

THE HONORABLE PETER SMYTH - - APPELLANT ;

AND

ELIZABETH McDOUGALL, SUGGEST-  
 ING THE DEATH OF THOMAS } RESPONDENT.  
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ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Special Case--Further Evidence.*

*Held:*—That when a case has, by consent of parties, been turned into a special case, and the Judge's minutes of the evidence taken at the trial agreed to be considered as part of the said special case, the Court has no power to add anything thereto, except with the like consent, and has no power to order any further evidence to be taken.

This was an appeal from the Supreme Court of Nova Scotia, which delivered judgment in favor of the Plaintiffs, in an action of ejection brought by the Plaintiffs to recover from the Defendant possession of certain lands and premises which are situate in the County of Inverness in that Province.

The case was tried on the twenty-eighth of October, 1874, before Mr. Justice McCully and a Jury, at Port Hood. After the evidence on both sides was concluded, on the recommendation of the presiding Judge, a juror was withdrawn, and it was then agreed "that the Judge's minutes be returned to Halifax, and that this cause should be treated as a special case, and that the Court on argument were to draw all such inferences of fact as a Jury might, and that final judgment be entered for Plaintiffs or Defendant as the Court should order." A *rule nisi* was granted, in accordance therewith, to enter judgment for the Respondents, and during the progress of the argument of the said rule, the Court stopped the argument and intimated that it would order

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PRESENT :—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J.J.

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further evidence to be taken before a Commissioner at Port Hood, which evidence was to be returned and to be used in the further argument of the cause. Appellant's counsel protested against this course, and insisted that this being a special case the Court had no power to interfere or make such order, except by consent of both parties. The Court took time to consider, and afterwards granted a rule "authorizing a Commissioner to take evidence as to whether the widow or daughter of Angus Morrison, the devisees named in the will of Donald Morrison, were living or dead at the time of bringing this action; also when said devisees of said life estate, if dead, either or both of them, departed this life, and, further, that the testimony to be taken under such rule, of which Defendant's attorney to have due notice, that he may attend and cross examine if he choose, be received on a future argument of the case, in the same way and to the same effect as if it had been taken down and returned at the trial with the minutes;" and it was with the further evidence, taken under this special order therefor, that the Respondents obtained the judgment which gave rise to the present appeal.

1st February, 1877.

Mr. *Gormully* for the Appellants:

When a case has been stated by consent of all parties the Court has no power to add thereto, except with the like consent. The parties in this case agreed to turn the action of ejectment into a special case, the Judge's minutes of the evidence taken at the trial to be the statement of the said special case. No Statute gave the Court below power to order any further evidence to be taken on two material facts and, excluding such further evidence, a non-suit ought to have been entered in the Court below.

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The only jurisdiction the Court had was that given to it by the consent of the parties.

38 section of Supreme and Exchequer Court Act and *Mersey Docks Trustees v. Jones* (1), especially the judgment of *Erle, C. J.*, were referred to.

[THE CHIEF JUSTICE to Respondent's Counsel:—If this point is against you, can you maintain the judgment?]

Mr. *Ferguson* for Respondents:—It was the Court ordered the evidence to be taken and we could not ask for a nonsuit. The judgment of the Court by *McCully, J.*, directing further evidence, was given on the authority of *Mersey Docks Trustees v. Jones*. If this is not deemed sufficient the judgment cannot be maintained.

1st Feb., 1877:—

The judgment of the Court was delivered by

THE CHIEF JUSTICE:

The appeal must be allowed with costs on the ground taken by the appellant in his factum, that the Court below had no power to add any fact to the special case without consent of the parties, though such fact may have been ascertained by an order of a Judge, such order having been made against the consent of the party now objecting. We, therefore, allow the appeal and adjudge that the rule for judgment in the Court below be charged, without prejudice to any application the parties, or either of them, may be advised to make in that Court as to the disposal of the special case or otherwise.

*Appeal allowed with costs.*

Attorney for Appellant: *S. McDonnell*.

Attorney for Respondent: *Peter Lynch*.

(1) 8 C. B. N. S., 114.