

THE COSGRAVE EXPORT BREWERY  
COMPANY (DEFENDANT) . . . . . } APPELLANT;

1928  
Apr. 24.

AND

HIS MAJESTY THE KING (PLAINTIFF) . . . RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Appeal—Jurisdiction—Plea—Paragraph alleging a set off—Judgment striking it out—Final judgment—Substantial right—Supreme Court Act, s. 2.*

An appeal lies to the Supreme Court of Canada from a judgment striking off from a plea a paragraph alleging a set off or counterclaim.

MOTION by way of appeal from a decision of the Acting Registrar of the Supreme Court of Canada, dismissing the respondent's motion to have the security refused and granting the appellant's motion for an order approving security.

The material facts of the case and the questions at issue are fully stated in the judgment of the Acting Registrar now reported.

The ACTING REGISTRAR.—The respondent sued the appellant before the Exchequer Court of Canada, claiming the sum of \$120,129.20 for taxes due under the *Special War Revenue Act*, 1925. The appellant, by its plea, first denied any liability and further alleged:—

During the periods mentioned in the information filed herein the defendant has overpaid for taxes under the said *Special War Revenue Act*, 1915, the sum of \$134,423.03 and if it should be found that the defendant is liable for any sums of money in respect of any of the claims made by reason of the facts specified in the said information, the defendant craves leave to set off against such sum the said sum of \$134,423.03 so overpaid by the defendant.

\*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

(1) [1923] A.C. 695.

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At the opening of the trial before Mr. Justice Audette, counsel for the respondent made an application to strike out this paragraph.

After argument by counsel for the respondent and for the appellant, the Honourable Mr. Justice Audette granted the motion to strike out the paragraph, with costs in favour of the respondent, on the ground that a set off or counter-claim cannot be urged against the Crown without a "fiat."

The defendant seeks to appeal to this court from that judgment.

The appellant moves before me for an order approving the security offered by it, and the respondent served a notice of motion upon the appellant to the effect that, upon the hearing of the appellant's motion, he would move to have the security refused on the ground that this court has no jurisdiction to hear the appeal.

Both motions were made returnable before me on the same day and the respondent's motion was first argued.

Appeals from the Exchequer Court of Canada are regulated by section 82 of the *Exchequer Court Act* which says:—

82. Any party \* \* \* who is dissatisfied with any final judgment or with any judgment upon any demurrer \* \* \* given therein by the Exchequer Court \* \* \* and who is desirous of appealing against such judgment may \* \* \* deposit with the Registrar of the Supreme Court the sum of \$50 by way of security for costs.

Counsel for the appellant and for the respondent having intimated that there would be an appeal from my decision in any case, expressed their desire to have my decision at an early date. I did not have time therefore to consider the merits of this case as much as I would have otherwise owing to the importance of the question raised by the motion.

The counsel for the respondent, in support of his motion, urged the following grounds:—

1. That the judgment appealed from is not a "final judgment" within the meaning of section 2 of the *Supreme Court Act*.

2. That the judgment appealed from is not a judgment upon a demurrer;

3. That the judgment appealed from is a "judgment or order made in the exercise of judicial discretion." (Section 38, *Supreme Court Act*)...

4. That the judgment appealed from deals with a question of practice and procedure.

I think the respondent cannot succeed on the third point.

Owing to the conclusion that I have reached on the first point, it is not necessary for me to decide the second one.

As to the fourth point, I am of the opinion that this appeal is not one upon a question of practice and procedure: the question in controversy is whether a person can allege a set off against the Crown without a fiat. Even if this was a question of practice and procedure, I presume this court will be inclined to take it into consideration as it "involved substantial rights or (the) decision appealed from may cause grave injustice." *Lambe v. Armstrong* (1).

Upon the first point, I have come to the conclusion that the judgment appealed from determines a substantial right of the appellant within the meaning of section 2 of the *Supreme Court Act* and is therefore a final judgment appealable to this court. *Bulger v. Home Insurance Co.* (2).

Counsel for the respondent argued that the judgment appealed from is not a "final judgment" because the appellant does not lose his rights to the amount claimed by the set off as the appellant's right to sue the respondent by direct action still remains.

I have been unable to follow this argument as the appellant cannot be denied the right to proceed by way of a set off, if he chooses to do so; and by the judgment appealed from, he is deprived of such right.

I have not found any decision precisely upon the point raised by this motion.

But this court has already held, in *McLennan v. McLennan* (3) that

the Supreme Court of Canada (can entertain) an appeal from a judgment confirming an order, by a judge in chambers, to strike out a scandalous and irrelevant paragraph of the plaintiff's reply to the defence pleaded.

The decision in *Dominion Textile Co. v. Skaife* (4) also held that this court has jurisdiction to entertain an

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(1) 27 Can. S.C.R. 309.

(2) [1927] S.C.R. 451, at p. 453.

(3) [1925] S.C.R. 279.

(4) [1926] S.C.R. 310.

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appeal from a judgment which had maintained an inscription in law asking that certain allegations be struck off from the plea.

On the whole I am of the opinion that the respondent's motion to have the security refused should be dismissed with costs and that the appellant's motion for an order approving security should be granted with costs to follow the event. ARMAND GRENIER, *Acting Registrar*.

The Supreme Court of Canada after hearing counsel for the motion and without calling the appellant's counsel, dismissed the motion with costs and affirmed its jurisdiction to entertain the appeal. The oral judgment delivered by the Chief Justice held that the judgment appealed from had determined a substantial right of the appellant and was therefore a "final judgment" within the meaning of par. e of s. 2 of the *Supreme Court Act*.

*Motion dismissed with costs.*

*F. Varcoe* for motion.

*D. L. McCarthy K.C. contra.*

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