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*Mar. 16.

*Nov. 17.

THE RURAL MUNICIPALITY OF MORRIS (DEFENDANTS)..... } APPELLANTS;

AND

THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY LIMITED (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Appeal—Final judgment—Practice—Specially indorsed writ—Order for signing judgment.

An appeal does not lie from a decision of the Court of Queen's Bench (Man.) affirming the order of a judge, made on the return of a summons to show cause, allowing judgment to be entered by the plaintiffs on a specially indorsed writ, which is not a "final judgment" within the meaning of the Supreme Court Act.

Per Patterson J.—Such decision is a "final judgment," but the order which it affirmed was one made in the exercise of judicial discretion as to which s. 27 of the act does not allow an appeal.

MOTION to quash for want of jurisdiction an appeal from a decision of the Court of Queen's Bench (Man.) (1), affirming an order made by Killam J. in chambers, allowing plaintiffs to sign judgment summarily upon a specially indorsed writ.

The facts of the case are fully set out in the report of the proceedings in the court below, and may be briefly stated as follows :—

On the 9th of July, 1890, the plaintiffs brought an action upon twelve debentures of the municipality of Morris, together with coupons upon the said debentures, and upon other debentures of said municipality, all of the said debentures and coupons having been

PRESENT :—Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

(1) 7 Man. L. R. 128.

issued under by-law No. 5 of the said municipality, and being part of the debentures and coupons referred to in an act of the legislature of the province of Manitoba 46 & 47 Vic. ch. 70.

The action was commenced by a writ of summons specially endorsed, a copy of which was served upon the defendants, and upon their appearing thereto the plaintiffs took out a summons, in pursuance of sec. 34 of the Court of Queen's Bench Act, 1885 (ch. 15 of 48 Vic. Manitoba), for liberty to sign final judgment for the amount so specially indorsed upon the said writ of summons.

This summons was heard before Mr. Justice Killam, a judge of the Court of Queen's Bench for Manitoba, who, upon the 4th of August, 1890, made an order allowing the plaintiffs to sign final judgment for the amount specially endorsed upon the said writ, together with interest and costs.

The defendants appealed to the full Court of Queen's Bench for Manitoba from the said order of Mr. Justice Killam, and upon the 19th December, 1890, the said Court of Queen's Bench delivered judgment unanimously dismissing the said appeal and confirming the said order.

The rule of the Court of Queen's Bench dismissing the appeal from the said order of Mr. Justice Killam was issued and is dated the 14th day of February, 1891.

The defendants sought to appeal to the Supreme Court of Canada from the rule dismissing said appeal, and the security on appeal was approved of by the Chief Justice of the Court of Queen's Bench for Manitoba on the 14th of February, 1891. The plaintiffs moved to quash the appeal for want of jurisdiction, on the ground that the judgment appealed from is not a final judgment within the meaning of the Supreme

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and Exchequer Courts Act, or if it was that the order of Mr. Justice Killam was one made in the exercise of judicial discretion.

Chrysler Q.C. for the motion. In *Standard Discount Co.* v. *La Grange* (1) a similar order to that made by Mr. Justice Killam was held to be an interlocutory order and not a final disposition of the cause.

See also *Collins* v. *Vestry of Paddington* (2); *Nelson* v. *Thorner* (3); and *Collins* v. *Hickok* (4).

Hogg Q.C. and *Crawford* opposed the motion citing *Bank of Minnesota* v. *Page* (5); *Chevalier* v. *Cuvillier* (6); Annual Practice 1890-91 (7).

SIR W. J. RITCHIE C.J.—I have no doubt that we should quash this appeal. The following cases, which deal with orders similar to the one in question here, establish that the judgment appealed from is not a "final judgment" from which an appeal will lie to this court.

Standard Discount Company v. *La Grange* (1). Bramwell L.J. says:—

> I am of opinion that this preliminary objection must prevail. There cannot be an order which is neither final nor interlocutory; and therefore if the order before us is not final it must be interlocutory. Is it a final order? It is, like every other order, in one sense final so long as it is not appealed against, but it is not the final order of the court in the cause, because in order to entitle the plaintiffs to levy execution there must be a subsequent direction by the court. Therefore I think it is an interlocutory order.
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> I only put these cases as possible. I may give another illustration: suppose judgment to be signed and an appeal brought on the judgment—it is unnecessary to consider whether it would be successful or not—it clearly must be brought from the time when judgment was assigned and not from the date of the order. Now, if there is a year within which to appeal from the order, and afterwards a like

(1) 3 C.P.D. 67.
(2) 5 Q.B.D. 368.
(3) 11 Ont. App. R. 616.
(4) 11 Ont. App. R. 620.
(5) 14 Ont. App. R. 347.
(6) 4 Can. S.C.R. 605.
(7) P. 895.

period to appeal from the judgment, that would give rise to a state of things which I think the legislature never intended.

Brett L. J. :—

I agree that the order obtained by the plaintiffs is interlocutory. My reason for so holding is, that the order is not the last step which must be taken in order to fix the status of the parties with respect to the matter in dispute; it is in itself ineffectual, and until a further proceeding has been taken the plaintiffs cannot recover the debt sued for. Another step must be taken before the status of the parties can be fixed, and that step is the entry of the judgment. The order was not the final step in the action, and therefore it is interlocutory.

I think that our decision may perhaps be founded upon another ground, namely, that no order, judgment, or other proceeding can be final which does not at once affect the status of the parties for whichever side the decision may be given : so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff ; whereas if the application for leave to enter final judgment had failed the matter in dispute would not have been determined. If leave to defend had been given the action would have been carried on with the ordinary incidents of pleading and trial, and the matter would have been left in doubt until judgment. I cannot help thinking that no order in an action will be found to be final unless a decision upon the application out of which it arises, but given in favour of the other party to the action, would have determined the matter in dispute.

Cotton L.J. :—

I am of opinion that this is an interlocutory order, and that the time for appealing against it is the shorter period of 21 days. The decision in *White* v. *Witt* (1) may not be our sole guide in determining this case ; but at least it shows this, that an order may be interlocutory and subject to appeal only within the shorter period, although it really decides that on which the judgment of the court, admittedly final, is ultimately given.

Now, it is no doubt the fact that if the order obtained by the plaintiffs be not set aside they will be able to sign judgment against the defendant ; but *White* v. *Witt* (1), certainly shows that, although the effect of a final judgment will result from making an order unless it be set aside, still this circumstance does not prevent the order from being interlocutory, and subject to appeal only during the shorter period. Without using an exhaustive definition, it may be laid down that an order is interlocutory which directs how an action is to proceed ; and

(1) 5 Ch. D. 589.

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the order before us is exactly of that kind. The rules of the Supreme Court, order 14, rule 1, allow a plaintiff, so soon as the defendant has appeared to a specially indorsed writ, to apply to a master or a judge, and to obtain an order which will prevent the action from going through its ordinary course, and will give the plaintiff liberty at once to sign judgment without taking the usual steps; the order, however, relates to the procedure, and therefore is only interlocutory.

This case was acted on in *Salaman* v. *Warner* (1). The court, Lord Esher M.R., Fry L.J. and Lopes L.J. thought that the true definition of a final order was that suggested by Lord Esher in *Standard Discount Company* v. *La Grange* (2).

In *Collins* v. *Vestry of Paddington* (3):

D. Seymour Q.C. and *Bompas* Q.C. (*Croome* with them) were called upon to argue for the plaintiff. First, the special case is completely disposed of by the decision of the Queen's Bench Division; the judgment of that court was final upon the rights of the parties as to the question submitted for its consideration; the reasoning of the Lords Justices in *Standard Discount Company* v. *La Grange* (2), shows that the judgment was not interlocutory.

Bagallay L.J.:—

That case shows that where any further step is necessary to perfect an order or judgment, it is not final but interlocutory; its principle applies here: the case must go back to the arbitrator that he may make his award; the judgment of the Queen's Bench Division is not the final step in the cause.

STRONG J.—I am of opinion that the appeal should be quashed. It is quite clear that such an order as was made in this case cannot be called a final judgment.

FOURNIER and GWYNNE JJ.—Concurred in quashing the appeal.

PATTERSON J.—The 34th section of the Manitoba Statute, 48 Vic. ch. 13, resembles rule 739 of the

(1) [1891] 1 Q.B. 734. (2) 3 C.P.D. 67.
(3) 5 Q. B. D. 370.

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Ontario Consolidated Rules of Practice, which follows rule 80 under the original Judicature Act of Ontario, that rule having itself followed one of the English Supreme Court rules of 1875, viz., order XIV, rule 1, as amended by a rule of May, 1877. When a defendant appears to a specially indorsed writ the plaintiff may, on an affidavit verifying his cause of action and stating his belief that there is no defence, call on the defendant to show cause why the plaintiff should not be at liberty to sign final judgment. Thereupon, unless the defendant satisfies the court or a judge that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend the action, an order may be made empowering the plaintiff to sign judgment accordingly. Such an order having been made in this case the defendant appeals, and his right to do so is contested on the ground that the judgment is not a final judgment within the meaning of that term in section 28 of the Supreme and Exchequer Courts Act. Without for the moment considering whether our jurisdiction depends entirely on the question, let us inquire whether this is or is not a final judgment.

That question must be decided upon the definition of the term "final judgment" given in the interpretation clause of the act, which declares that in that act, unless the context otherwise requires, the expression "final judgment" means any judgment, rule, order or decision, whereby the action, suit, cause, matter, or other judicial proceeding is finally determined and concluded. Decisions upon the English rules of the Supreme Court are as likely to mislead as to assist in the construction of this definition unless careful attention is paid to the difference between the legislation in the one case and the other. Most of those decisions in which the character of a judgment, as being

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final or interlocutory, is discussed, are under order LVIII, Rule 15, the numbers being the same in the rules of 1875 and those of 1883, which limits the time for appealing. The great point of difference is that the English rule does not define either "interlocutory judgment" or "final judgment," and the effort has been in each case to hit upon a definition that will carry out the object of the rule, while we have an exhaustive definition of "final judgment," and have to say whether or not the particular case comes within it. The rule of 1875 happens not to contain the term "final judgment" at all. Its words were "no appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year."

The rule of 1883 introduced, after the words "interlocutory order," the words "or from any order whether final or interlocutory in any matter not being an action." The leading word is "interlocutory," which does not occur in the clauses relating to the jurisdiction of this court. It is a technical word, and in reference to actions or suits denotes proceedings taken before the formal final judgment is reached. It is a convenient word to express the idea that a judgment is not a final judgment within the meaning of section 28, but we must guard against the fallacy of first adopting a term which is not in our statute as a convenient short name for a judgment that is not final, and then reasoning from its technical use in another situation as to what is a final judgment, in place of testing every judgment by the definition our statute gives. In the English cases the terms "final" and "interlocutory" are not treated as terms of precision to be rigidly applied without regard to modifying considerations.

This is clear from several cases cited on the argument as well as from others, and chiefly from *Salaman* v. *Warner* (1), which was decided by the Court of Appeal since the argument in this case. The court there unanimously adopted the definition given fourteen years before by Lord Esher in *Standard Discount Co.* v. *La Grange* (2), as the right test for determining whether an order, for the purpose of giving notice of appeal under the rules, is final or not, holding that a decision, though it finally disposed of the matter in dispute, was not to be considered a final order for the purpose of the rules unless it would have finally disposed of the matter if it had been given the other way. Lord Esher M.R., and Fry and Lopes L.JJ., gave judgments to the same effect. I shall quote only a few words of Fry L.J., who remarked concerning the 3rd and 15th rules of order LVIII, that they—

> Have raised considerable difficulties because they use the term "interlocutory order" of which no definition is to be found in the rules themselves, or, so far as I know, by reference to the earlier practice either of the common law or chancery courts. These difficulties have been well illustrated by various cases that have been decided. We must have regard to the object of the distinction drawn in the rules between interlocutory and final orders as to the time for appealing. The intention appears to be to give a longer time for appealing against decisions which in any event are final, a shorter time in the case of decisions where the litigation may proceed further. I think the true definition is this: I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined.

The rule thus adopted for the construction of the words "final" and "interlocutory" with reference to the limitation of time for appealing will, no doubt, be regarded as now definitely settled in the English courts, but it is obvious that a construction which

(1) [1891] 1 Q. B. 734. (2) 3 C. P. D. 67-71.

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classes under the head of interlocutory orders an order by which the question in controversy is finally decided against one of the parties is one which, though it carries out the object of the English rule, would not give effect to the intention of our statute, and could not be made to fit in with the definition of "final judgment" given in the interpretation clause.

In the case of *Whiting* v. *Hovey* (1) the right to appeal to the Court of Appeal of Ontario was contested, under certain provisions of the Judicature Act, on the ground that an interpleader issue, the decision of which finally disposed of the dispute between the parties to the issue, was only an interlocutory proceeding. There was an equal division of opinion in the Court of Appeal in consequence of which the appeal went on. The case ultimately came to this court on its merits, and the question of the right to appeal being again raised the right was sustained. In that case I expressed, in the Court of Appeal, the opinion which has, I think, been confirmed by the late case of *Salaman* v. *Warner* (2), and a still later case which I am about to cite, that the word "interlocutory" in our statutes is not necessarily to be construed in the same way as under the English order LVIII, rule 15.

The discussion in *Whiting* v. *Hovey* (1) turned mainly upon a case of *McAndrew* v. *Barker* (3) in which an interpleader issue was held to be an interlocutory proceeding, and an order under it to be appealable, under the rules of 1875, only within twenty-one days. In the very late case of *McNair* v. *Audenshaw Paint and Colour Co.* (4), the Court of Appeal held that it was the same under the rules of 1883, Bowen and Kay L.JJ. expressly pointing out that although the judge who tries the issue is clothed with the power of finally adjust-

(1) 12 Ont. App. R. 119.
(2) [1891] 1 Q. B. 734.
(3) 7 Ch. D. 701.
(4) [1891] 2 Q. B. 502.

ing the rights of the parties and disposing of the whole matter, it does not follow that his decision on the interpleader issue is not an interlocutory order so far as regards the time for appealing.

Then is this a final judgment as defined in the statute? I think it is. It is an order whereby the action is finally determined and concluded, and so is literally within the definition. The point so much insisted on by Bramwell L.J., in *Standard Discount Co.* v. *La Grange* (1), that the order, though finally adjudicating against the defendant's right to defend the action, was not a final order, because it merely gave the plaintiff leave to sign final judgment and was not itself a judgment on which, without something more being done, execution could be issued, might be made in this case also, but we must remember that the discussion in that case was that which I have already dealt with, not being whether the order did not finally dispose of the matter in controversy, but whether it was one which, under the policy of the rule of court, must be appealed from within the shorter period. In the case *In re Riddell* (2) the question was whether the dismissal of an action for want of prosecution, with award of costs to the defendant, was a "final judgment" which entitled the defendant to serve the plaintiff with a bankruptcy notice under the Bankruptcy Act, 1883. It was held by Cave J. and afterwards by the Court of Appeal that not being an adjudication of the merits between the parties, but only like a non-suit which left the parties at liberty to renew the litigation, it was not a final judgment as contemplated by the Bankruptcy Act. The order before us, besides coming literally within the statutory definition of a final judgment, has in its operation the attribute of finality that

(1) 3 C. P. D. 67.

(2) 20 Q. B. D. 318, 512.

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does not belong to a non-suit, because the defendant cannot renew the contest.

Therefore if the right to appeal followed from the finding that this was a final judgment I should hold the right to be established. But the 27th section of the statute has to be taken into account. It declares that, with exceptions which do not apply here:

> No appeal shall lie from any order made in any action, suit, cause, matter, or other judicial proceeding made in the exercise of the judicial discretion of the court or judge making the same.

I think this order is of that class, and that the case affords a good example of the beneficial character of section 27.

The object of the Manitoba statute evidently is to prevent a plaintiff to whose cause of action there is no real defence from being delayed by the setting up of a defence which is frivolous or pleaded merely to gain time.

Speaking of the corresponding provision in the rules of the Supreme Court, in *Wallingford* v. *Mutual Society* (1), Lord Selborne said:—

> It is a very valuable and important part of the new procedure introduced under the Judicature Act, that the means should exist of coming by a short road to a final judgment when there is no real *bonâ fide* defence to an action. But it is at least of equal importance that parties should not in any such way, by a summary proceeding in chambers, be shut out from their defence when they ought to be admitted to defend.

In two cases *Nelson* v. *Thorner* (2) and *Collins* v. *Hickok* (3), the Ontario Court of Appeal had to deal with orders like the one now in question. The appeals were from county courts whose procedure is regulated by the Judicature Act. The judgments of the court, delivered in both cases by Mr. Justice Osler, recognise the orders as being made in the judicial discretion of

(1) 5 App. Cas. 685, 694. (2) 11 Ont. App. R. 616.
(3) 11 Ont. App. R. 620.

the judge, one of them expressly recognising, as did also the judgments in the House of Lords in *Wallingford* v. *Mutual Society* (1), the power of the judge to impose terms as a condition of allowing a defence to be pleaded, a power which is incident only to a discretionary jurisdiction.

It is worth while to notice that the jurisdiction of the Court of Appeal to hear those cases depended on the decision or order of the county court judge being " in its nature final and not merely interlocutory " (2).

The power given to a judge in chambers, and which in England is exercised in the first instance by a master of one of the divisions of the High Court, and in Ontario by the master in chambers, of shutting out, by a summary order, a defence that appears not to be genuine or in good faith, is undoubtedly a useful and important power, but one in the exercise of which great caution is required, lest the examination of the genuineness and good faith of the proposed defence become in reality a trial of the merits, and the defendant be deprived of a trial by the ordinary methods and a resort to an ultimate court of appeal. There should be an effective means of reviewing the decision in chambers, but that may be found in the provincial courts without the necessity of protracting the litigation and adding to the costs by coming to this court. The exclusion of our jurisdiction by section 27 is therefore a salutary provision.

In my opinion the appeal should be quashed.

Appeal quashed with costs.

Solicitors for appellants: *Campbell & Crawford.*

Solicitors for respondents: *Perdue & Robinson.*

(1) 5 App. Cas. 685.

(2) R.S.O. 1887, c. 44, s. 42.