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*March 23.
*April 3.

SAMUEL R. CLARKE (DEFENDANT) . . APPELLANT;

AND

JAMES GOODALL (PLAINTIFF) . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Appeal—Nature of action—Equitable relief—"Supreme Court Act," s. 38(c)—Appeal from referee—Final judgment.*

Where a statement of claim discloses only a common law cause of action and the cause was so dealt with at the trial the facts that the indorsement on the writ indicates a claim for equitable relief and that the trial judge, in ordering a reference to assess the damages, reserved further directions do not make it a judicial proceeding in the nature of a suit in equity within the meaning of sec. 38(c) of the "Supreme Court Act."

The judgment of the Court of Appeal varying the report of the referee directed to assess the damages for the plaintiff in an action is not a final judgment from which an appeal lies to the Supreme Court of Canada.

APPEAL from the judgment of the registrar sitting as a judge in chambers who affirmed the jurisdiction of the court to entertain the appeal in this cause.

The judgment of the registrar was as follows:

THE REGISTRAR.—This is an application under Rule 1 for an order affirming the jurisdiction of the Supreme Court to hear this appeal. The facts of the case as disclosed by the appeal book in the Court of Appeal are as follows: On the 27th March, 1909, the respondent, Goodall, caused to be issued a writ of

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

summons out of the High Court of Justice at Toronto against the defendant, indorsed as follows:

"The plaintiff's claim is to have it declared that the plaintiff is entitled to receive from the defendant 20,000 shares fully paid up and non-assessable of the capital stock of the Lawson Mine, Limited, and for an injunction to restrain the defendant from selling, assigning, transferring, encumbering, or otherwise disposing of or dealing with his shares of the capital stock of the said company until he shall have transferred said 20,000 shares to the plaintiff, and from selling, assigning, transferring, encumbering or otherwise disposing of or dealing with the certificate for 371,094 of said shares in his favour now deposited with the accountant of the Supreme Court of Judicature in pursuance of the judgment entered in the action now or lately pending in this court wherein Murdock McLeod and others are plaintiffs and Thomas Crawford and the said defendants and others are defendants."

On this writ an interim injunction was granted until the 10th May next by the Hon. Mr. Justice MacMahon, on the 29th March, restraining the defendant from disposing of the shares of stock in question. On the 2nd April, 1909, a consent order was obtained dissolving the injunction upon payment into court to the credit of the cause of the sum of $5,000 to stand as security to satisfy the plaintiff's claim. On the 4th May, the statement of claim was filed, which alleged that an agreement had been entered into on the 14th December, 1908, between the plaintiff and defendant by which the defendant, in consideration of an advance to the amount of $5,549.12, upon which there was interest due, bringing the claim up to $6,500, agreed to pay $1,500 in cash and deliver 20,000 shares

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of stock in the Lawson Mine, Limited. Plaintiff then alleged that defendant, in fraud of the plaintiff, attempted to sell his stock in the Lawson Mine without first setting apart the 20,000 shares belonging to the plaintiff, and in the 15th and 16th paragraphs stated as follows:

"15. The defendant having conceived the design of cheating the plaintiff out of his 20,000 shares of stock in the Lawson Mine, Limited, falsely and fraudulently made claim that under the said agreement of 14th December, 1908, the plaintiff was to hold the aforesaid 20,000 shares of stock in said company only as a security for the repayment of the sum of $5,000, and interest, and not as the absolute owner thereof.

"16. In order to carry out his said fraudulent design in breach of his said agreement with the plaintiff, the defendant paid to the plaintiff the sum of $5,100 in alleged settlement of his indebtedness to the plaintiff and endeavoured to transfer and to make a good title to the said 20,000 shares of stock to some one else and to deprive the plaintiff of his right, title and interest therein and thereto."

The pleading concluded by the plaintiff claiming "that it be declared that under the agreement of the 14th day of December, 1908, the plaintiff was entitled to receive from the defendant, 20,000 non-assessable shares of stock of the Lawson Mine, Limited, or a 250th interest in the Lawson Mine, as the absolute purchaser and owner thereof.

"2. That it may be declared that the plaintiff is entitled to receive payment out of court of the said sum of $5,000 and accrued interest and that the said sum with accrued interest may be paid out to him."

To this the defendant pleaded, amongst other

things, that the agreement above mentioned was given on the understanding on the part of both that it should only become operative when assented to by one Thomas Crawford, and that the said Thomas Crawford never assented to the agreement, and the same thereby became inoperative.

Upon this issue the action went down for trial before the Hon. Mr. Justice Riddell, who gave judgmen on the 26th October, 1909, whereby he declared the agreement valid and subsisting and referred the cause to the official referee of the court to assess the damages which the plaintiff had sustained by reason of the breach of the contract, and reserved further directions and costs until the referee should have made his report. The referee made his report on the 8th April, 1910, assessing the damages at $8,000. From this an appeal was taken by the defendant before the Chief Justice of the Common Pleas, who reduced the damages from $8,000 to $5,200. The plaintiff then appealed to the Divisional Court where the damages were increased to $6,700, and subject to this variation the report was confirmed. The judgment of the Divisional Court was affirmed by the Court of Appeal, and the defendant now proposes to appeal to the Supreme Court.

The nature of this action as disclosed by the statement of claim which asks for a declaration of the rights of the parties under the agreement in question, the circumstance that the relief asked for by the writ is an injunction, and the form of the judgment itself, which reserved further directions and costs, a provision under the old practice only found in decrees of a court of chancery, all in my mind abundantly establish the fact that this is a case

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which, under the old distinction which obtained between actions in law and equity, could only have been brought by bill in chancery; and if I am right in the view as to this preliminary point, the determination of the present application does not, in my judgment, afford any difficulty.

Practically the sole question discussed before me was whether or not the judgment proposed to be appealed from is a final judgment, the assumption being that if not a final judgment, no appeal would lie. But this view overlooks the provisions of section 38, sub-section (*c*) of the "Supreme Court Act," which provides for an appeal to the Supreme Court in cases, whether the judgment was final or not, where it is given "in any action, suit, cause, matter or judicial proceeding in the nature of a suit or proceeding in equity originally instituted in any Superior Court, in any province of Canada other than the Province of Quebec." The section of the statute uses the word "judgment," not "final judgment," and the expression "judgment" is interpreted in section 2 of the Act as including any judgment, rule, order, decision, decree, decretal order or sentence thereof, when used with reference to the court appealed from.

The present case is not one in which an appeal to the Supreme Court is excluded by virtue of section 48, because the judgment below, as above pointed out, exceeds the sum of $1,000, and in my opinion therefore this is undoubtedly a case in which the court has jurisdiction by virtue of section 38, sub-section (*c*) of the Act.

The case of *Booth* v. *Ratté*(1) is a decision of this court, the nearest in character to the present application that I have been able to find. The action was in-

(1) 21 Can. S.C.R. 637.

stituted in the chancery division of the High Court of Justice, plaintiff claiming damages against several mill owners for obstructing the Ottawa River by throwing sawdust and refuse into it from their mills; and also a mandatory injunction restraining the defendants from continuing their unlawful acts. The judgment at the trial was in favour of the defendants; but on a re-hearing, judgment was given for the plaintiff, declaring that the defendants were guilty, and the plaintiff entitled to recover damages for the wrongful acts in the pleadings mentioned, with a reference to the Master to inquire and state the amount of damages. The original judgment declaring the plaintiff entitled to damages from the defendants was appealed through the Ontario courts, and finally confirmed by the Privy Council. The reference then went on before the Master. An appeal taken from his report was affirmed by the Court of Appeal, and a further appeal to the Supreme Court of Canada was dismissed.

It is true that in this case no question of the jurisdiction of the court seems to have been raised, but the reason for this is obvious, in that the relief claimed for in the action was one which originally could only have been given in a court of equity, and therefore it was considered that the appeal would lie whether the judgment was final or not.

In addition to *Booth* v. *Ratté*(1) there have been some other cases in the Supreme Court where the judgment or order complained of was from an officer of the court to whom a reference was made at the trial. These are *Doull* v. *McIlreith*(2); *McDougall* v. *Cameron*(3); *Grant* v. *Maclaren*(4), and *Bell* v. *Wright*(5).

(1) 21 Can. S.C.R. 637.
(2) 14 Can. S.C.R. 739.
(3) 21 Can. S.C.R. 379.
(4) 23 Can. S.C.R. 310.
(5) 24 Can. S.C.R. 656.

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The motion to affirm the jurisdiction is therefore granted. Costs in the cause.

*Owen Ritchie,* for the appellant. This is not a case in equity. In such a case damages could only be awarded if an injunction issued or specific performance was decreed. See *Ferguson* v. *Wilson*(1); *Lewers* v. *Earl of Shaftesbury*(2); *Patch* v. *Wyld*(3).

The judgment appealed against is not a final judgment. *Ville de St. Jean* v. *Molleur*(4); *McDonald* v. *Belcher*(5).

*G. F. Henderson K.C.* for the respondent. That the case is one in equity appears from *Bozson* v. *Altrincham Urban District Council*(6).

As to final judgment see *Rural Municipality of Morris* v. *London and Canadian Loan and Agency Co.* (7); *Baptist* v. *Baptist*(8).

THE CHIEF JUSTICE.—I would allow the appeal from the registrar with costs; the motion to affirm jurisdiction is dismissed with costs.

DAVIES J.—I concur in the opinion of Mr. Justice Duff.

IDINGTON J.—Section 38, sub-section (*c*), of the "Supreme Court Act," is relied upon as giving jurisdiction to hear this appeal.

As the appeal proposed is from Ontario, it is upon

(1) 2 Ch. App. 77.
(2) L.R. 2 Eq. 270.
(3) 30 Beav. 99.
(4) 40 Can. S.C.R. 139.
(5) [1904] A.C. 429.
(6) [1903] 1 K.B. 547.
(7) 19 Can. S.C.R. 434.
(8) 21 Can. S.C.R. 425.

the latter part of said sub-section alone that the question raised must turn.

It reads as follows:

from any judgment in any action, suit, cause, matter or judicial proceeding, in the nature of a suit or proceeding in equity, originally instituted in any superior court, etc.

We must avoid confusing the subject-matter of equitable jurisdiction with the proceedings in a purely common law action, by means of forms borrowed from courts of equity.

It is not the incident of any form or procedure which originally was a feature of a suit in equity, and which by reason of the progress or development of legal procedure has become a common mode of furnishing common law relief that is to determine what is here meant.

We must find the cause existent upon which a bill in equity might have been founded to invoke the equitable jurisdiction.

Now have we that presented in this case as launched?

It seems, in this branch of it which has been followed, to be an action purely and simply for breach of contract, and we have a judgment upon that contract awarding damages for breach of it and a reference to assess same.

It is to be observed, and not for an instant overlooked, that there was nothing else thenceforward in these proceedings than that which happens daily in many such actions as are purely of common law origin.

It matters not that there were used in executing this judgment many of the forms of procedure borrowed from the practice of the courts of equity. That does not change the nature of the suit, action or proceeding.

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The process of adopting the chancery forms of procedure for common law actions, began with the tentative adoption by the "Common Law Procedure Act" of mandatory orders, was enlarged by the "Administration of Justice Act" and thereafter by the passage of the judicature Acts. When the process first began it did not enlarge the jurisdiction of the Courts of Chancery.

What took place was the mere adoption and application of some of its methods of justice without driving the suitor to that court.

It was in the early stages of this development in Ontario that this court was created, and it was probably relative thereto and anticipatory of its outcome, as well as to the condition of things in other provinces, that the peculiar phraseology of this section was adopted.

I have no manner of doubt that the words "suit, action or proceeding" were used relative to the enforcing of some right or giving of relief which could only have been at one time got in courts of equity.

It, therefore, seems to me clear the word "proceeding" was not intended any more than the word "action" to extend the jurisdiction given by this part of the sub-section, beyond giving appeals in those cases arising out of an equitable cause or ground of suit in equity.

I do not overlook the fact that mixed up with this common law action there appears another cause in the statement of claim setting forth threatened fraud needing equitable relief by way of injunction.

This branch of the case, however, seems to have dropped out of sight and no longer to have been pursued.

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It is a case of common law cause of action and a cause for a suit in equity joined in the same statement of claim of which one seems to have been by mutual understanding dropped, and the other retained and followed by steps which are of an interlocutory character, and so remain until the final judgment is entered up, and unfortunately, or perhaps fortunately, for the would-be appellant that entry must take place in a court from which no appeal lies here.

I think the motion must be allowed with costs.

DUFF J.—The registrar has upheld the jurisdiction of the court to entertain this appeal upon the ground that the judgment appealed from is a judgment in a suit or proceeding in the nature of a suit or proceeding in equity within section 38(*c*) of the "Supreme Court Act." The words of the section are these:

(*c*) In an action, suit, cause, matter or other judicial proceeding originally instituted in any superior court of equity in any province of Canada other than the Province of Quebec, and from any judgment in any action, suit, cause, matter of judicial proceeding, in the nature of a suit or proceeding in equity, originally instituted in any superior court in any province of Canada other than the Province of Quebec.

It is, I think, indisputable that this enactment contemplates two distinct classes of equitable proceedings; that is to say, proceedings which fall within the category of suits or actions and proceedings which are not suits or actions, but which are comprehended within the phrase, "cause, matter or proceeding."

I do not think it was intended to give a right of appeal in respect of any judgment upon an application for an injunction or receiver, for example, in a purely common law action. The judgment, to be ap-

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pealable must be given either in an action or suit in the nature of an action or suit in equity or in a proceeding (not in an action) of the same nature. The right of appeal can consequently be sustained under this provision only if the action out of which the appeal arises was in the nature of a suit in equity. The test of that appears to me to be not the character of the pleadings as originally delivered still less the nature of the claim as indorsed on the writ of summons, but rather the character of the action as actually tried. It is a common experience that the pleadings being moulded to suit the evidence or rather assumed to be so moulded an action may at the trial undergo a complete transformation under the practice as established by the Judicature Acts. It is to the nature of the action as it is in substance finally tried that we must look to ascertain its character for the purpose of applying this section.

The action we are concerned with was treated by the learned trial judge as an action for damages for breach of a contract to deliver shares, and it is clear that although an injunction was claimed the circumstances at the commencement and at the close of the action were such that there was no equity upon which a claim for an injunction or other distinctively equitable relief could properly be founded. In such circumstances a court of equity would, of course, have had no jurisdiction to award damages.

There was, it is true, a declaration of the plaintiff's rights under the contract upon which the action was founded; but such a declaration where it would not have been within the power of the court to award consequential relief would never have been made by a court of equity any more than by a court of common law. In

such circumstances relief of that character can now be given under the statutory authority conferred by the Judicature Acts, but it can be given in all classes of actions and does not fall within the category of equitable relief. *Chapman* v. *Michaelson*(1), at pp. 242 and 243. The action was, therefore, not an action in the nature of a suit in equity and the only question remaining is whether the judgment was a final judgment. That it was not is made perfectly clear by the decision of the Court of Appeal in *Cummins* v. *Herron*(2). There (in an action by a riparian proprietor to restrain the pollution of a stream and for damages) at the hearing an inquiry as to damages was ordered and further consideration reserved. The chief clerk having certified to the amount of the damages a motion to vary the certificate was adjourned into court to be heard with the further consideration of the action. On further consideration the motion to vary was refused and judgment was given for the sum awarded by the chief clerk with an injunction. It was admitted that the substantial question in the action was disposed of by the chief clerk's certificate, but it was held that the judgment in so far as it dealt with the motion to vary was interlocutory.

There can be no doubt, Jessel M.R. observed during the argument, that such an order is interlocutory whatever its results may have been.

In giving judgment the Master of the Rolls said:

The appeal from the refusal to vary the certificate is now too late and must fail. As the whole merits of the case were decided by the chief clerk's certificate the appeal from the order on further consideration must also be dismissed.

(1) [1909] 1 Ch. 238. (2) 4 Ch. D. 787.

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Mr. Henderson very properly called our attention to the decision of the Court of Appeal in *Bozson* v. *Altrincham Urban District Council*(1). In that case the action was dismissed by the order appealed from; the decision has, I think, no relevancy to the question before us on this appeal.

ANGLIN J.—This is an appeal from an order of the Registrar of this court affirming its jurisdiction to entertain an appeal from the judgment of the Court of Appeal for Ontario, disposing of an appeal from the report of a referee to whom the assessment of damages was referred. The registrar was of the opinion that this action falls within the purview of section 38(*c*) of the "Supreme Court Act," and that an appeal to this court therefore lies. Although as originally framed in the writ this was an equitable action, the statement of claim discloses merely a common law cause of action for damages for breach of contract, and the trial was proceeded with on this basis. Only common law and statutory relief is claimed. I have little doubt that in framing sections 36 and 38 of the "Supreme Court Act," Parliament did not contemplate that the equitable procedure of a reference to ascertain damages with a reservation of further directions might be resorted to in common law actions.

It is to be regretted that solely owing to the course taken at the trial of referring the question of damages and reserving further directions in this common law action a party claiming to be aggrieved should be deprived of a right of appeal to this court, against the assessment of damages, whether it is sought to

(1) [1903] 1 K.B. 547.

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attack merely the quantum of the allowance or what is probably of greater importance, the principle which formed the basis of the assessment. But as the statute stands we appear not to have jurisdiction to entertain this appeal because the action is not an action in equity or in the nature of a suit in equity (section 38(*c*)), and the judgment *a quo* is not a final judgment (section 36).

The appeal from the registrar must be allowed with costs and the motion to affirm jurisdiction must be dismissed with costs.

*Motion dismissed with costs.*

Solicitors for the appellant: *Shilton, Wallbridge & Co.*

Solicitors for the respondent: *Cassels, Brock, Kelly & Falconbridge.*