

and sec. 38 of the Act was not cited or referred to. On the motion before the full Court, counsel for the appellant stated that he desired to present his claim not only by way of appeal, but also as a substantive motion under sec. 38, as well as sec. 71, and he read in support of his motion affidavits that were made subsequent to the decision of the Chief Justice refusing the motion presented to him, chiefly as to the intention of the defendants to appeal.

The action was instituted in 1906 for the specific performance of two agreements whereby certain stock and bonds of the company were to be handed over to the plaintiffs. The trial Judge 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: 11 O.W.R. 1062. There was no appeal from this judgment; and, the company not delivering the stock or bonds, there was a reference before the Master to assess the damages, and he made his report on the 7th April, 1909. The company appealed, and the appeal came before MEREDITH, C.J., who, on the 23rd January, 1911, gave judgment reducing the damages: 2 O.W.N. 643. The company further appealed to this Court, and on the 28th September, 1911, their appeal was dismissed: ante 65.

From this last judgment an appeal was taken to the Supreme Court of Canada, which is still pending. The company moved in the Supreme Court to have an appeal from the judgment of this Court of the 21st April, 1908, included in their appeal to that Court. This motion came before the Registrar, who held that the Supreme Court had no jurisdiction to grant this or to extend the time for appealing; and an appeal from the Registrar was heard by the full Court and dismissed on the 23rd February, 1912: 21 O.W.R. 201. . . .

In my opinion, the company might have appealed as of right from the last-named judgment within the 60 days provided by sec. 69 of the Supreme Court Act, although it is not a final judgment; and there is nothing to the contrary in the cases of *Union Bank of Halifax v. Dickie*, 41 S.C.R. 13; *Wenger v. Lamont*, ib. 603; *Clarke v. Goodall*, 44 S.C.R. 284; or *Crown Life Insurance Co. v. Skinner*, ib. 616—as these were all common law actions.

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 Province other than Quebec,