ALEXANDER SMYTH WOODBURN.....SUPPLIANT; 1898

AND Jan. 17.

HER MAJESTY THE QUEEN.....RESPONDENT.

Practice—Appeal—Extension of time—Order of reference—Amendment of record—Laches.

An order of reference had been settled in such a way as to omit to reserve certain questions which the court expressly withheld for adjudication at a later stage of the case. Both parties had been represented on the settlement and had an opportunity of speaking to the minutes. The order was acquiesced in by the parties for a period of some eighteen months; the reference was executed and the referee's report filed. After final judgment in the action, the Crown appealed to the Supreme Court. Subsequent to the lodging of such appeal, an application was made to the Exchequer Court to amend the order of reference so as to include the reservations mentioned, or, in the alternative, to have the time for leave to appeal from such order extended. Under the circumstances, the Court extended the time to appeal but refused to amend the order of reference as settled.

APPLICATION to extend the time for leave to appeal from an order of the court referring a case to a Referee for the purpose of enquiry and report as to damages; or, in the alternative, to amend the order as settled. The circumstances under which the application was made are stated in the head-note.

10th January, 1898.

E. L. Newcombe, Q.C., D. M. J. in support of motion: One of the matters in controversy in this case is as to whether or not the suppliant is entitled to damages for an alleged breach of contract, covering the period elapsing between the 1st of December, 1884, and the 9th of November, 1886. When the whole case came before the court, no adjudication was made upon the question of liability either in respect of the period

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covered by the formal contract or in respect of the period I have just mentioned. When your Lordship made the order of the 16th April, 1896, you said from the Bench that you did not intend to deal with the question of liability at that time ; that your then intention was to refer the question of damages only to the learned Referee, and that after the Referee had made his report the question of liability could come up either upon a motion to confirm, or upon a motion to appeal from such report. In settling the order of reference the Registrar has made no reservation of the questions of law arising in the case. The order as settled, without purporting to be a judgment, simply refers the question of damages to the Referee. Perhaps, under ordinary circumstances, we should have no fault to find with the manner in which the order or reference was formally settled ; but in view of the judgment of the Supreme Court of Canada in the case of *Clark* v. *The Queen*, (1] the Attorney-General for Canada fears that the interests of the Crown on appeal to the Supreme Court in this case might be prejudiced, unless your Lordship extends the time in which an appeal might be taken from the judgment of this court. It is not the intention of the Attorney-General to appeal from the judgment of this court so far as it relates to the question of damages for the period subsisting between 1879 and 1884, but an appeal has been lodged against such judgment so far as it allows damages for the period between the 1st December, 1884, and the 9th November. 1886. *Ex debito justitiae* the Attorney-General may ask the court to prevent any possible prejudice to the appeal of the Crown by reason of any mistake or oversight in the records of the court. It being obvious that under the decision of the Supreme Court in *Clark* v. *The Queen*, (*Supra*) it may very properly be argued that the order

(21) Can. S. C. R. 656.

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of reference was a final judgment; then unless your Lordship consents to either extend the time for appealing from such order, or, in the alternative, reforms the record of it in your own court so that the reservation of the question of liability will appear upon the face of it, the Crown may be precluded from raising the question on the appeal in this case. Of course considerable time has elapsed since the making of the order, but I submit that the material upon which I make this motion shows that the Crown has not been guilty of undue delay. As soon as it was advised by its solicitor as to the fact of the order of reference being framed as it is, steps were immediately taken to have it corrected. Further than this, there is a short-hand note of what your Lordship said from the Bench in directing the order of reference of the 16th of April, 1896, to issue; and in that memorandum or note your Lordship is made to say that you expressly reserved the questions of law arising in the case until after the Referee has made his report. Under such circumstances the authorities show that the court will not hestitate to reform the record so as to make it conform to the actual judgment or order pronounced, but will take all such other steps as may be necessary to prevent the party appealing from being prejudiced in any way.

In *re Swire*, *Mellor* v. *Swire* (1), *Cotton* L.J. says, at page 243:—"Although it is only in special circum-"stances that the court can interfere with an order "that has been passed and entered, except in cases "of mere slip or verbal inaccuracy; yet in my opinion "the court has jurisdiction over its own records, and "if it finds that the order as passed and entered con-"tains an adjudication upon that which the court in "fact has never adjudicated upon, then in my opinion "it has jurisdiction which it will in a proper case

(1) 30 Ch. Div. 239.

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"exercise to correct its record that it may be in accord-"ance with the order really pronounced."

Bowen L.J., at page 247 says: "An order, as it seems to me, even when passed and entered, may be amended by the court so as to carry out the intention and express the meaning of the court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice."

See also *Tucker* v. *New Brunswick Trading Co. of London* (1); *Lawrie* v. *Lees* (2).

R. V. Sinclair contra: The appeal having been lodged in the Supreme Court before this application was made, this court has no jurisdiction to grant the extension of time for leave to appeal asked for. That has been decided over and over again by the Supreme Court. He cites *Walsmley* v. *Griffith* (3); *Lakin* v. *Nutall* (4); *Starrs* v. *Cosgrove Brewing and Malting Co.* (5).

Furthermore, the Crown is too late in its application to have the record reformed. The minutes of the order of reference were spoken to by the solicitor for the Crown, and this point not having then been raised, the Crown is not at liberty to raise it now. Again, the reasons for judgment ordering the reference herein did not expressly direct that a clause should be inserted in the order of reference reserving for further consideration the question of liability between 1884 and 1886. Such a clause could only be inserted on the express direction of the court. *Bird* v. *Heath* (6); *Holmstead and Langton's Ontario Judicature Acts*, at page 654.

No mere clerical error has been made by the Registrar in settling the order; nor was the clause which the

(1) 44 Ch. Div. 249.
(2) 7 App. Cas. at p. 35.
(3) 13 Can. S. C. R. 434.
(4) 3 Can. S. C. R. 685.
(5) 12 Can. S. C. R. 571.
(6) 6 Hare 236.

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Crown now wishes to insert in it omitted through inadvertence. The amendment asked for should not be allowed. He cites *Port Elgin Public School Board* v. *Eby* (1); in *re Suffield & Watts, ex parte Brown* (2); *Daniel's Chancery Practice*, 6th edition, at page 819; *Attorney-General* v. *Tomline* (3); *King* v. *Savery* (4); *Willis* v. *Parkinson* (5). No alteration can however be made in a judgment except where there has been a matter of clerical error, or where the matter to be inserted is clearly consequential on the directions as actually made from the Bench.

THE JUDGE OF THE EXCHEQUER COURT now (January 17th, 1898) delivered judgment.

One of the matters in controversy in this case is as to whether or not the suppliant is entitled to damages for breaches of the contract set up occurring between the 1st of December, 1884, and the 9th of November, 1886. When that question first came before me at the trial on the 16th of April, 1896, I was inclined to think that the suppliant was entitled to recover damages for such breaches, but I refrained at that time from determining the question. When the question came again before me upon a motion by way of appeal from the Referee's report I came to the conclusion that the suppliant was entitled to recover for such breaches during the period mentioned, and on the 29th of November last I directed judgment to be entered for such damages, and other damages which the Referee had reported that the suppliant had sustained. From that judgment an appeal has been taken to the Supreme Court. It appears, however, that the Attorney-General for Canada fears that the appeal may be prejudiced by reason of the terms in which the formal order of refer-

(1) 17 Ont. P. R. 58.
(2) 20 Q. B. D. 697.
(3) 7 Ch. D. 388.
(4) 8 De G. M. & G. 311.
(5) 3 Swanst. 233.

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ence of the 16th April, 1896, was stated. The judge's direction, of which a note has been preserved, is clear and is not complained of; but it is feared that the formal order, the minutes of which were settled before the Registrar by counsel for the parties, goes beyond the direction, and the Attorney-General now applies either to have the order of reference amended or that the time for appealing therefrom be extended.

I am not disposed, after the long lapse of time, to amend the order that was taken out and acted upon without objection, but if the application to extend the time for appealing from that part of the order of April 16th, 1896, which has reference to damages for breaches of contract occurring between the 1st of December, 1884, and the 9th of November, 1886, had been made to me before the appeal was taken to the Supreme Court I should have thought the application should be granted. Should I refuse it now because that appeal has been asserted? I think not. It is argued that the Supreme Court will not take into consideration any order that I may now make, the appeal having been instituted in that court; but that is an objection that may be renewed before the Supreme Court, and with which the Supreme Court itself will be able to deal, and so I shall not in any way prejudice the position of the suppliant with regard to that objection by extending the time, and under the circumstances it seems to me that by so doing I shall, so far as that may now be done, be placing the parties in the position in which it was intended from the first they should occupy and which they would now occupy, but for some inadvertence in settling before the Registrar the minutes of the order that I made on the 16th of April, 1896.

There will be an order extending the time for appealing from the order of this court of the 16th April, 1896, until the 1st day of February, 1898,

so far, and so far only, as that order deals with that portion of the suppliant's claim which is based upon breaches of the alleged contract occurring between the 1st of December, 1884, and the 9th of November, 1886,—the costs of this application to be costs to the suppliant in any event.

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