Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Alexander McDonald v. *Frank J. Belcher and Others, as Executors of the Estate of Alexander Calder deceased, from the Supreme Court of Canada, delivered the 28th April 1904.*

Present:

THE LORD CHANCELLOR.

LORD LINDLEY.

LORD KINROSS.

SIR ARTHUR WILSON.

[*Delivered by the Lord Chancellor.*]

Notwithstanding the time occupied by this case in argument, the questions for decision are very narrow indeed. The action, which was commenced in the Territorial Court of the Yukon Territory, was brought under circumstances similar to those which would arise in this country if a Plaintiff were to bring a number of actions comprehended in one Writ.

During the argument a great many observations were made which some half-century ago would have been very appropriate, and probably conclusive, but which are wholly inapplicable to the system of jurisprudence which has been established since that period. Formerly there were forms of action outside which the Plaintiff could not go. One Record was one history of a particular litigation. Indeed, in earlier times, only one plea was admitted ; and until the Statute of Anne (The Law Amendment Act, 1705) a person was compelled to base his whole defence on one plea, and could not raise more than one.

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In like manner he had either to plead, or to demur, and the Judgment upon the plea, if issue was taken upon it, was conclusive against the person who was found to be in the wrong; and the Judgment upon Demurrer was conclusive, and would, in the strictest and most appropriate sense, be described as a final Judgment. The so-called Declaration, to which a person was confined, had to set out the cause of action, appropriately describe it, and, within very narrow limits indeed, bring it under a particular head of right. All that is changed. It is clear that all those rules are now inappropriate, and that the learning and phraseology applicable to them have passed away. Rightly or wrongly, the Legislature has enacted—and the law in force in the Yukon Territory follows in terms the procedure of this country—that the Statement of Claim shall be a simple narrative of the facts upon which the Plaintiff relies, and it is for the Judge to direct the Jury, if there be a Jury, or to decide himself, if there be none, as to the nature of the legal liability which is disclosed, not upon appropriate legal averment, but upon the facts described in the Statement of Claim. It is necessary to bear these matters in mind in deciding the present case, because many of the observations made and some of the authorities quoted by Counsel appear to rest upon the idea that, notwithstanding the fundamental changes made by the Legislature, the old legal procedure is still preserved.

In this case the Respondents, the Executors of one Caldwell, brought an action against the Appellant claiming that certain sums of money were due from him to Caldwell's estate. There were several matters in dispute, and the Statement of Claim describes the mode in which they arose. The particular matter, however, upon which the case now before their Lord-

ships depends (and it has been frankly admitted that, if that one particular matter is decided against the Respondents, the Appeal must succeed and that the other matters may be disregarded) is whether the question of an indebtedness by the Defendant (the Appellant) to the extent of $50,000 was, or was not, finally disposed of by the trial which took place before the Territorial Judge; that is to say, whether the language used by the learned Judge in disposing of the matter constituted a final Judgment of the Court. If the Judgment was interlocutory, no Appeal lay. If it was final, an Appeal could only be brought within 20 days, whereas, in fact, no Appeal was entered, or notice given, until a period of 21 days.

The question, therefore, is reduced to this: Was there, or was there not, a final Judgment? The learned Judge ordered, on the 23rd May 1901, that, "as to the alleged note or paper "writing mentioned in paragraph 2 of Plaintiffs' "Statement of Claim," the Plaintiffs' action be dismissed. On the language used by the learned Judge some criticism might be passed as to whether, in giving a decision on one item of an account, it is appropriate to say that "the action "thereupon is dismissed." The Respondents contend that the language used might have misled them as to the amount of time in which they could appeal, because they did not understand that language to constitute a final Judgment. The point in dispute is whether the Judgment of the learned Judge, who, by the request of the Respondents themselves, took out one of the items of account and adjudicated upon that item, was a mere adjudication that an action on a promissory note would not lie, or was really a decision that the sum of money represented by that note was one which, according to his view of the evidence, was not due.

Their Lordships desire, in the first place, to observe that, if the decision were simply that the instrument relied on was sued on in its character as a promissory note, no other evidence than the document itself was required to enable the learned Judge to give such a decision. But so far from confining himself to the document itself, the learned Judge heard the evidence. Apart altogether from what he said afterwards, in September 1901, it is impossible, if one looks at what was done and said at the time of the trial, to suppose but that the learned Judge entered into the merits, and came to the conclusion that the $50,000 were not due. If confirmation of that view were wanted, it is only necessary to look at what occurred when the rest of the items in the account were referred to the Clerk of the Court, to determine, whether or not, any money was due from the Defendant to the Plaintiffs. In making his Report, dated the 10th September 1901, the Referee says: —"The claim for $50,000 " having been dismissed, I take this as a starting " point, and the only starting point that I can " take from the evidence." The Referee, therefore, understood what the learned Judge had said; and if it was intended to contest his construction of the Judgment of the 23rd May 1901, one would have expected the Plaintiffs to make an application to the Court, and to urge that the Referee had not understood the Judgment, and that the learned Judge only intended to say that an action would not lie on a promissory note, whereas the Referee to whom the rest of the account has been remitted had actually refused to enter into the question of the $50,000, on the ground that this money had been adjudicated upon, and that he had no right to enter into that part of the account. If that is what the Plaintiffs thought at the time, and if they did not themselves understand the meaning of the learned

Judge, what would have been simpler than for them to apply to the Court, and to have the matter put right? They could have urged that all the learned Judge meant was that an action would not lie upon this as a promissory note, because it was for gold dust, and not for money. But instead of doing this, they allowed the account to be taken, to the exclusion of the claim for $50,000. The Referee does not use the phrase "Promissory Note." He speaks of "the claim for $50,000." He says in effect:— "The claim for $50,000 having been decided "against you, it is hardly necessary to proceed "further to show what everybody understood at "the time to be that which the learned Judge "subsequently explained"; and their Lordships cannot admit that there was anything to prevent the learned Judge from explaining what he had intended to decide, if there was any ambiguity in his language. However, the question whether there should be an Appeal, was, as Mr. Blake has pointed out on behalf of the Appellant, decided by the parties themselves, and the notion of their having been misled, and having delayed this notice of Appeal through a misunderstanding of the learned Judge's Judgment, is illusory, because they had actually decided to appeal and an interlocutory order would have been unappealable. The account given of why they did not appeal in time — viz., that they could not give notice of Appeal in 20 days— is a somewhat singular one, which is treated with great propriety by the Supreme Court of British Columbia.

In the result, their Lordships are of opinion that there was a final Judgment in the Territorial Court as to the claim for $50,000, whether the costs were given at the time, or followed in due course of law. If there was a final Judgment the present Appeal does not lie; for it is impossible

to get out of the express language of the Canadian Statute (The Yukon Territory Act, 1899, Section 8). This is a most important matter for one of the litigants, at any rate. For the moment the time for appealing has passed, the litigation is at an end, and it would be very disastrous, if, under such circumstances, it could be extended contrary to Statute. As pointed out in a case cited before their Lordships (*International Financial Society* v. *City of Moscow Gas Company*. L.R. 7 Ch. D. p. 241, at p. 247) the law in such cases confers a most important right on one of the litigants by ordering that there shall be an end, finally, of the litigation between the parties.

The result is, that an Appeal did not lie to the British Columbian Court from the Judgment of the Territorial Court of the 23rd May 1901, as regarded the claim for $50,000, and the Appeal to the Supreme Court of Canada was incompetent.

In these circumstances it is not necessary, and indeed, it would not be proper to discuss the merits of the question which have been decided by the only tribunal competent to decide them and from whose decision there is now no Appeal. Their Lordships will therefore humbly advise His Majesty to allow the Appeal, to reverse the Judgment of the Supreme Court of Canada with costs and to restore the Judgment of the Supreme Court of British Columbia of the 19th November 1902, with a Declaration that the Judgment of the Territorial Court of the 23rd May 1901 was final so far as it "ordered and "adjudged as to the alleged note or paper "writing, mentioned in paragraph 2 of Plaintiffs' "Statement of Claim that the Plaintiffs' action "thereupon be and the same is hereby "dismissed."

A preliminary objection was taken by the Respondents that the particular Statute in question, the construction of which was stated to be a matter of general public importance justifying an application to His Majesty in Council for special leave to appeal, had, at the time of such application, been repealed, and that the Appellant ought to have brought that fact before their Lordships at the time when his application was made. It has not been suggested, and very properly not suggested, that there was any lack of *bona fides* on the part of the Appellant. At the same time, the fact ought to have been mentioned. Their Lordships do not, however, consider the point to be such as to affect the question of costs in this case, inasmuch as the real question arising on this Appeal—viz., whether or not an order made under the circumstances stated was a final Judgment within the meaning of the Statute—is as important now as it was then. Their Lordships have already expressed their opinion that it was a final Judgment; and it is only necessary to add that some of the confusion and difficulties that have arisen are due to the acts of the Respondents themselves. If the causes of action had been allowed to take their ordinary course, and the whole matter had been disposed of by the learned Judge in the Territorial Court, no question could possibly have arisen, and the learned Judge would probably have disposed of the costs, and have used language not open to ambiguity in disposing of the whole litigation. But at the express desire of the Respondents themselves he took out of the account the particular item of the claim for $50,000, and gave Judgment upon that particular item. The compliance with this request of the Respondents has probably given rise to all this trouble. But the question whether the Order under consideration

was, or was not, a final Judgment, is as important to-day as it was before the Statute referred to was repealed. The result is that their Lordships find no sufficient reason to deprive the Appellant of his ordinary right to the costs of the Appeal.