Privy Council Appeal No. 86 *of* 1913.

The Windsor, Essex, and Lake Shore Rapid Railway Company - - - - - *Appellants,*

v.

A. J. Nelles and another - - - - *Respondents,*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH OCTOBER 1914.

Present at the Hearing:—

LORD DUNEDIN. SIR CHARLES FITZPATRICK.
LORD PARMOOR.

Delivered by LORD DUNEDIN.

The Plaintiffs and Respondents in this case were engineers and contractors, and acted as promoters in making preliminary arrangements and negotiating franchises through the different municipalities for the Defendant Company, now Appellants.

The Defendant Company was incorporated by an Act of the Province of Ontario of 1901. The Plaintiffs entered into an agreement with certain persons who formed the major part of the provisional directors of the company, by which they stipulated for a payment of $72,000 of the paid-up capital stock of the company and $45,000 of the first mortgage bonds of the company to be paid to them by the company in respect of their services as promoters. The line

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was eventually constructed under arrangements which need not be here detailed.

The present action was brought on the 25th September 1906, by the Plaintiffs against the company and against the individuals who had been parties to the above-mentioned agreement. In the writ and statement of claim they claimed specific performance of the terms of agreement or damages for breach thereof, with various ancillary claims which need not be detailed. The action was tried before Mr. Justice Clute, and judgment was given against all the Defendants on March 16th, 1907, decreeing specific performance, and on failure to make good that decree to go before the Master on a reference as to damages.

Appeal was taken by all the Defendants to the Court of Appeal for Ontario, when, on 21st April 1908, the judgment of the trial judge upon the merits (the Defendants having on various grounds denied liability altogether) was affirmed. The action was, however, dismissed as against the individual Defendants, but specific performance was again decreed against the company, and, failing specific performance, a reference as to damages. Upon that judgment the Defendants (the present Appellants) took no step to bring it to further appeal, but went back to the court below and appeared before the Master, before whom a long and expensive reference was conducted. On the 7th April 1909 the Master made his report. That report was brought before the Chief Justice of the Common Pleas by appeal, and, on the 23rd January 1911, the Chief Justice varied the amount as brought out by the Master. On the 8th March 1911, on a motion for further directions, the Chancellor of Ontario gave judgment against the company in accordance with the report as varied.

The company then appealed to the Court of Appeal for Ontario against the judgment of the Chief Justice varying the Master's report and the judgment of the Chancellor on further directions. On the 28th April 1911 the Court of Appeal unanimously dismissed both appeals with costs.

The Appellants then appealed to the Supreme Court of Canada against the last judgment and sought in that appeal to review the original judgment of the Court of Appeal of the 21st April 1908. The question of jurisdiction or competency was raised, and the Registrar of the Supreme Court affirmed the jurisdiction of the Supreme Court to hear an appeal from so much of the judgment of the 28th September 1911 as had reference to the order of the Chancellor on further directions, but held that the Supreme Court had no jurisdiction to hear an appeal from the original judgment of the 21st April 1908. This order of the Registrar was confirmed on appeal by the Supreme Court of Canada on the 23rd February 1912.

On the 6th March 1912 an application was made by the Appellants to the Chief Justice of Ontario for special leave to appeal from the original judgment of the 21st April 1908, but was refused. On the 18th June 1912 a motion by way of appeal from this order was made to the Court of Appeal for Ontario, and a substantive motion was also made to extend time and for leave to appeal. Both motions were refused, and the reasons of refusal were given by Mr. Justice Maclaren in a judgment in which Moss, Chief Justice of Ontario, and Garrow and Magee, JJ., concurred, in the following words:—

"The Trial Court ordered specific performance
" and in default damages. On appeal to this
" Court the judgment was modified, but specific

" performance was decreed against the company " on the 21st April 1908. . . . In my opinion " the company might have appealed as of " right from the last-named judgment within " the sixty days provided by section 69 of the " Supreme Court Act. . . . Section 38 (*c*) of " the Supreme Court Act gives an appeal to " that Court from any judgment whether final " or not of the highest court of final resort " . . . in any action, suit, cause, matter, or " judicial proceeding in the nature of a suit " or proceeding in equity. . . . Assuming that " we still have the power under section 71 of " the Supreme Court Act to extend the time " and allow the appeal, I am strongly of the " opinion that it should not be done."

On the argument of the appeal before the Supreme Court of Canada from the judgment on further directions which, as already mentioned, had been allowed by the judgment of that Court of the 23rd February 1912, the Appellants maintained that this was a common law action and that, if so, they were entitled as of right to open up the original judgment on the appeal from the judgment on further directions. On the 10th December 1912 the Supreme Court of Canada dismissed the appeal, holding that they were not entitled under it to touch the original judgment of the 21st April 1908.

When the Appellants applied to this Board for special leave to appeal, the point was taken by the Respondents that no appeal ought, in the circumstances above detailed, to be allowed against the original judgment of the 21st April 1908. Their Lordships have perused the remarks of those of their Lordships who sat at the Board on the occasion of granting leave to appeal, and they are clearly of opinion that such leave was only granted *periculo petentis*, and that the point

of whether leave upon a full knowledge of the circumstances should have been granted is still open.

The first matter to be considered is whether the Supreme Court were right in holding that under the judgment on further directions they were not entitled to go into the question of the merits which had been disposed of in the original judgment of the 21st April 1908. Assuming that this were a common law action, the difficulty might be said to arise in this way: The appellate jurisdiction of the Supreme Court is dealt with as regards final judgments by section 36 of the Supreme Court Act. Now in the original common law procedure the judgment on liability and damages would always be given at one and the same time. That is obviously the case in cases tried by a jury, and would also be so in cases tried by a judge, and accordingly a judgment which fixed liability and assessed damages would inevitably be a final judgment. Since, however, the fusion of courts of law and equity there has grown up a practice—convenient, no doubt, in cases tried before judges without juries—to make a finding of liability and direct an inquiry into damages, a course of procedure which is really borrowed from the equity side. In such a case, is the judgment fixing the liability a final or is it an interlocutory judgment? The view in Canada seems to have prevailed that, so long as the whole matter is not effectively dealt with, the first judgment is merely interlocutory, and that therefore no appeal as of right lies against the judgment fixing liability, damages being yet undetermined, in a purely common law action. That being so, it seems to their Lordships that the judgment of the Supreme Court was necessarily right. The appeal from the directions

had to do with the damages, and the damages alone. All that the Supreme Court could do was to pronounce the order which the Judge below should have pronounced if he had done it right. In other words, they might, if they thought right, have varied the amount of the damages; but the Judge below never could have touched the judgment on the merits of his own Court of Appeal; he, in pronouncing the order as to the damages, was really merely carrying out what the Court of Appeal had already determined as to the liability; and accordingly the Supreme Court could not pronounce an order which the Judge below himself could never have pronounced. This may be inconvenient, and as a matter of fact their Lordships notice that by a subsequent statute (chap. 51 of 3 & 4 Geo. V., sec. 1) an alteration in the law has been made which will allow a judgment of the class of which their Lordships have been speaking, which settles liability and leaves an inquiry as to damages to follow, to be treated as a final judgment. That, however, was not the law in Canada at the period to which these matters relate.

In their Lordships' view, however, this proceeding was not a common law proceeding, but was an equity proceeding. Specific performance was the primary claim, and the alternative claim for damages in default of specific performance is a well-known equity remedy, and in particular was one that was in use to be given by the old Court of Chancery in Ontario, as is evident by section 40 of the Chancery Act of Ontario (Revised Statutes of Ontario, 1877, chap. 40). That being so, their Lordships are of opinion that Mr. Justice Maclaren was right in the passage already quoted, and that an appeal as of right against

the judgment of the 21st April 1908 lay under section 38 (*c*) of the Supreme Court Act. That appeal was not taken, and although their Lordships are willing to consider that an application under section 71 was quite competent, that application was made and was refused by the unanimous judgment of the Court of Appeal of Ontario of the 18th June 1912. Their Lordships have come to the conclusion that if these facts had been fully stated and understood as they now are, no leave to appeal would have been given in this case. In their Lordships' view it would be most unfortunate that where a matter could have been brought up in the ordinary course, and where the discretion of the court has been exercised, of saying that indulgence as to extended time should not be given, the whole of the proceedings should be allowed to come to an end, a long lapse of time intervene, and then the whole matter be opened from the very beginning by an appeal to this Board.

In these circumstances their Lordships do not express any opinion upon the difficult and intricate questions which were argued before them as to the technical objections which existed against the agreement sued on being binding on the company, but they will humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

THE WINDSOR, ESSEX, AND LAKE SHORE RAPID RAILWAY COMPANY

v.

A. J. NELLES and another.

JUDGMENT BY LORD DUNEDIN.

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