THE CANADIAN PACIFIC RAILWAY COMPANY (PETITIONER) .... } APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (RESPONDENT)..... } RESPONDENT.

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*May 30.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Vendor and Purchaser Act—Reference to master—Admission of evidence—Appeal from certificate—Final judgment—R. S. C. c. 135, s. 24, (e.)

Where a master, on a reference under the Vendor and Purchaser Act to settle the title under a written agreement for a lease, ruled that evidence might be given to show what covenants the lease should contain, an appeal does not lie to the Supreme Court from the judgment affirming such ruling it not being a final judgment and the case not coming within the provisions of sec. 24 (e) of the Supreme and Exchequer Courts Act relating to proceedings in Equity. Gwynne J. dissenting.

* PRESENT:—Sir Henry Strong C. J. and Taschereau, Gwynne Sedgewick and Girouard JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Armour C.J., who had sustained the ruling of a referee ordered to settle the form of a lease to the Railway Company under the Vendor and Purchaser Act.

The material facts of the case were stated as follows in the judgment of the Court of Appeal delivered by Mr. Justice Maclennan.

"The question in this appeal is whether, upon a reference to settle a lease pursuant to a contract between the parties, evidence is admissible to establish that the lease ought to contain a covenant on the part of the lessees, the Railway Company, to pay taxes. The learned referee decided that the evidence was admissible, and his ruling was affirmed by Armour C.J., on appeal."

"There are two contracts between the parties, the first dated the 26th July, 1892, and the other the 4th February, 1895. and they deal with a great many different matters besides the lease in question. Among other things the Railway Company is to convey to the city absolutely all its interest in certain defined parcels of land, and the city is to demise to the Railway Company certain other lands, called the 'alternative site,' that is, a site in the City of Toronto 'for its station grounds, tracks and appurtenances.' The city's contract is in the following terms:—The city 'covenants and agrees to demise and lease the alternative site to the Canadian Pacific for successive terms of fifty years each, during all time to come.' The rental for the first term of fifty years shall be $11,000 per annum, and the rental for each subsequent terms of fifty years shall at each renewal be increased by $2,750 per annum, and all rent shall be payable on the 3rd days of July, October, January and April of each year, for the first

(1) 27 Ont. App. R. 54.

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quarter a proportionate amount to be paid, having regard to the time of possession under the said lease."

"The second agreement, paragraph 2, provides that the first term of fifty years is to commence on the first day of January, 1895. Paragraph three defines more particularly what is to be included in the alternative site. Paragraph four provides for an adjustment of rents to the commencement of the lease. Paragraphs 11 and 13 provide for leases to the company by the city for successive terms of twenty-one years, in perpetuity, at the expiration of existing leases, of other parcels of land, at rents to be settled by arbitration; and paragraph 12 stipulates for the delivery of an abstract of title to the alternative site, and for its approval within a month after delivery. There seems to be nothing else in the agreements, material to the present question. There is a contract for a lease renewable in perpetuity in successive terms of fifty years, at an agreed rent, payable on named days; and the agreement is silent as to what, if any, covenants on the part of either lessors or lessees, are to be inserted therein."

The Railway Company appealed from this judgment to the Supreme Court.

Robinson Q.C. and *Fullerton* Q.C. for the respondent moved to quash the appeal.

The appeal is not from a final judgment. After the case is decided by the Ontario courts on the merits there can be an appeal to this court in which the questions now raised will be open.

Moreover, the matter is one of procedure only with which this court will not interfere.

Armour Q.C. and *Macmurchy* for the appellant, *contra*. The proceeding had in this case is identical with a suit for specific performance under the former law.

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See *Re Burroughs* (1); Fry on Specific Performance, 3rd ed. sec. 36. That being so there is an appeal under sec. 24 (*e*) of the Supreme and Exchequer Courts Act.

The judgment need not be final under that section; *Grant* v. *McLaren* (2).

The court, Gwynne J. dissenting, quashed the appeal with costs of a motion.

Appeal quashed with costs.

Solicitors for the appellant: *Wells & Macmurchy.*

Solicitor for the respondent: *Thomas Caswell.*

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(1) 5 Ch. D. 601.

(2) 23 Can. S. C. R. 310.