Supreme Court of Canada

Ellis *v.* Baird (1889) 16 SCR 147

Date: 1889-03-18

John V. Ellis

Appellant

And

George F. Baird

Respondent

1888: Oct. 2; 1889: Mar. 18.

Present.—Sir W. J. Ritchie C. J. and Strong, Fournier, Taschereau and Patterson JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Contempt of court—Discretion—R. S. C. c. 135 s. 27—Final judgment—Practice in case of contempt.

By a *rule nisi* of the Supreme Court of New Brunswick E. was called upon to show cause why an attachment should not issue against him, or he be committed for contempt of court, in publishing certain articles in a newspaper. On the return of the rule it was made absolute, and a writ of attachment was issued commanding the sheriff to have the body of E. before the court on a day named. By the practice in such cases in the said court it appeared that the attachment was issued merely in order to bring the party into court, where he might be ordered to answer interrogatories and by his answers purge if he could his contempt. If unable to do this the court would pronounce sentence. E. appealed from the judgment making the rule absolute. On motion to quash said appeal.—

*Held*, that the judgment appealed from was not a final judgment from which an appeal would lie under sec. 24 (a) of the Supreme and Exchequer Courts Act, R. S. C. c. 135.

Motion to quash appeal for want of jurisdiction.

The appellant is editor of a newspaper in St. John, N.B., and as such published certain articles concerning judicial proceedings in regard to an election in New Brunswick. The respondent, one of the candidates at such election, obtained a rule *nisi* for an attachment for contempt against the appellant, which was afterwards made absolute, and this appeal was brought

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from the judgment of the Supreme Court of New Brunswick making the said rule absolute.

The practice in New Brunswick in matters of constructive contempt is as follows: On application supported by affidavits, which is usually made by the Attorney-General, a rule *nisi* is granted, requiring the person alleged to be in contempt to show cause why an attachment should not issue against him, or why he should not be committed for contempt. On the return of this rule, if it has been properly served and within four days, if sufficient cause is not shown against it, it is made absolute. The court then orders the prosecutor to administer, interrogatories to the party in contempt within four days, he either giving bail for his appearance to answer the same or being committed to gaol. After the interrogatories are administered, if the contempt is not purged by the answers thereto, or in case of refusal to answer, the party is adjudged guilty of contempt and the court imposes sentence therefor.

These were the proceedings in the present case, and the rule for an attachment being made absolute the appellant gave sureties for his appearance to answer the interrogatories, and then brought his appeal. Pending the appeal the time for answering the interrogatories has been extended by the court below.

*Currie* moves to quash the appeal for want of jurisdiction.

There are several objections to the jurisdiction of the court in this case.

First—The case is not ripe for appeal. Until the interrogatories are administered, and the court is in a position to pronounce sentence, there is no final judgment. Corner's Crown Practice[[1]](#footnote-2), Dunn's Crown Practice[[2]](#footnote-3).

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Secondly—There is no appeal unless contempt is expressly mentioned in the statute giving jurisdiction in this court.

Thirdly—The subject matter in this appeal is entirely within the discretion of the court brought into contempt, and the appeal is expressly taken away by statute. R.S.C. c. 135, s. 27. Rapalje on Contempt[[3]](#footnote-4); *McDermott's Case[[4]](#footnote-5)*; *Rainy* v. *Justice of Sierra Leone[[5]](#footnote-6)*.

Fourthly—The matter of contempt is not, and from its nature cannot be, a subject matter of appeal. See *Hayes* v. *Fischer[[6]](#footnote-7)*; *New Orleans* v. *S. S.Co.[[7]](#footnote-8)*; *Exparte Kearney[[8]](#footnote-9)*; *Shattuck* v. *The Stale[[9]](#footnote-10)*.

The Privy Council will never entertain such appeals. See Macpherson's P.C. Prac.[[10]](#footnote-11).

*Davis* Q.C. *contra* cited *Rex* v. *Elkins[[11]](#footnote-12)*, on the first of the above grounds, that the case was not ripe for appeal, and *Jarmain* v. *Chatterton[[12]](#footnote-13)*, where an appeal in a case of contempt was entertained and the rule governing such appeals laid down.

Sir W. J. RITCHIE C.J.—I am of opinion the motion to quash should be granted without costs, on the ground that there was no final adjudication; and, in my opinion, the party appellant was led into error by the action of the court, and should not suffer therefor.

STRONG J.—I am of opinion that the motion to quash must be granted. The rule *nisi* was in the alternative for an attachment or to commit the appellant for contempt. It was made absolute generally, and the rule absolute does not specify which alternative was

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granted. As the granting of the rule was followed up by an attachment, we must assume that it was intended to make the rule absolute in the alternative which asked for this writ; more especially as the appellant did not move against the writ for irregularity, but gave bail to it. Then this writ of attachment is merely the first step in the procedure to punish for contempt of court. It is only a process to bring the party to be attached into court in order that he may answer. The proceedings subsequent to the execution and return of the writ include the bringing of the body into court, the requiring the defendant to answer to the contempt and to answer interrogatories and there is then a formal adjudication, followed by sentence. Until there has been an adjudication as to the defendant's guilt or innocence of the contempt there is no final judgment from which an appeal can lie.

There seem to be two modes of proceedings for contempt of court—one formal and plenary, the other summary. The former mode of proceeding is that which has been adopted in the present case.

I proceed altogether upon what appears on the face of the proceedings; the rules *nisi* and absolute, and the writ of attachment itself—the exigency of which is that the appellant shall be attached in order that he may "appear and answer." Surely when the stage of appearance in answer to process of this kind has alone been reached, and there has not even been a hearing, there cannot be said to be any final judgment. In the opinions delivered by some of the learned judges they do not advert to the distinction between the summary mode of procedure and the more formal mode of proceeding adopted in the present case.

I agree with the Chief Justice, that there should be no costs.

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FOURNIER J. concurred.

TASCHEREAU J.—I would quash this appeal, on the ground that the judgment appealed from is not a final judgment.

GWYNNE J.—In Easter Term, 1887, a rule was issued out of the Supreme Court of the Province of New Brunswick. Crown side, *exparte* George F. Baird, the above respondent, calling upon the above appellant, the editor, publisher and proprietor of the "St. John Globe" a newspaper printed and published in the city of St. John, in the Province of New Brunswick, to show cause in Trinity Term then next why an attachment should not be issued against him, or why he should not be committed for contempt of court for writing printing and publishing in the issue of the said "St. John Globe" newspaper, on the 18th March preceding, an article under the caption of "The Queen's Election," and certain other articles in other issues of the newspaper mentioned in the rule

in which said articles the said John V. Ellis has been guilty of a contempt of this honourable court in scandalising this court, and particularly His Honor Mr. Justice Tuck, one of the Justices thereof, in calumniating and vilifying the applicant George F. Baird, and in commenting on matters of said election, said recount and said order *nisi* for a writ of prohibition in a manner calculated to prejudice and that does prejudice the public before the hearing and judicial decision of said matters, and so as is calculated to prevent the said applicant George F. Baird from obtaining a fair and impartial disposal of said matters, &c. Upon reading the said articles in the newspapers aforesaid, and upon reading the affidavit of George F. Baird.

Upon this rule being served and the matter being brought up again before the court, if it should appear that the appellant had written and published the articles complained of, or any of them, all that remained to be done by the court, after hearing the appellant show cause in person or by his counsel as he was

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called upon by the rule to do, was to pronounce judgment either convicting the appellant of the offence and passing appropriate sentence upon him for such offence, or otherwise dealing with the case as justice might require and to the court should seem meet.

From the judgment and expression of opinion as delivered by the learned Chief Justice of the court, and which is made part of the case laid before us, it appears that the appellant appeared in obedience to the above rule and showed cause thereto, as he was called upon by the rule to do; for the learned Chief Justice there says:—

The writing and publishing of the articles complained of are admitted by Mr. Ellis, but his counsel contends that they do not amount to a contempt of court, for two reasons.

He then states these reasons, and adds:

I do not think either of these objections is sustainable.

He then proceeds to deal with those objections, and to define the law as to contempt of court and to apply it to the circumstances of the case before him; and referring to the proceedings which were before Mr. Justice Tuck, and which formed the subject of comment in the articles complained of, he concludes:

In what he (Mr. Justice Tuck) did, he was acting for this court judicially, and in the administration of justice, and the language which was used respecting him in the matter, in some at least of the articles published, was a contemptuous interference with the judicial proceedings in which he was acting.

From the above it appears beyond doubt that in the opinion of the learned Chief Justice the appellant, by writing and publishing the articles complained of (as admitted by him), was guilty of a contempt of court; and if that opinion had been embodied in the rule of court issued thereupon, which is the subject matter of this appeal, the appellant would have been, beyond all doubt, convicted of the offence of contempt of court

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with which he had been charged, and by the rule *nisi* cited to appear in court and answer; but the learned Chief Justice concludes his judgment thus:

I am therefore of opinion that the rule should be made absolute for an attachment.

Not, it is to be observed, for committal of the appellant, as for an offence of which he had been convicted.

Mr. Justice Fraser expressed his concurrence in the judgment of the learned Chief Justice.

Mr. Justice Wetmore, after referring to the circumstances of the case, the nature of the proceedings before Mr. Justice Tuck, and a point that had been argued that he had been acting without jurisdiction, and that, therefore, the articles constituted no contempt of court, concludes thus:

I cannot fancy any cause that could be reasonably shown against making the rule absolute; but if there was any, there would have been ample opportunity to have presented it for the judges' consideration at the return of the rule *nisi.* But supposing I am all wrong in the views I have expressed, and that Judge Tuck had no right to have granted the rule *nisi*, what justification would his error be for the articles published in the "Globe" newspaper? It appears to me, none whatever; so, whether Judge Tuck was right or wrong—the severe articles are equally such a contempt of court as call for the attachment.

And he agreed with the Chief Justice that an attachment should be ordered.

Now as the appellant was before the court and showed cause to the rule *nisi*, and admitted the publication by him of the articles complained of, and as a majority of the court were clearly of opinion that the publication of the articles, so admitted by the appellant to have been published by him, was a contempt of court, it does not clearly appear why judgment should not have been pronounced, convicting the appellant of the contempt and passing an appropriate sentence therefor, instead of ordering an attachment to issue,' the object of which appears, from the judgment

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of Mr. Justice Palmer, to be still to keep the matter of the rule *nisi sub judice*, and to be an interlocutory proceeding only. He says:—

I do not say that Mr. Ellis is guilty of the acts charged against him or convict him of a contempt of this court; all I at present say is that sufficient is shown to make it our duty to bring him into court to answer for the acts charged against him. When here, it will be the duty of this court to give him an opportunity to fully defend himself and, if it turns out, according to his own oath, that he has not violated any of the principles I have endeavored to state it will be the pleasant duty of this court to acquit; if otherwise, it will be our duty, no matter how unpleasant, to inflict upon him the punishment that the law directs, which is just such punishment as will prevent a repetition of the crime by him or by anybody else.

Now, whether or not the articles contain matter which, being published as admitted, constitutes a contempt of court, is a question the determination of which depends upon the construction by the court of the articles themselves—and the publication having been admitted by the appellant, and counsel who showed cause for him having been heard, I fail to see why the matter should not have been considered as quite ripe for adjudication, without any further opportunity of showing cause being given to the appellant. However, the court seems to have adopted the view expressed by Mr. Justice Palmer as to the object of the attachment being issued—for the order made by the court, and which is the subject of this appeal, simply is that the rule *nisi* be made absolute and upon the rule so made absolute the court has issued a writ of attachment, addressed to the sheriff of the city and county of St. John commanding him to attach the appellant, so that he may have him before the court on a day named "to answer for certain trespasses and contempts brought against him"—thus adopting the view expressed by Mr. Justice Palmer as being the object and purpose of the attachment ordered, namely, as an interlocutory proceeding

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to enable the appellant to show cause why he should not be "convicted" of the offence of contempt of court and to defend himself against the charge brought against him. It appears, therefore, that the order of the court, which is the subject of this appeal, is not a final adjudication in the matter, and that therefore it is not appealable to this court. The appeal, therefore, must be quashed and with costs.

Appeal quashed without costs.

Solicitors for appellant: Weldon, McLean & Devlin.

Solicitor for respondent: L. A. Currie.

1. P. 28. [↑](#footnote-ref-2)
2. P. 220. [↑](#footnote-ref-3)
3. P. 11. [↑](#footnote-ref-4)
4. L. R. 2 P. C. 341. [↑](#footnote-ref-5)
5. 8 Mo. P.C. 47. [↑](#footnote-ref-6)
6. 102 U.S. R. 121 [↑](#footnote-ref-7)
7. 7 Wheaton 38. [↑](#footnote-ref-8)
8. 20 Wall. 392. [↑](#footnote-ref-9)
9. 51 Miss. 50. [↑](#footnote-ref-10)
10. 2 Ed. p. 48 and cases there cited. [↑](#footnote-ref-11)
11. 4 Burr. 2129. [↑](#footnote-ref-12)
12. 20 Ch. D. 493. [↑](#footnote-ref-13)