1931
Oct. 22.

PETER LAVISSIERE .....CLAIMANT;

VS.

HIS MAJESTY THE KING.....RESPONDENT.

Practice—Application for new trial—Court of Appeal—Exchequer Court Act, Sec. 81—Rule 174

Held that when in any action or proceeding before this Court final judgment has been pronounced, an application for new trial cannot be made to a Judge of the Court but should be made to the Court to which an appeal lies from the judgment of this Court.

2. That a final judgment of this Court becomes effective at and from the day on which such judgment is pronounced.

MOTION by the claimant herein for new trial and permission to adduce new evidence.

The motion was heard before the Honourable Mr. Justice Maclean, President of the Court, in Chambers, at Ottawa.

E. G. Gowling for claimant.

J. F. MacNeill for respondent.

After hearing parties, the following judgment was rendered.

THE PRESIDENT, now (October 22, 1931), delivered the following judgment.

This application, as I read the notice of motion, seeks nothing less than an order for a new trial.

I delivered final judgment in this case on the 11th day of July last. If it were conceded that I am not *functus officio,* and have jurisdiction to grant an order of this kind under the law and practice of the Court, I would not be disposed to do so upon the facts set out in the affidavits heard upon the motion. So that even if I had jurisdiction to allow the motion I should dismiss it on the merits.

On the hearing of the motion I entertained no doubt about the failure of the application on the merits. But I was pressed by counsel for both parties to give them the benefit of my opinion as to the jurisdiction of a trial judge in this Court to grant a new trial after final judgment pronounced by him.

A number of early cases decided in this Court were cited to me, but after examining them I find that they were decided at a time when, under the Rules of Court, it was open to a trial judge sitting in this Court to grant such a motion upon a proper case being made therefor. This observation applies to the cases of *Humphrey* v. *The Queen* (1) and *DeKuyper* v. *Dulken* (2), as noted in the second edition of Audette's Practice at pages 480-1, which were strongly relied on by Mr. Gowling.

On referring to the case of *The General Engineering Company* v. *The Dominion Cotton Mills* (3), I find that the late Mr. Justice Burbidge in the last-mentioned case distinguished the two earlier cases from the case then before him, for the reason that in the *Humphrey* case no final judgment had been pronounced, and the effect of his order there was to reopen the trial before judgment; while in the *DeKuyper* case the motion was to allow a Commission to take further evidence in respect of a matter which was left open to both parties for the production of further evidence. In the *General Engineering Company's* case Mr. Justice Burbidge refused the application to reopen the case after the trial and argument but before judgment. So that none of these cases support the present application.

Then, again, as I have pointed out, the rule of practice that was in force at the time that these cases were decided has been rescinded, and there is no provision in the present practice for the judge at trial in this Court to order a new trial. It is true that under the provisions of Rule 2 of the Practice now in force, where such rules do not expressly provide for a particular matter, the practice and procedure at the time in force in similar suits in His Majesty's Supreme Court of Judicature in England is invoked. On turning to the last edition of *The Annual Practice* in the English Court, I find in Order XXXIX the following provision:

> 1. Except as hereinafter provided every application for a new trial or to set aside a verdict, finding, or judgment where there has been a trial with or without a jury shall be made to the Court of Appeal.

So far as this Court is concerned there is nothing in any subsequent portion of Order XXXIX which would enable

(1) Decided—January 9, 1891. (2) Decided June 26, 1893.
(3) (1889) 6 Ex. C.R. 306.

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a Judge of this Court to make an order for a new trial in a case in which he has pronounced final judgment. That such should be the law of the Court seems to me to be eminently proper. It realizes the wisdom of the rule, *Interest reipublicae ut sit finis litium,* as expounded in the leading case of *Marriott* v. *Hampton* (1).

There were certain English cases cited by counsel for the Claimant to show that if the old rule enabling the trial judge in this Court to order a new trial was still in force the motion could have been entertained because my judgment, though pronounced, had not been entered by the Registrar. That is an entirely technical point which rests upon a difference in the procedure in the English Courts and this Court with regard to the moment when the judgment becomes operative. I am inclined to think that under the provisions of section 81 of the Exchequer Court Act, R.S., 1927, c. 34 and of Rule 174 of the present practice, a final judgment in this Court becomes effective at and from the day on which such judgment is pronounced.

Judgment accordingly.