UNION BANK OF HALIFAX (PLAINTIFFS) ..... } APPELLANTS;

AND

ALFRED DICKIE (DEFENDANT) ..... RESPONDENT.

1908

*Oct. 19.
*Oct. 27.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Jurisdiction—Final judgment.

In 1903 the United Lumber Co. executed a contract for sale to D. of all its lumber lands and interests therein the price to be payable in three instalments at fixed dates. By a contemporaneous agreement the company undertook to get out logs for D. who was to make advances for the purpose. The agreement for sale was carried out and two instalments of the purchase money paid. At the time these contracts were executed the Union Bank had advanced money to the company and shortly after the contract for sale was assigned to the bank as security for such and for future advances. The company having assigned in insolvency the bank brought action against D. for the last instalment of the purchase money to which he pleaded that he had paid in advance to the company and the bank more than the sum claimed. The trial judge held that the bank had no notice of the second agreement under which D. claimed to have advanced the money and gave judgment for the bank with a reference to ascertain the amount due. The full court set aside this judgment and ordered a reference to ascertain the amount due the bank and, if anything was found to be due, to ascertain the amount due to D. from the company. The bank sought to appeal from the latter decision.

Held, that the judgment of the full court was not a final judgment from which an appeal would lie under the Supreme Court Act to the Supreme Court of Canada.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside the judgment at the trial in favour of the plaintiffs and directing a reference to

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

1908

UNION BANK OF HALIFAX v. DICKIE.

ascertain the amount due the plaintiffs and also that due the defendant from the United Lumber Co.

The facts are stated sufficiently in the above headnote.

Mellish K.C. for the respondent, moves to quash the appeal for want of jurisdiction.

W. B. A. Ritchie K.C. contra.

The judgment of the court was delivered by

IDINGTON J.—The appellants sued for certain instalments of the price of some land sold by the United Lumber Company to respondent and claim to recover the same by virtue of an assignment made by the company as collateral security for debts due to the appellant.

The learned trial judge held the defendant liable and so adjudged with costs, but referred the question of the amount of liability to a referee.

On appeal to the Supreme Court of Nova Scotia that judgment was set aside and instead thereof the referee was directed to find and report the amount of the advances made by the appellants to the company before the 21st day of December, 1903, and still remaining unpaid and was further directed in the event of the referee finding any of the said advances are still unpaid to inquire and report the amount, if any, due and payable to the company under and by virtue of the agreements in writing between the said company and defendant dated the 10th December, 1903, and meantime the court reserved further directions

and costs. It is from this judgment an appeal is sought here.

It is conceded that the report of the referee when made can have no other effect than to inform the court to which it may be made and before having the effect of a judgment settling the rights of the parties must be followed by an order of a judge or a judgment of the court.

It is nevertheless contended by the appellant that the court below had no right to set aside the judgment inasmuch as the learned judges gave in support of this judgment reasons therefor which it is alleged appear to have been in accord with the opinion of the learned trial judge in regard to the liability of the respondent. There are two or three answers to this.

In the first place the record itself does not shew on its face any concurrent declaration either way as to the liability.

In the next place the judgment of record as the result of the trial by no means clearly defines where the lines are to be drawn in taking the accounts.

The respondents contend that the assignment to the appellant was only for securing certain debts due the appellant and that those debts had been discharged, long before this action, by payments, and thus the right in appellant to sue terminated.

If these contentions are correct or either fairly arguable on the true construction of the collateral security there are important matters left by the trial judgment of record undisposed of for the referee to wrestle with according as he might happen to construe the judgment of reference and then if need be the collateral security.

The judgment directed as follows:

1908

UNION BANK OF HALIFAX v. DICKIE.

Idington J.

It is ordered, adjudged and decreed that the plaintiff bank do recover from the defendant the amount due to the plaintiff bank from the said United Lumber Company, Limited, under the assignment from the said United Lumber Company, Limited, to the plaintiff bank, set out in the statement of claim.

It is further ordered, that it be and it is hereby referred to Mr. F. H. Bell, barrister, to hear the parties and their witnesses and to inquire and report the balance due to the plaintiff bank from the United Lumber Company, Limited, for moneys advanced by the plaintiff bank to the said United Lumber Company, Limited, and secured by the said assignment.

It is further ordered, that judgment be entered for the plaintiff bank for the amount found by the said referee on his report being confirmed or varied and confirmed, together with its costs of action to be taxed.

If that judgment had stood uncorrected and the referee had gone on and ruled that it was not open upon this reference to the respondent, to give evidence in support of these contentions relative to the limited nature of the assignment and the discharge of the debts it (when so construed) secured, a miscarriage of justice or much confusion might have followed.

The effect of the judgment of record now appealed from setting aside and varying the trial judgment is a matter of procedure, and simply to substitute a clear and explicit judgment purely and simply of reference for a judgment that is by no means clear, but claimed to be one for costs with a reference therein virtually to find out whether it was right or wrong. Obviously all the court has done is to enable the parties to have every phase of their case presented properly for a final adjudication and upon that being arrived at and passed upon by the appellate court of Nova Scotia, the case will be ripe for an appeal here if either of the parties desire then to come here.

Whatever final judgment is given upon the referee's findings will be appealable here if worth while.

1908

UNION BANK OF HALIFAX v. DICKIE.

Idington J.

The motion is allowed and appeal quashed with costs.

Appeal quashed with costs.

Solicitor for the appellant: *W. A. Henry.*

Solicitor for the respondent: *W. H. Fulton.*