

1894
 Jan. 16.

WILLIAM DUNN.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN..... RESPONDENT.

*Petition of Right—Demurrer—50-51 Vict. c. 16 s. 50—Interpretation—
 Jurisdiction—Practice.*

Where a petition of right has been demurred to and judgment obtained on such demurrer before a judge of the Supreme Court, acting as Judge of the Exchequer Court, prior to the passage of 50-51 Vict. c. 16, it was held to be a case fully heard and determined and not one coming within the class of cases referred to as being "partly heard" in section 50 of that statute; and the judge who heard the demurrer refused a motion to amend the petition, made after the passage of such Act, on the ground of want of jurisdiction.

Semble, That the provision in section 50 of *The Exchequer Court Act*, that "any matter which has been heard or partly heard or fixed or set down for hearing before any judge of the Supreme Court, acting as a judge of the Exchequer Court, may be continued before such judge to final judgment, who for that purpose may exercise all the powers of the Judge of the Exchequer Court," is not to be construed as an imperative enactment, and does not impose the duty upon a judge before whom a case was instituted before the Act was passed to continue to entertain the case until final judgment, nor does such provision oust the jurisdiction of the Judge of the Exchequer Court in respect of such matter.

MOTION to amend a petition of right after judgment allowing demurrer.

On the 30th June, 1883, the suppliant filed a petition of right. On the 30th November of the same year the Crown demurred thereto, the demurrer coming up for hearing before Mr. Justice Fournier, of the Supreme Court of Canada, acting as Judge of the Exchequer Court, on the 18th February, 1884. On the 22nd of October in that year judgment was delivered by the learned judge overruling the demurrer. This judg-

ment was reversed on appeal to the Supreme Court, (1) and by the order of that court dated 16th November, 1885, leave was granted to the suppliant to apply to the court below to amend his petition of right. The motion to amend was not made until some seven years after leave was so granted, and was then made to the learned judge who decided the case on demurrer. In the meantime *The Exchequer Court Act*, 50-51 Vict. c. 16, was passed. The sections of the Act bearing upon the issues involved in the motion are set out in the judgment.

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January 15th, 1894.

*Gemmill*, in support of motion ;

*Hogg*, Q.C. *contra*.

FOURNIER, J. now (January 16th, 1894) delivered judgment.

The motion for leave to amend the petition of right in this case now presented to me purports to be made before the Exchequer Court. By section fifteen of *The Exchequer Court Act* (1887) exclusive jurisdiction in such cases as the present is given to the Exchequer Court, and by section fifty of the same Act the present petition, being a matter pending in the Exchequer Court when the Act came into force which has not been fixed or set down for hearing, is to be continued before the Exchequer Court. The learned counsel who has made the motion claims that the following words which are added in section fifty, namely :—

But any matter which has been heard or partly heard or fixed or set down for hearing before any judge of the Supreme Court, acting as a judge of the Exchequer Court, may be continued before such judge to final judgment, who for that purpose may exercise all the powers of the Exchequer Court.

(1) See 11 Can. S.C.R. 385.

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give me jurisdiction. I will remark, first, that this right is only optional, and the duty is not imperatively imposed upon any judge of the Supreme Court and that this provision does not in my opinion oust the Exchequer Court Judge's jurisdiction over the case. However, I do not think the present case comes within the wording of this section, for the case on the demurrer has been fully heard and finally determined by me before the Act came into force, and as the amended case has not been heard or partly heard, or fixed or set down for hearing before me acting as a judge of the Exchequer Court, I am clearly of opinion that I have no jurisdiction to entertain the present motion. In virtue of the judgment of the Supreme Court granting to the suppliant the right to apply to the Exchequer Court for leave to amend his petition, it gave him the right to apply to any judge to make out a new case which was never heard, or fixed or set down for hearing and any judge other than the judge who heard the demurrer could have heard the amended petition of right.

Being of opinion that when the Act was passed in 1887 the case had been for years finally disposed of on the issue submitted, I think the case does not come within the words relied on in section fifty by the counsel who has made the motion. I order that the matter be referred back to the Exchequer Court.

*Judgment accordingly.*

Solicitors for suppliant: *Gemmill & May.*

Solicitors for respondent: *O'Connor & Hogg.*

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