A. G. Campbell.*

Solicitor for the respondents: *J. G. Wallace.*