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*Mar. 25, 26.
*April 22.

DAVID DIAMOND (PLAINTIFF).....APPELLANT.

AND

THE WESTERN REALTY COMPANY AND OTHERS (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Judgment—Interlocutory—Res judicata—Appeal—Final judgment—Discretion.

An interlocutory judgment which definitely decides a question of law and from which no appeal is taken may be *res judicata* when the question is raised between the same parties even in the same action.

On appeal to the Appellate Division from a decision of a judge refusing to grant an application for payment out of court of the applicant of over $6,000 the appeal court granted the application to the extent of $800 but refused any order as to the residue until rights of other parties had been determined.

Held, Idington J. dissenting, that the judgment of the Appellate Division was not a "final judgment" as that term is defined in the Supreme Court Act and was non-appealable on the further ground that it is discretionary in its nature. Supreme Court Act, section 37.

The judgment appealed against was affirmed as to the question of damages.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming with a variation the judgment of a judge on appeal from a referee's report and on an application for payment of money out of court.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff and Malouin JJ. and Maclean J. *ad hoc.*

In 1914 the appellant agreed to purchase certain lands from the respondent company on terms and conditions set out in the agreement and went into possession and sold some lots. In 1916 respondent purported to cancel the agreement, took possession of the land and cancelled the agreements for sale made by appellant and made new ones with the same parties. Appellant then brought action to have his agreement declared to be in force and for an accounting and damages. In this action the Supreme Court of Canada directed a reference to ascertain the damages suffered on matters specified. The referee reported over $6,000 due to appellant which was paid into court and a further sum due which was struck out by the judge in chambers who also refused an application by appellant for payment to him of the money in court. The appellant appealed to the Appellate Division to obtain the amount so struck out of the report and for payment of the money in court. The appeal was dismissed but the judgment was varied by allowing $800 of the money in court to be paid to appellant, no order being made as to the residue until the rights of the mortgage of the land originally purchased were determined. The appellant then took this appeal.

Christopher Robinson K.C. and *Cohen* for the appellant.

H. J. Scott K.C. and *Newman* for the respondents.

THE CHIEF JUSTICE.—For the reasons stated by my brother Duff, I would dismiss this appeal with costs.

IDINGTON J. (dissenting).—The appellant entered into an agreement on the 6th day of November, 1914, with the respondents the Western Realty Company, Limited, and Davidson and one Hunter, whereby the said respondent company agreed to sell a large number of lots in the subdivision of part of lot no. 114 and lot no. 125, in the township of Stamford, known at Lundy Park, according to registered plan no. 44, and except lots coloured on the blueprint attached to said agreement.

The prices of each of said lots were named and the terms of payment set forth in said agreement.

The moving causes of the agreement evidently were that the respondent company had not been very successful in

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their venture to sell and hoped that the appellant, an experienced hand at the business, might, if encouraged by a liberal profit, do very much better than it had done.

The surplus over the prices named for each class or number was to become the property of the appellant.

The prices named, so far as necessary to entitle the appellant's sub-purchasers to get conveyances clear of encumbrances, were to be paid to the mortgagees, Davidson (now one of the respondents) and one Hunter—the latter being no longer one.

The sales were to be made at a rate or rates of progress set forth in the agreement and, in default thereof, the further operation of the agreement was to cease upon notice to the now appellant.

He seems to have been very successful at first but later on rather slower than strictly entitled to be and, on the 19th of July, 1916, the said Western Realty Company gave notice pretending to cancel the said agreement as of said date, and took possession of the property.

The present appellant thereupon, on the 6th August, 1916, brought this action against the respondents and was unsuccessful at the trial and on appeal until reaching this court, when we found that the conduct of respondents herein had been such as to waive the right of either to give the notice of cancellation above referred to, and awarded him damages for the gross breach of the contract by not only dispossessing him of the property, but also advertising the fact.

The respondent Davidson was also held liable personally for damages for enticing away from his employment said Charles Bettal.

And we directed there should be a reference to a referee to assess said respective claims for damages, and made several other directions.

The Official Referee made his first report on the 8th June, 1920.

Upon appeal to Mr. Justice Middleton he made a number of changes in that report and sent it back to the referee, when he, as directed, went into many new features and reported finally on the 21st June, 1921.

By that report he found damages under the direction

of our judgment to something over $6,000, which does not surprise me but seems to have appalled Mr. Justice Middleton who disallowed any damages.

From that judgment appeal was taken by the appellant herein to the Appellate Division of the Supreme Court of Ontario.

On the 7th September, 1918, an order was made appointing Davidson receiver of moneys payable by sub-purchasers of the appellant herein but as he had failed to account therefor Mr. Justice Middleton made an order that he should pass his accounts as such receiver before the said referee having in charge the other reference under the said judgment of this court.

It would seem as if after some difficulty he was got to do so and the referee reported the sum of $6,619.27 as having been got by him from sub-purchasers of the appellant.

Again that sum was reduced by order of Mr. Justice Middleton to $6,393.27, and that forms an item which came up for consideration by the said Appellate Division and that court refused to direct the payment out to the appellant of said sum.

Hence the appeal here as to the said damages and said moneys in court.

In the result the appellant's money is withheld apparently to meet some claim of the respondents, or either of them.

According to my interpretation of the contract neither respondent had any right to collect said moneys or meddle with same but having done so merely as custodian under the direction of the court they are, I submit, in the hands of the court merely for the appellant.

As I understood whilst considering this appeal that the majority of this court were taking another view and holding that the appeal should be dismissed I concluded it would be entirely useless labour to go further into details and verify some of the items of the allowance for damages as I had intended to do, and the accuracy of the figures of what appellant is entitled to have paid out of court.

I desire now only to present my reasons for dissenting from the judgment of the majority.

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The question of the case not being ripe for judgment seems to me answered by what I have just said.

And as to the suggestion, only very mildly or faintly put forward in argument, that the appellant should have appealed from Mr. Justice Middleton's first ruling that the report of the referee exceeded his jurisdiction, with that ruling I agree and clauses 12 and 13 were properly stricken out.

I fail to see how there could have been any legitimate appeal. And I fail to see how, under Mr. Justice Middleton's direction, the damages should not be stated in figures by the referee and properly assessed, and the items of interest and taxes the appellant might have been freed from by prosecuting and possibly finishing the work had he not been improperly meddled with, are clearly, to my mind, deserving of the most serious consideration both directly and indirectly.

To say that there is no evidence of any damages therein or any other aspect of the wrongful dealing by respondent with appellant's rights from the 19th July, 1918, to 17th February, 1919, seems beyond my comprehension after much reading of the evidence herein.

Who knowing of the world and its affairs would like to take that as a guide to his chances in a deal such as in question?

I would allow the appeal subject possibly to some modification of the figures.

DUFF J.—Effect must, I think, be given to Mr. Scott's objection that sub-paragraph (*b*) of the fourth paragraph of the judgment appealed from, in which the court refuses to make any order in respect of the residue of the moneys paid into court until the rights of the mortgagees have been ascertained, and without notice to purchasers who have not been received releases from the mortgagees, is not appealable. The judgment, in this part of it, does not determine "in whole or in part any substantive right" of the parties (3-4 Geo. V, c. 51, s. 2 (*e*); moreover, in this respect the judgment is discretionary in its nature within the meaning of R.S.C., c. 139, s. 45.

The other question concerns the appellant's right to damages under clause 5 (*b*) of the judgment of this court on the 17th February, 1919, under which a reference is ordered to determine

what damages have been suffered by the appellant by reason of the breaches by the respondent company of the said agreement dated the 6th of November, 1914, and of the wrongful interference by the respondent company with the rights of the appellant under said last mentioned agreements made by the appellant for the sale of lots

in the subdivision in question. The referee, by his report of the 8th June 1920, directed (clauses 12 and 13 of the report), in purporting to deal with the matters referred under this head, that the date from which interest was payable by the appellant under the agreement of the 6th November, 1914, should be postponed for fifteen months and eighteen days, and the date from which taxes were payable should be postponed for seventeen months and twelve days respectively, after the confirmation of the final report. These clauses of the report (clauses 12 and 13) were struck out by Middleton J., on appeal, and the report was referred back to the referee to consider whether the appellant was entitled, under clause 5 (*b*) of the judgment, to any damages "in lieu of the matters dealt with" by those clauses. On this subject Middleton J., says:—

This, as I understand it, covers two inquiries: first, as to damages by reason of breach of the agreement; and secondly, damages by reason of wrongful interference by the respondents with Diamond's sub-purchasers; and, thirdly, the Master is to find and report the damages suffered by the appellant by reason of the tampering with Bettel.

1. By paragraph 12 of the Master's report he finds that the date from which interest is payable by the plaintiff should be postponed for a period of fifteen months and eighteen days after the date on which the final report is confirmed.

By the agreement it is provided that no interest shall be payable by the purchaser of a period three years from the 6th of November, 1914, but after the expiration of that period the purchaser shall pay on the unpaid purchase money, interest at the rate of six per cent per annum, payable half-yearly. The Supreme Court has declared that this agreement, in its entirety is a valid and subsisting agreement, and I do not think that the Master had any jurisdiction to make the direction given.

2. By paragraph 13 of the report the Master has found that the date from which taxes are payable as provided by the agreement is to be postponed for a period of seventeen months and twelve days after the date on which the final report is confirmed. The agreement provides that the vendor shall pay the taxes upon the whole of the property up to and inclusive of the year 1917, and, for the reasons given in dealing with the question of taxes, I can find no jurisdiction upon the reference to make the direction complained of.

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The referee, by his second report, dated 21st June, 1921, found that the appellant was entitled against the respondent company under clause 5 (*b*) of the judgment to the sum of $6,763.38 as damages. But this sum allowed by the referee as damages is made up of a series of items considered by him to be the equivalent, in a pecuniary sense, of the postponements allowed by his previous report and disallowed by the judgment of Middleton J. On appeal from this second report, Middleton J. discusses this feature of the report thus:—

> The next matter is the finding of the Master as to the damages to be allowed by reason of the wrongful cancellation of the agreements. This, I think, has been dealt with by the Master in an entirely erroneous way. In an earlier report he had followed, substantially, the same course and I allowed the appeal referring it back to the Master to allot damages upon a proper footing and my judgment was not appealed from. The present report is a reiteration of what was then deemed to be erroneous. What the Master has done is to allow to Diamond, by way of damages, a sum equivalent to interest on the amount of unpaid purchase money from November, 1917, to the 30th of June, 1921, which he estimates as the date upon which his report would become confirmed, and interest over a further period of six months thereafter, and a third sum as representing six months' interest on the price of 50 lots at $65 per lot, a fourth sum representing the interest on the price of 100 lots at $65 per lot for three months, and a fifth sum, representing taxes from 1st January, 1918, to the 30th June, 1921, and a sixth sum representing the assumed charge of the taxes for 17 months and 12 days up to the 1st July, 1921, these sums amounting to something over $6,000. It is manifestly inconceivable that this is the proper measure of damages. The theory is that because the agreement was cancelled when Diamond comes to purchase the remaining lots he may have to pay interest upon his purchase money, and he may have to pay taxes. But he has not paid this interest and he may never have to pay it; he may never carry out his purchase or pay the purchase price. What the Supreme Court no doubt thought was that damages should be paid by the company by reason of its wrongful interference with Diamond's right to purchase and sell to sub-purchasers. If it could be shewn that he had some organized scheme on hand for the selling of this land, and he had lost purchasers by reason of the wrongful cancellation, there would be some foundation for such a claim. He had already recovered damages for what was actually done. The company took over his organization, retained his agent and sold lots wherever a purchaser could be found, and it is not suggested in the evidence that any sale could have been made other than those that were made. Five hundred dollars has been fixed, and paid, in discharge of the claim for wrongful interference, and it has not been shewn that outside of this any damage whatever has been sustained. There was a period from the date of the cancellation to the date of the Supreme Court Judgment, that is, from 19th July, 1916, to 7th February, 1919, in which the company appeared as vendor instead of Diamond, but Diamond has taken over all those agreements, he has, on the accounting received credit for nine

thousand odd dollars paid under them, and there is a further sum of about four thousand dollars to be paid by sub-purchasers of which he will have the benefit. All these accounts have been obtained for $900 allowed by way of commission, which is much less than the actual outlay for agent's commission and advertising. I think that this claim for damages is entirely unfounded and should be disallowed. As the company is in liquidation and has no assets, this matter is not one of importance, for clearly no such liability for damages could be allowed to interfere with the rights of the mortgagees whose claim will overtop the balance due for purchase money if the contract is carried out in its entirety.

On appeal to the Court of Appeal the judgment of Middleton J. was on this point affirmed.

I agree with the view of Middleton J. Virtually there is a finding of fact by him that the appellant, having had the advantage of the efforts put forth and the moneys expended by the Western Realty Company for the purpose of selling the land in which the appellant was interested, had not in fact suffered any loss (within the categories of damages the referee was directed to consider) other than that for which compensation had been made by the allowance ($300) mentioned. That finding of fact cannot be successfully impeached.

In truth, in the argument addressed to us by Mr. Robinson it was hardly contended that there was evidence which could justify a finding that damages had in fact been sustained by the appellant to the amount found by the referee. The real point of his argument was that Diamond having been prevented from performing his contract by the vendor, he was in point of law relieved from his obligation to pay interest and taxes accruing during the interregnum or for a period corresponding with the interregnum.

Now to this argument there appears to be one conclusive answer. The point raised by it was decided against Diamond in the judgment given by Mr. Justice Middleton on the appeal from the first report. The claim thus advanced was one he held which the referee, under the terms of the reference, had no jurisdiction to examine. This judgment of the learned judge was a definite decision upon a definite point of law. From that decision no appeal was taken, and it seems to put an end to the controversy.

It is true that in a sense the decision was interlocutory; that is to say, the proceeding in which it was given was an

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interlocutory proceeding; but it was nevertheless a final decision in the sense that in the absence of appeal it became binding upon all parties to it.

As Lord Macnaghten said, in *Badar Bee* v. *Habib Mercan Noordin* (1):—

> In the words of the Digest, lib. xliv, t. 2, s. 7 "*exceptio rei judicatae obstat quotiens eadem quaestio inter easdem personas revocatur.*" It is not competent for the court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time.

The application of the principle is not affected, it is, perhaps, needless to say, by the circumstance that the first decision is pronounced in course of the same action; *Badar Bee* v. *Habib* (1); *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (2); *Hesseltine* v. *Nelles* (3); nor is it material that the reasons for judgment, as distinguished from the formal judgment itself, must be examined in order to ascertain the scope of that decision. *Hook* v. *Administrator General of Bengal* (4); *Ramachandra Rao* v. *Ramachandra Rao* (5).

The appeal should be dismissed with costs.

MALOUIN J.—I would dismiss this appeal with costs for the reasons assigned by Mr. Justice Duff.

MACLEAN J.—I concur in the judgment which has been prepared by Mr. Justice Duff and think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Cohen & Cohen.*

Solicitor for the respondent Davidson: *George E. Newman.*

Solicitors for the respondent Western Realty Co.: *McMaster, Montgomery, Fleury & Co.*

(1) [1909] A.C. 615 at page 623.
(2) [1883] 11 Ind. App. 37.
(3) [1912] 47 Can. S.C.R. 230.
(4) [1921] 48 Ind. App. 187, at pp. 192-4.
(5) [1922] 49 Ind. App. 129 at pp. 137-8.