SAMUEL E. DUNN AND THE EASTERN TRUST COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

FREDERICK R. EATON AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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*Oct. 21, 22.
*Oct. 29.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Final judgment—Reference.

In an action claiming rescission of a contract for the sale of timber lands and other equitable relief and, in the alternative, damages for deceit, the trial judge held that it was a case for damages only and gave judgment accordingly and referred to a referee matters arising out of a counterclaim ordering him also to take an account of moneys paid, an inquiry as to liens and incumbrances and as to the quantity of standing timber on the lands and other proper accounts. Further consideration of the cause was reserved. This judgment was affirmed by the full court and the defendants sought to appeal to the Supreme Court of Canada.

Held, that the action tried and determined was the common law action for deceit only; that the judgment given therein was not a final judgment within the meaning of that term in the "Supreme Court Act"; and that the court had no jurisdiction to entertain the appeal. *Clarke* v. *Goodall* (44 Can. S.C.R. 284), and *Crown Life Ins. Co.* v. *Skinner* (44 Can. S.C.R. 616) followed.

APPEAL from a decision of the Supreme Court of Nova Scotia maintaining the judgment at the trial in favour of the plaintiffs and dismissing the defendants' counterclaim.

The action claimed relief in equity and in law. The trial judge held that the plaintiffs were not entitled to equitable relief and dealing with the case

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

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as an action in damages for deceit gave judgment for the plaintiffs with a reference for inquiry as to the action and counterclaim and reserved further consideration of the cause. His judgment was affirmed by the full court and the defendants took an appeal to the Supreme Court of Canada.

L. A. Currey K.C. for the appellants.
T. S. Rogers K.C. for the respondents.

THE CHIEF JUSTICE.—The statement of claim in this action sets out certain agreements for the sale of timber lands and asks as relief rescission of the agreements, re-payment of moneys paid on account, a receiver and an injunction, and, in the alternative, damages for deceit. It is, therefore, framed both as an action in equity and an action at common law. The defence, besides denying the allegations as to misrepresentation, is united with a counterclaim in which the defendant asks for damages for breaches of the agreement with respect to the time within which the lumber was to be cut and for an injunction restraining the plaintiffs from continuing their wrongful acts. The counterclaim contained the usual common law counts to recover the price of goods sold and delivered, for work and labour done and for the values of a steam saw-mill, engine and boiler.

At the trial Mr. Justice Meagher gave reasons for judgment in which he generally found in favour of the plaintiffs, but decided that it was not a case for rescission, but for damages, and the formal judgment of the court ordered, declared and decreed that the agreements in question had been obtained through fraudulent misrepresentations. He refused the

remedy of rescission, but declared that the plaintiffs were entitled to damages, the amount thereof being reserved pending the report of the referee, and referred to the referee a number of matters referred to in the counterclaim above mentioned, and directed the referee to take an account of all moneys paid by the plaintiffs, an inquiry as to liens and incumbrances, an inquiry as to the quantity of timber standing upon the purchased premises within the meaning of the first agreement, such other accounts as the referee might deem proper, and also finally reserved further consideration of the cause.

It would appear, therefore, that the action which was tried, and for which relief was given, was the action for deceit, and it was, therefore, a common law action in which the judge, although determining generally on the question of fraudulent misrepresentation as between the parties did not attempt to assess the damages, but referred these and other matters to a referee and reserved to the court the final judgment which should be given after the referee had made his report.

The case, therefore, would seem to be entirely on all fours with *Wenger* v. *Lamont*(1); *Crown Life Ins. Co.* v. *Skinner*(2); and *Clark* v. *Goodall*(3); and we are without jurisdiction on this branch of the case.

We are also of opinion that the appellant failed completedly to maintain his counterclaim and the appeal is dismissed as to that claim with costs, for the reasons given by the trial judge.

DAVIES, ANGLIN and BRODEUR JJ. concurred.

(1) 41 Can. S.C.R. 603. (2) 44 Can. S.C.R. 616.
(3) 44 Can. S.C.R. 284.

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IDINGTON J.—The individual respondents and the appellant Dunn entered into an agreement, dated the 10th of May, 1909. Then the corporation named The S. E. Dunn Company was created, apparently for the purpose of executing the purposes which the individual respondents had in effecting the first agreement.

On the 18th of January, 1910, an agreement was entered into between Dunn and the said corporation based upon what the first agreement had in view. This action was launched by the individual respondents and said corporation seeking to rescind said first agreement on the ground that it had been induced by fraud of Dunn, but, alternatively, asking for damages if rescission could not be had.

The appellant Dunn, by way of counterclaim, amongst other things asked for a declaration that the agreement of the eighteenth of January, 1910, was not his deed, was never delivered, and to have it set aside.

The learned trial judge could not see his way to rescind the first agreement, but found there had been fraud practised, and, with a view to giving relief in respect thereof, directed a reference embracing numerous inquiries.

By the same judgment he dismissed that part of the counterclaim which sought to have the agreement of the eighteenth of January, 1910, set aside.

An appeal was had by appellants herein to the full court, and a cross-appeal was taken by the present individual respondents, and that court dismissed these appeals.

Therefrom the appellant brought this appeal seeking to have said judgment of reference set aside and to have the judgment reversed so far as it dismissed the counterclaim as to the part of it seeking to set aside the agreement of eighteenth of January, 1910.

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No objection was taken by respondents to the jurisdiction of this court, but, upon its being observed in course of the argument, that it was an appeal involving chiefly the judgment of reference, attention of counsel was called thereto. Nothing urged in support of the jurisdiction save as to one part of the counterclaim can maintain it.

The cases of the *Union Bank of Halifax* v. *Dickie* (1); *Crown Life Ins. Co.* v. *Skinner* (2); and other cases rendered it hopeless to maintain that the judgment of reference was a final judgment within the meaning of the "Supreme Court Act."

That part of the appeal should, therefore, be dismissed for want of jurisdiction with such costs as might have been given on a motion by the respondent at the proper time to quash the appeal.

That part of the judgment dismissing the part of the counterclaim impeaching the agreement of the 18th of January, 1910, is, of course, final and properly appealable, but the evidence given on the trial of the issues raised thereby renders the appeal therefrom apparently hopeless and it should be dismissed with such costs of and incidental to the appeal as would be properly taxable had the appeal been confined to that part of the counterclaim alone.

DUFF J.—The trial judge held that the first of the two agreements was procured by means of representations which were false and which were fraudulent in the sense that they were made recklessly and without care whether they were true or untrue. This finding was affirmed by the full court and it cannot be said

(1) 41 Can. S.C.R. 13. (2) 44 Can. S.C.R. 616.

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that there is not evidence to support it. On this ground I should dismiss the appeal with costs. I express no opinion on the question of jurisdiction because it was not argued and I am by no means satisfied that the facts of the case bring it within the principles upon which this court acted in *Wenger* v. *Lamont*(1); *Crown Life Ins. Co.* v. *Skinner*(2), and *Clarke* v. *Goodall*(3).

Appeal from judgment in action quashed with costs. Appeal from judgment on counterclaim dismissed with costs.

Solicitor for the appellants: *H. W. Sangster.*
Solicitor for the respondents: *W. M. Ferguson.*

(1) 41 Can. S.C.R. 603. (2) 44 Can. S.C.R. 616.
(3) 44 Can. S.C.R. 284.