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* May 4.
* May 11.

ELFRIDA SVENSSON (DEFENDANT) ..... } APPELLANT;

AND

CHARLES BATEMAN (PLAINTIFF) ... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Appeal — Jurisdiction — Commitment of judgment debtor — Final judgment—Manitoba King's Bench rules 748, 755—*"Matter or judicial proceeding"—Supreme Court Act, s.* 2(*e*).

An order of committal against a judgment debtor, under the Manitoba King's Bench rule 755, for contempt in refusing to make satisfactory answers on examination for discovery is not a "matter" or "judicial proceeding" within the meaning of subsection (*e*) of section 2 of the Supreme Court Act but merely an ancillary proceeding by which the judgment creditor is authorized to obtain execution of his judgment and no appeal lies in respect thereof to the Supreme Court of Canada. *Danjou* v. *Marquis*, 3 Can. S.C.R. 258, referred to.

MOTION to quash an appeal from the judgment of the Court of Appeal for Manitoba(1) affirming the order made by Mathers J. committing the appellant to twelve months' imprisonment under the authority of the Manitoba Court of King's Bench, rule 755. A statement of the case is given in the judgments now reported.

W. L. Scott supported the motion.

Trueman contra.

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

(1) 18 Man. R. 493.

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THE CHIEF JUSTICE.—This appeal is quashed with costs fixed at $50. I agree in the opinion stated by Mr. Justice Duff.

GIROUARD and DAVIES JJ. also agreed with DUFF J.

IDINGTON J.—There is not sufficient resemblance in the language establishing or the scope and purpose of the establishment of the respective courts of appeal in England and Ontario to that in the Supreme Court Act defining our jurisdiction to render the cases cited to us relative to the distinctions drawn between final and interlocutory judgments of much help herein.

Nor do I think the cases determining and distinguishing the nature and quality of the acts or offences committed by persons under examination which had involved them in imprisonment under orders of judges in chambers are much more helpful in leading to a right conclusion on this motion.

Assuming for argument's sake that the offence in question herein was criminal brings us to consider whether or not it is so in the sense of the section of the Supreme Court Act prohibiting, (unless upon certain terms and following certain conditions of things), an appeal here. I have no hesitation in saying that it was not a criminal offence in the sense used in that section.

But how far does the finding it, if we do find it, a criminal offence in the sense in which local laws punishing specified acts with imprisonment, lead such acts to be spoken of as criminal offences bring us? Is it any more appealable when thus looked at than if merely held to be a contempt of court in the ordinary sense; that is in the presence and face of the court?

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There formerly prevailed many cases of enforcing by imprisonment obedience to orders of courts in order that justice should be done between parties and for which alternative methods are now substituted.

For example, the attachment of the person to enforce an interim order for costs is replaced by ordinary execution; the refusal to attend or submit to examination for discovery by an order striking out the defence or dismissing the action and the vesting order takes the place of the former process. Are any such orders appealable to this court?

Suppose the former practice or law and practice restored and imprisonment directed instead of any such order would appeal lie here? Any appeal of that kind involving mere procedure would, I venture to think, be met by the practice adopted here long ago and consistently followed of refusing to hear the appeal unless there appeared some violation of the principles of natural justice.

How can this case be distinguished from those? What is this if not matter of procedure?

I have always supposed that the legislation of Ontario, from which that of Manitoba now in question was evidently copied, was but a substitution for the right which the judgment creditor formerly had to issue, as of course, a writ of *capias ad satisfaciendum.* Imprisonment for debt was abolished but I rather think the intention was and at all events the practical result was not to extend this amelioration of the law to the case of the fraudulent debtor but, in his case, to leave it in the discretion of the court or judge conditioned upon satisfactory answers being made upon examination. I will not say that this view has always prevailed or that the later cases are clearly consistent

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with the earlier ones. The order for a writ of *ca. sa.* was more common at one time as the result of such examinations, than later when it became so fruitless partly as the result of continued amendments as to the effect to be given the writ, that the order therefor fell into disuse.

The order to commit was effective and the power to make it formed part of the same section.

Another power to make orders for examinations of debtors was that brought in with the Common Law Procedure Act in order to found proceedings for garnishee proceedings.

It was quite usual and I think properly so in asking for an order to commit under either such Acts to treat the subject matter of the complaint as one for contempt of court implied in the disobedience of the order.

It was often just as much so as the other instances I have adverted to which subjected the party to attachment.

It was competent for a judge to take and he sometimes did take the examination before himself.

In the cases of *Henderson* v. *Dickson*(1), and *Baird* v. *Story* (2), such eminent judges as the late Sir John Beverley Robinson, Chief Justice Draper and Hagarty J., afterwards C.J., all living in the times when these changes were made and knew what they involved or implied, either directly or impliedly deal with the matter as one of contempt.

But again, how far does holding them matters of contempt clear matters up for us?

Thirty years later the rules, which are statutory in

(1) 19 U.C.Q.B. 592.

(2) 23 U.C.Q.B. 624.

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character, enabled the creditor to have the examination before certain officers of the court without any order, but merely an appointment. And such seems to be the nature of the Manitoba rule now in question.

Such being the history of the law, does it not indicate that it is a matter of indifference whether the substance of the offence be treated as contempt or the proceeding be held in aid of the execution or as substitute for execution by way of *ca. sa.,* or whatever we choose to call the proceeding and order made? They are but in the nature of procedure and, hence, even if within the jurisdiction of the court, something the court has uniformly refused to hear unless there appeared something done in violation of natural justice.

It seems, moreover, as something hardly within the general purview of the Supreme Court Act to suppose it intended thereby to have such orders appealable here.

I should have had no hesitation in holding either on this latter and broad ground that there was no jurisdiction to hear such an appeal or that, in any event, it being in the nature of matter of procedure should not be heard, but for the cases of *Wallace* v. *Bossom*(1), where an appeal allowed from an order setting aside an execution, *Mackinnon* v. *Keroack* (2), a capias case but which took the form of pleadings and an issue to be tried, and the case of *In re O'Brien*(3).

These cases I think each and all distinguishable. The first is, perhaps, in principle the least possible of being distinguished. But the facts are far from being the same and the case an early one inconsistent with

(1) 2 Can. S.C.R. 488. (2) 15 Can. S.C.R. 111.
(3) 16 Can. S.C.R. 197.

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the later jurisprudence of the court, as, for example, the case of *Martin* v. *Moore*(1), and *McGugan* v. *McGugan*(2).

And the others seem of the same nature as interpleader in being proceedings quite independent of those involving the rights of the parties in the issues raised in the action.

I incline very much, subject to reservation of opinion, as it was not argued as other points above referred to were, to hold also as the result of much consideration of the case in all its bearings that the order was discretionary and, hence, not the subject of appeal. Suppose the converse case of an appeal because the Court of Appeal had set aside an order, or both judge and appellate court refused to make an order, would we not answer, that they had merely exercised their discretion?

No necessity exists to rest upon this point of discretion for, in my view, the grounds I have just stated are sufficient to enable me to hold the appeal will not lie or ought not to be heard as being a matter in the nature of procedure.

There is in support of this latter ground also this, that on its face the appeal involves only costs and would be fruitless, for the appellant is now discharged.

The acquiescence relied on would but for the peculiar facts be also fatal, but, on account of such facts, I say nothing as to that.

Carter v. *Molson*(3) is instructive as to the scope of the appellant's right intended. There it was held no appeal would lie as of right to the Privy Council from an order for *ca. sa.* in a similar case in Quebec,

(1) 18 Can. S.C.R. 634. (2) 21 Can. S.C.R. 267.
(3) 8 App. Cas. 530.

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where the statute limiting appeals from Quebec to the Privy Council is identical with that defining as to that province, appeal to this court.

The express provision for appeal in case of habeas corpus in other than criminal cases provided for by section 39, sub-section (*c*) of the Supreme Court Act rather implies that such an appeal as this is not intended. In case habeas corpus would apply that is the proper mode of relief, if beyond the power of the court to make the order.

The appeal should be quashed with costs.

DUFF J.—The Court of Appeal for Manitoba, by the judgment appealed from, dismissed an appeal from an order of Mathers J. committing the appellant to gaol for twelve months under the authority of rule 755 of the Court of King's Bench. The order is expressed to be based upon an adjudication that the appellant was "guilty of contempt" in not making satisfactory answers "upon her examination as a judgment debtor" under rule 748 "as to her property or her transactions respecting the same."

I think this order is not a final judgment within sub-section (*e*) of section 2 of the Supreme Court Act. That sub-section is as follows:—

> (*e*) "Final judgment" means any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding in finally determined and concluded.

The order of Mathers J. did, it is true, finally dispose of the matter in question upon the application before him; and, if that application was a "matter or other judicial proceeding" within the meaning of the definition just quoted, the order disposing of it must be held to be a final judgment within that definition.

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The point for determination is whether the application was such a "matter or other judicial proceeding."

I think it is not such a "matter or other judicial proceeding"; and I base my opinion upon the short ground that a proceeding under rule 755 is merely ancillary to the proceedings by which a judgment creditor is authorized to obtain execution of his judgment. The examination under rule 748 is designed to enable the creditor to obtain, (through the oral examination of the debtor), discovery of the debtor's assets which are subject to execution in satisfaction of his judgment. By rule 755, the court is invested with power to commit the debtor for failing to make, upon such an examination, a full and true disclosure respecting his property and his dealings with it. *Taylor's Case*(1), *per* Lord Eldon; *Re Courtney*(2); *Dougall* v. *Yager*(3); *Hobbs* v. *Scott*(4), *per* Draper C.J.; *Lemon* v. *Lemon*(5), *per* Strong V.-C.; *Graham* v. *Delvin*(6), *per* Boyd C.; *Ross* v. *Van Etten*(7), at page 600, *per* Taylor C.J. The rule 755 is thus but the necessary complement of rule 748; and a proceeding under it is not, to use the language of Sir James Colville, speaking for the Judicial Committee in *Goldring* v. *La Banque d'Hochelaga*(8), referring to the proceedings under the articles of the Civil Code of Quebec relating to *capias ad respondendum*, "so severed from the general suit that" it is "to be treated as something separate" in its nature, "and not as incident to the suit"; on the contrary "from its nature" it is "merely incidental to the suit and in the nature of process therein."

(1) 8 Ves. 328.
(2) 11 Ir. Ch.R. 410.
(3) 2 U.C.L.J. (N.S.) 161.
(4) 23 U.C.Q.B. 619.
(5) 6 Ont. P.R. 184.
(6) 13 Ont. P.R. 245.
(7) 7 Man. R. 598.
(8) 5 App. Cas. 371, at p. 373.

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A proceeding thus incidental to the principal action, and not touching the rights of the parties in respect of the matters in controversy in that action, cannot be treated as a "matter or other judicial proceeding" within the enactment under consideration. To hold otherwise would lead to the result (which it is impossible to suppose Parliament could have contemplated) that any order made in the course of an action—though touching exclusively the course of the proceedings and having no relation to the merits of the controversy in the action itself—is a final judgment within the Supreme Court Act as finally disposing of the particular application in which it was pronounced.

There is, perhaps, some reason to think that this view is in conflict with the view of Strong J., as indicated in his observation in *Danjou* v. *Marquis*(1), that the phrase "final judgment" as used in the Supreme Court Act comprehends any order or judgment which is

> final as regards the particular motion or application and not necessarily final and conclusive of the whole litigation.

I do not think the learned judge could have meant to say that every order disposing of an interlocutory proceeding in the course of an action is, as such, a final judgment and appealable under the Supreme Court Act; if so, I must, with respect, dissent from that view. Other cases which may, at first sight, appear inconsistent with the opinion above expressed will be found, on examination, to be either, (1) cases in which, by the order or judgment appealed from, the rights of the parties in respect to some distinct

(1) 3 Can. S.C.R. 251, at p. 258.

ground of action or defence in the principal proceeding have been determined; or (2) cases in which the proceeding in which the order or judgment in question was pronounced, (although bearing some relation to another proceeding), was held by this court to be, in substance, independent.

I think the appeal should be quashed with costs.

ANGLIN J. agreed with Duff J.

Appeal quashed with costs.

Solicitors for the appellants; *Bonnar, Timmant & Thorburn.*

Solicitors for the respondent: *Hull, Sparling & Sparling.*