

1892  
 \*Oct. 31. HER MAJESTY THE QUEEN (DE- { APPELLANT;  
 FENDANT)..... }  
 1893  
 \*Feb. 20 JACOB P. CLARK AND JOHN R. { RESPONDENTS.  
 BARBER (SUPPLIANTS)..... }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Appeal—Limitation of time—Final judgment.*

On the trial in the Exchequer Court in 1887 of an action against the crown for breach of a contract to purchase paper from the suppliants no defence was offered and the case was sent to referees to ascertain the damages. In 1891 the report of the referees was brought before the court and judgment was given against the crown for the amount thereby found due. The crown appealed to the Supreme Court, having obtained from the Exchequer Court an extension of the time for appeal limited by statute, and sought to impugn on such appeal the judgment pronounced in 1887.

*Held*, Gwynne and Patterson JJ. dissenting, that the appeal must be restricted to the final judgment pronounced in 1891; that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter unless the time was extended as provided by the statute and the extension of time granted by the Exchequer Court on its face only refers to an appeal from the judgment pronounced in 1891.

*Held*, per Gwynne and Patterson JJ. that the judgment given in 1891 was the only judgment in the suit in respect to the matters put in issue by the pleadings and on appeal therefrom all matters in issue are necessarily open.

APPEAL from a decision of the Exchequer Court of Canada awarding to the suppliants damages to the amount reported by referees under order of the court.

The facts of the case, which are fully stated in the judgments of the court, may be summarized as follows:—

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\*PRESENT:—Strong C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

The petition of right was filed to recover damages for an alleged breach of contract for the supply of paper to the crown required for use by the various departments at Ottawa. On the trial in 1887 the crown offered no defence and the case was sent to referees to ascertain the damages. A question as to the scope of the inquiry before the referees was raised and decided against the suppliants and an interim report was made to the court, an appeal against which resulted in the ruling of the referees being reversed (1). In 1891 the referees reported to the court the amount of damages found by them, which report was confirmed and judgment entered against the crown for the said amount.

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The crown wishing to appeal to the Supreme Court but not having taken the necessary steps within the time limited by statute, an order was made by the Exchequer Court extending the time (2) and the appeal was duly brought. On this appeal the crown claimed the right to impugn, not only the ultimate judgment pronounced in 1891, but also the judgment given on the trial in 1887, and the court directed the question as to the scope of the appeal to be first argued.

*Robinson* Q.C. and *Hogg* Q.C. for the appellant. There was no right of appeal from the original judgment when it was given. Rule 147 of Exchequer Court rules; *Danjou v. Marquis* (3); and on appeal from the final judgment the whole case must be open.

*McCarthy* Q.C. and *McDonald* Q.C. for the respondents referred to *Wilson v. Metcalfe* (4); *Shaw v. St. Louis* (5).

Judgment was reserved on this question and argument on the merits postponed until it was decided.

The judgment of the majority of the court was delivered by:

(1) 2 Ex. C.R. 141.

(2) 3 Ex. C.R. 1.

(3) 3 Can. S.C.R. 251.

(4) 1 Russ. 530.

(5) 8 Can. S.C.R. 385.

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THE CHIEF JUSTICE.—This was a petition of right by which Jacob P. Clarke, executor of James Barber, deceased, and John R. Barber, the suppliants, the present respondents, sought to recover damages for an alleged breach of contract entered into by James Barber with the crown for the supply of paper for various purposes to the officers of the Dominion Government at Ottawa. Various defences were pleaded on behalf of the crown. Upon the cause coming on for hearing before the judge of the Exchequer Court on the 14th of November, 1887, the contracts as set forth in the petition of right were admitted by counsel for the crown, and no evidence in support of the defence being offered a judgment was pronounced in accordance with the practice of the Exchequer Court, as prescribed by the 26th sec. of 50 & 51 Vic. ch. 16, and by the 128th general rule of the Exchequer Court. By this judgment it was ordered and adjudged that it be referred to Robert Cassels, Esq., Q.C., and Brown Chamberlin, Esq., to ascertain and report to the court the items and the particulars of the paper required for departmental and other reports, forms and documents of the civil service departments of the Government of Canada during the periods embraced under the contracts already referred to, furnished or supplied by any person or persons, corporation or corporations, other than the respondents. And, further, to report the profit, if any, which was lost to the respondents by not being permitted or allowed to furnish or supply such paper. And further consideration and costs were reserved.

An objection having been made on behalf of the crown to the reception of evidence tendered by the respondents in the course of the reference, and this objection having been sustained by the referees, who thereupon made an interim report dated 18th June, 1888, an appeal was taken by the respondents to the

Exchequer Court against that report, whereupon and upon the 20th June, 1890, this appeal was allowed, the decision of the referees was overruled and reversed and the referees were ordered to receive the evidence objected to.

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The reference then proceeded upon the mérits and the evidence objected to having been received the referees made their report bearing date the 8th day of May, 1891. This last report having been appealed against by the crown that appeal was set down to be heard at the same time as the cause on further directions, and both the appeal and the cause on further directions came on to be heard before the Exchequer Court on the 16th of December, 1891, when the court dismissed the appeal and confirmed the report of the referees, and ordered and adjudged that the suppliants were entitled to recover from the crown the sum of \$37,990.77 being the amount found by the referees as and by way of damages for the breach of the contracts in the petition of right mentioned.

The crown has now appealed to this court and seeks to impugn not the judgment of the 16th December, 1891, but the original judgment of the 14th of November, 1887. This, I am clearly of opinion, it is not open for the crown to do, and that for the reason that the time for appealing against that judgment had long passed before this appeal was instituted.

The time for appealing against the judgment of November, 1887, was by the statute limited to thirty days from the day on which the judge had given his decision, and this appeal not having been instituted until the 23rd March, 1892, was, therefore, manifestly too late. The enlargement of time ordered by the judge of the Exchequer Court by his order of the 18th of March, 1892, manifestly and on its face only refers to an appeal from the final judgment of the Exchequer

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Court pronounced on the 16th December, 1891, whereby the appeal against the referees' final report was dismissed and damages as before mentioned were awarded against the crown.

It is quite open to the crown now to proceed with their appeal but it must be restricted to an appeal against the last mentioned judgment. Upon such an appeal it will, of course, be open to the crown to impugn the correctness of the finding of the referees as to the amount of damages, but if they fail on this they must fail altogether since, if the report stands unvaried, the final order of the Exchequer Court declaring that the amount awarded by the referees ought to be paid was of course, and cannot be successfully impeached. I understood the counsel for the crown upon the argument before us to say that they had no objections to offer to the report of the referees, but that they desired to attack the original judgment which, for the reason mentioned, it is, I think, clear they have no right to do.

If the crown do not desire now to proceed with the appeal, confining it to an attack upon the report, the appeal may be at once dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—This is an appeal by Her Majesty the Queen, as representing the Government of the Dominion of Canada, against a judgment of the Court of Exchequer pronounced on the 16th December, 1891, in a petition of right instituted at the suit of the respondents as suppliants therein, and the sole question now before us is as to what is open upon such appeal, for until that be decided the hearing of the appeal on the merits has been deferred.

The contention upon behalf of the appellant is that everything which was in issue on the petition of right is open upon the appeal, while the contention of the respondents is that there were two other decisions of the Court of Exchequer in the cause embodied in orders of the court of the respective dates of the 14th November, 1887, and the 20th January, 1890, and that there were matters decided by those orders respectively, and among such matters the liability of the appellant to the respondents in respect of the allegations contained in the petition of right which, as those orders were not appealed from, cannot be entertained and inquired into on the present appeal.

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The suppliants, in their petition of right, alleged that tenders for printing and the supply of printing paper were called for by the Government of Canada in the months of April, 1874, and September, 1879, respectively, and that one James Barber, in reply thereto, made tenders for such work at such respective times, which tenders were accepted by the Government, and that in pursuance thereof the said James Barber in the months of October, 1874, and December, 1879, respectively, entered into two several contracts with the Dominion Government whereby he covenanted with Her Majesty that he should and would well, truly and faithfully and from time to time and when and so often as application or order might be given to him for the same and during the term of five years from the date of the said respective contracts, supply and deliver to the person or persons appointed to take charge thereof at Ottawa such quantity or quantities of paper and of such qualities or varieties as might be required or desired from time to time for the printing and publishing of the Canada Gazette, of the statutes of Canada, and of such official and other reports, forms, documents and other papers as might at any time be required to be printed

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and published, or as might be ordered from time to time by the proper authority therefor according to the requirements of Her Majesty in that behalf. The petition then alleged that on the 19th May, 1880, the said James Barber departed this life whereby he made the suppliant, Jacob P. Clark, to be executor of his last will and testament, and that the suppliant, John R. Barber, a son of the said James Barber, has since the death of his father, the said James Barber, continued the business of paper manufacturer carried on by his father in his life time, and that he, the said John R. Barber, at the request of and on behalf of the said Jacob P. Clark and with the assent of the Government, furnished, supplied and delivered all paper applied for, ordered or required under the last mentioned of the said two contracts. The suppliants then in the 15th and subsequent paragraphs of their petition of right alleged :

15. Shortly after the said James Barber had entered upon the performance of the said first mentioned contract and during the year 1874, and from time to time during each of the ten years thereafter covered by the said two contracts hereinbefore particularly mentioned, large quantities of paper required during said years for the purposes aforesaid were ordered and obtained from certain individuals and companies other than the said James Barber or your suppliants, without the knowledge or consent of the said James Barber or your suppliants, and without any public notice of tenders therefor and without any order in council authorizing the same and contrary to and in violation of the act respecting the office of Queen's Printer and the public printing, 32 & 33 Vic. ch. 7, to the great and serious loss of the said James Barber and your suppliants.

16. The said James Barber, and your suppliants after his decease, were at all times ready and willing to furnish, supply and deliver the paper supplied, ordered and obtained as in the last preceding paragraph mentioned.

17. That profits would have been made and realized by the said James Barber and your suppliants, had they been allowed to furnish, supply and deliver the last mentioned paper.

The petition of right then sets forth particulars of some of the paper alleged to have been purchased from other persons which the suppliants claimed should, under the contracts, have been obtained from the said James Barber in his life time and from the suppliants since his decease, and by the 19th paragraph of the petition of right the suppliants

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submit that the paper aforesaid should have been ordered from the said James Barber in his life time or from your suppliant Jacob P. Clark, as his executor, after his death, and that by reason of the default in ordering the same the said James Barber in his life time and your suppliant Jacob P. Clark as his executor after his decease, and your suppliant, John R. Barber, as the beneficiary under the said will, have been unlawfully and unjustly deprived of the profits which would have been derived from furnishing and supplying said paper.

And thereupon they prayed for relief.

To this petition of right the Attorney-General for the Dominion of Canada, by way of defence thereto, in the 4th and 5th paragraphs of his statement of defence alleges as follows :

4th. Her Majesty's Attorney-General denies that Her Majesty committed any breach of the contracts or agreements for supplying and delivering of the paper for the printing of the Canada Gazette, statutes and orders in council and for pamphlets and other work required by the several departments of the Government of Canada, as in the 15th paragraph of the petition of right is alleged. And Her Majesty's Attorney-General denies that large quantities of paper required during the said period of the said contracts for the purposes aforesaid were ordered and obtained from certain individuals and companies other than the said James Barber and the suppliants, without the knowledge and consent of the said James Barber or the suppliants and without any public notice of tender therefor, and Her Majesty's Attorney-General states that no persons or companies other than the said James Barber and the suppliants did supply, furnish and deliver any portion of the said paper which by the tenders set out in the first and seventh paragraphs of the said petition and the contracts set out in the fourth and ninth paragraphs of the said petition were to be furnished, supplied and delivered by the said James Barber and the suppliants.

5th. Her Majesty's Attorney-General alleges, and the fact is, that the said James Barber and the suppliants were not under the said tenders



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and contracts in the said petition of right set out, entitled to supply, deliver and furnish all the paper required for the printing of the Canada Gazette, the statutes and the orders in council and for pamphlets and other work required by the several departments of the Government of Canada, and it is denied that the said James Barber, in his life time, and the suppliants have been unlawfully and unjustly deprived of the profits which would have been derived from furnishing and supplying the said paper by reason of the said paper having been furnished, supplied and delivered by persons and companies other than the said James Barber and the suppliants.

Before it could be adjudged by the court that any breach of the contracts set out in the petition of right had been committed by the Dominion Government, and before, therefore, any judgment could be rendered against Her Majesty upon the issues joined in these pleadings, it is obvious that the issue upon matters of fact must be first determined by evidence in the cause, namely, whether any, and if any what, paper had been, and under what circumstances, purchased by the Government from other persons than the said James Barber and the suppliants during the periods mentioned. Upon this fact being ascertained then would arise the question of law raised, namely, whether such paper was paper the procuring of which from other persons than the said James Barber and the suppliants constituted a breach by the Government of the contracts set out in the petition of right. Now, before any evidence was taken in the cause the order of the 14th November, 1887, was made by the court, whereby it was ordered :

That it be referred to Robert Cassels and Brown Chamberlin to ascertain and report to this court, giving items and particulars, what, if any, paper for the printing and publishing of the Canada Gazette, of the statutes of Canada and of such official, departmental and other reports, forms, documents and other papers as have been required by the several Departments of the Government of Canada were, during the periods embraced by the contracts in the fourth and ninth paragraphs of the petition of right herein set forth, furnished or supplied by any person or persons, corporation or corporations other than James Barber in

the said contracts mentioned, or the above named suppliants—to ascertain and report what profit, if any, was lost to the said James Barber, in his life time, or to the said suppliants since his decease, by not being permitted or allowed to furnish or supply the said paper, if any, furnished or supplied by any person or persons, corporation or corporations, other than said James Barber or said suppliants; and to report any special circumstances that may be deemed necessary. And that the further consideration of this cause and the costs do stand over until the referees shall have made their report with liberty to either party to apply.

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Whatever may have been intended by this order we can judge of it only by the terms in which it is expressed, and to my mind it is very clear that it contains no adjudication whatever upon any of the issues raised by the pleadings in the cause. It treats as a matter of fact, yet unascertained, whether any, and if any what, quantity of paper and of what value had been, during the periods named, procured by the Dominion Government from any person or persons other than James Barber and the suppliants. Until that matter of fact should be ascertained no judgment could be rendered in the cause, and if it should be found in the negative judgment must have been rendered for the respondent in the petition of right dismissing the petition. The reference, therefore, would seem to have been made under section 26 of 50 & 51 Vic. ch. 16, for the purpose of enabling the referees to take the evidence in the cause with a view to their reporting to the court their finding upon the matters of fact upon which the suppliants rested their claim to have a judgment rendered in their favour, and as that was a point necessary to be determined preliminary to the rendering of judgment upon the issues joined the respondent in the petition of right had no occasion to appeal against an order which adjudicated nothing to the respondent's prejudice in the suit.

The referees having proceeded to take evidence under that order the suppliants tendered certain evi-

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dence to the reception of which the now appellant objected upon the contention that it did not relate to paper which was covered by the contracts. In this view the referees concurred and they made their certificate to that effect. Upon the matter being brought before the court an order was made by the court whereby it was ordered that the said certificate be remitted back to the referees to report to the court their reasons for their ruling and any evidence on which the same was founded or which might tend to explain the contract. With this order the referees complied and thereupon the order of the 20th January, 1890, was made by the court whereby the certificate of the referees was set aside and it was ordered by the court :

That the said referees do, upon the reference made to them by the order of this honourable court on the 14th day of November, 1887, admit without any such limitation as is in such certificate mentioned all evidence that may be tendered by the suppliants of the purchase by the crown, from parties other than the contractor, of paper for the printing and publishing of such official, departmental and other reports, forms, documents and other papers as have been required by the several departments of the Government of Canada during the period embraced by the contracts in the fourth and ninth paragraphs of the petition of right, and that the costs of and incidental to the said appeal be costs in the cause to the successful party.

Now, this order does not, any more than did that of the 14th November, 1887, adjudicate anything upon any matter upon which issue was joined between the parties in the suit. It did not in its terms conclude or decide anything as to the liability of the respondent to the suppliant in respect of the matters in issue. It simply referred back the matter to the referees under the order of the 14th November, 1887, with directions to them to take all the evidence which should be tendered by the suppliants under that order. It decided nothing whatever as to what the result should be upon

the evidence being taken and the report thereof being made to the court. That nothing further was intended to be decided by the order of the 20th January, 1890, appears from the fact that the costs of it were reserved as costs in the cause and to the successful party therein, a point which could only be determined when, upon all the evidence being taken and considered by the court, the whole question as to the liability of the respondent upon the law and the evidence bearing upon the issues raised should be decided by the court.

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The referees accordingly proceeded under this order and took all the evidence tendered by the suppliants and made their report as directed by the order of the 14th November, 1887. Upon this report coming up before the court the judgment now appealed from was rendered and thereby the court ordered and adjudged that the suppliants are entitled to recover from the defendant the sum of \$37,990.77 with costs. This is the first and only judgment in the suit in respect of the matters put in issue by the pleadings or which adjudges the now appellant to be liable in any respect to the suppliants; and as it is the only decision in the suit which fixes the now appellant with any liability to the suppliants it is the only decision in the suit the now appellant had any occasion to appeal against.

The provision of law as to appeals from judgments of the Exchequer Court is contained in sections 51 and 53 of 50 & 51 Vic. ch. 16, namely:

Any party to a suit in the Exchequer Court who is dissatisfied with the decision therein may appeal, etc.

Now, while I am of opinion that these words "the decision therein" can mean nothing but the final judgment therein, I am also of opinion that, however that may be, as there is no decision in the suit here which adjudicates upon and decides the matters put in issue by the pleadings in the suit other than the judgment

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and decision embodied in the order of 16th December, 1891, upon an appeal from that judgment all the matters which were put in issue by the pleadings in the cause are necessarily open.

It may be that these matters are concluded by authority; whether they are or are not is one of the questions to be raised by the appeal and it cannot be determined until the appeal is heard upon the merits.

PATTERSON J. concurred in the judgment of Mr. Justice Gwynne.

*Appeal dismissed with costs unless  
the crown signified its intention  
to proceed with it as restricted.*

Solicitors for appellant: *O'Connor, Hogg & Balderson.*

Solicitors for respondents: *MacLaren, MacDonald,  
Merritt & Shepley.*

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