1935
* Oct. 7.
* Oct. 22.

BRITISH AMERICAN BREWING CO. LTD. (SUPPLIANT)..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Appeal—Jurisdiction—Dismissal of action in Exchequer Court, when called for trial and suppliant not ready to proceed and asking adjournment—Appeal by suppliant to Supreme Court of Canada—Applicability of s. 38 of Supreme Court Act (R.S.C. 1927, c. 35)—"Final judgment" within s. 82 (4) of Exchequer Court Act (R.S.C. 1927, c. 34)—Whether case one for exercise of Court's power to dismiss appeal summarily.

When the action, which was by way of petition of right in the Exchequer Court, came on for trial, counsel for the suppliant moved for postponement, and the trial judge gave directions for the trial to be had within a certain time. When the case later came on for trial, counsel for the suppliant again sought postponement, stating he was not prepared to proceed, as attendance of his witnesses could not yet be procured. Thereupon the petition of right was dismissed. The suppliant appealed to the Supreme Court of Canada. Respondent moved to quash the appeal for want of jurisdiction, on the grounds that the judgment appealed from was not a final judgment, and that it was in exercise of judicial discretion within s. 38 of the *Supreme Court Act*.

Held: The Court had jurisdiction to hear the appeal, and the motion to quash should be dismissed.

The jurisdiction of the Supreme Court of Canada in respect of appeals in exercise of a right of appeal given by the *Exchequer Court Act* is not affected by s. 38 of the *Supreme Court Act*. S. 38 is limited in its application to those cases in respect of which the jurisdiction is set forth and defined immediately or referentially by the *Supreme Court Act*.

* PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon and Kerwin JJ.

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The judgment appealed from was a final judgment within the meaning of s. 82 (4) of the *Exchequer Court Act*.

The case was not one in which the Court's power to dismiss summarily an appeal should be exercised.

MOTION to quash appeal for want of jurisdiction on the grounds that the judgment appealed from was not a final judgment, and that it was in exercise of judicial discretion within s. 38 of the *Supreme Court Act*.

The action was by way of petition of right in the Exchequer Court of Canada, for repayment of certain moneys alleged to have been paid by the suppliant to the Department of Customs and Excise and to the Department of National Revenue of the Dominion of Canada as an excise tax and as a sales or consumption tax on ale and beer manufactured for export and duly exported, the imposition and collection of which taxes, it was alleged, was not authorized.

The action was set down for trial before the President of the Exchequer Court at Toronto for February 19, 1935.

On February 11, 1935, counsel for the suppliant moved before the President of the Exchequer Court to postpone the trial on the ground that some of suppliant's witnesses were ill, and others who resided in the United States were not available as such for the trial on February 19. That motion was enlarged to the trial.

On February 16, 1935, counsel for the suppliant again applied to the President for a postponement of the trial, and the President again directed that the application be heard at the trial on February 19.

At the opening of the trial on February 19, counsel for the suppliant again presented his application for a postponement of the trial, and the President directed that the suppliant must move to set the case down for trial within sixty days from that date, and that the trial must take place and be concluded before the summer vacation.

On May 15, 1935, the case came on for trial before the President of the Exchequer Court at Toronto, and the suppliant again sought an adjournment until the middle of October on the ground that the witnesses that the suppliant counted on to be available were in the United States and their attendance could not be forced, and that the

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suppliant had been unable to get them to agree to be present at the trial in Toronto before the middle of October.

The request for adjournment was refused, and as counsel for the suppliant stated that he was not prepared to proceed with the trial, the petition of right was dismissed with costs.

The suppliant appealed to the Supreme Court of Canada, and the respondent launched the present motion to quash the appeal.

A. C. Hill K.C. for the motion.

O. M. Biggar K.C. contra.

THE COURT.—The grounds of the motion are: first, that the judgment appealed from is not a final judgment; and, second, that the jurisdiction of this Court is excluded by section 38 of the *Supreme Court Act.*

By section 35 of the *Supreme Court Act,*

> The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada;

and, by section 44,

> Notwithstanding anything in this Act contained the court shall also have jurisdiction as provided in any other Act conferring jurisdiction.

The appellate jurisdiction, bestowed upon the Supreme Court in general terms by section 35 of the *Supreme Court Act,* is, in point of fact, defined in part by the *Supreme Court Act* itself, and, in part, by other statutes, for example, the *Criminal Code* and the *Controverted Elections Act.*

As regards appeals from the Exchequer Court, the right of appeal is given by section 82 of the *Exchequer Court Act;* and it is contended on behalf of the Crown that section 38 of the *Supreme Court Act* applies to such appeals. In our opinion, the jurisdiction of this Court in respect of appeals in exercise of a right of appeal given by the *Exchequer Court Act* is not affected by section 38 of the *Supreme Court Act;* which section, we think, is limited in its application to those cases in respect of which the jurisdiction is set forth and defined immediately or referentially by the *Supreme Court Act.*

We are also of opinion that the judgment appealed from is a final judgment. The formal judgment is in these words:—

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THIS ACTION, by way of Petition of Right, having come on for trial before this Court at the City of Toronto on the 19th day of February, A.D. 1935, in presence of counsel for the Suppliant and for the Respondent and having been adjourned, and again coming on this day before this Court in the said City of Toronto in presence of counsel for the Suppliant and for the Respondent, UPON HEARING what was alleged by counsel aforesaid, counsel for the Suppliant declaring that it was not prepared to proceed and asked for an adjournment of the trial.

THIS COURT DOTH ORDER AND ADJUDGE that the Petition of Right herein be and the same is hereby dismissed.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that His Majesty the King is entitled to recover from the Suppliant His costs of the present action, after taxation thereof.

This is a judgment at the trial of the action dismissing it. True, as the suppliant was not prepared to prove his case, the matter of substance considered by the trial judge was whether or not the trial should be adjourned in order to give the suppliant a further opportunity to produce evidence. Nevertheless, it is a judgment pronounced at a trial, both parties being present, after the suppliant, on whom the burden of proof lay, had declared he had no evidence to offer. Such a judgment, we have no doubt, is a final judgment within the meaning of section 82, subsection 4, of the *Exchequer Court Act.*

The contention of the Crown, therefore, on both of the grounds on which it is rested, that the appeal should be quashed for want of jurisdiction, fails. We do not think this a case in which the power of summarily dismissing an appeal, which the Court has on rare occasions exercised where there is no lack of competence to dispose of it on the merits, ought to be put into execution. Appeals have been summarily dismissed where the appellant was held, *exceptione personali,* to be demonstrably precluded by his conduct from prosecuting the appeal (*Schlomann* v. *Dowker* (1)); where, by reason of some change in circumstances, the actual interest of the appellant in the appeal had disappeared, except as regards the costs, and in other similar cases (*Moir* v. *Village of Huntingdon* (2); *McKay* v. *Township of Hinchinbrooke* (3); *Martley* v. *Carson* (4)).

(1) (1900) 30 Can. S.C.R. 323.
(2) (1891) 19 Can. S.C.R. 363.
(3) (1894) Can. S.C.R. 55.
(4) See 25 Can. S.C.R. at p. 15, note.

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The Court.

The procedure followed in these cases is not, we think, a convenient procedure in cases such as this.

The motion is dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellant: *McLarty & Fraser.*

Solicitor for the respondent: *A. C. Hill.*