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DOMINION BUILDING CORP. LIMITED. CLAIMANT;  
 AND  
 HIS MAJESTY THE KING.....RESPONDENT.

1927  
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 Jan. 27.  
 Feb. 3.  
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*Crown—Reference by Minister—Exchequer Court—Withdrawal*

*Held*, that where a Minister of the Crown has referred a claim to the Exchequer Court under the provisions of section 38 of the Exchequer Court Act, and the same has been duly filed in the said court, the court is then seized with the matter, and the reference cannot thereafter be withdrawn by the Crown from the Court without an order of such court.

MOTION by the claimant that the allegations of its Statement of Claim be taken *pro confessis*, respondent not having filed any defence.

Motion heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

(1) [1880] 16 Ch. D. 93, 95, 98.      (2) [1914] 2 Ch. D. 129.

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*G. H. Kilmer, K.C.* and *R. V. Sinclair K.C.* for claimant.

*Lucien Cannon K.C.*, Solicitor General, for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now, this 3rd day of February, 1927, delivered judgment:—

This is a motion for judgment on behalf of the claimant, upon the ground that the respondent is in default in filing a Statement of Defence, in a proceeding referred to this court under the provisions of sec. 38 of the Exchequer Court Act, by the Acting Minister of Railways, which was later sought to be withdrawn by Order in Council. In opposition to this motion, one important question at least has been raised which will justify I think a brief discussion of the matter. The principal point for decision is whether the Crown may by Order in Council withdraw a Reference made to this court.

The Solicitor General, appearing on the motion on behalf of the respondent, urged that an Order in Council having been passed for the purpose of withdrawing the Reference, and before the filing of the Statement of Claim, that no further proceedings could be taken under the Reference, which was now at an end; that it was improperly made, inasmuch as it was not made by the Minister of Customs and Excise, as well as by the Minister of Railways and Canals; that it was void upon the ground that the same should have been made by the Minister of Justice; and that the Reference was also void because the amount of damages claimed in a statement deposited with the Acting Minister of Railways and Canals prior to the making of the Reference, was substantially smaller than that claimed in the Statement of Claim.

It would appear from the opinions of constitutional historians and lawyers, that since the independence of the judges was secured by the Act of Settlement, 12-13 Will. III, c. 2, sec. 3 (7), no peremptory interference by the Crown or the executive with proceedings in the courts will be tolerated. It is not open to the Crown, or any of its Ministers, to remove a record from the court unless the appropriate procedure of the court for that purpose is invoked, as it would be by a subject or citizen of the coun-

try. That principle, it seems to me, was acutely recognized by the Canadian Parliament, when it thought it necessary to amend the Petition of Right Act, in 1923, (13-14 Geo. V, ch. 25), to enable the Crown to withdraw a Fiat when induced by misrepresentation or concealment on the part of the petitioner of any material fact, which should have been truly stated for the Minister's information in considering the petition.

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Very little authority is to be had on the subject, but I think what was said by Lord Langdell in the Petition of Right case of *Ryves v. Duke of Wellington* (1), at page 600, is extremely pertinent and weighty in this connection.

I am far from thinking that it is competent to the King or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a Petition of Right. The form of the application being, as it is said, to the grace and favour of the King, affords no foundation for any such suggestion.

It may also be observed that the action of Lord Holt in the celebrated case of *Ashby v. White* has some bearing on the question. In that case when the Speaker of the House of Commons came into the Court of King's Bench to order the judges of the court to refrain from inquiring into a case arising out of an election to the House of Commons, Lord Chief Justice Holt ordered the Speaker to withdraw his pretention on pain of commitment for contempt of court, and the case was proceeded with. The forceful language imputed to Lord Holt on that occasion has become historical (see Jennings Anecdotal History of the British Parliament (p. 46) ).

I am of the opinion that there was no authority for the withdrawal of the Reference by Order in Council, that the Reference is still effective, and that the Statement of Claim is properly before the court. Sec. 38 of the Exchequer Court Act recognizes the Petition of Right, and a Reference, as equivalent means of enabling a subject to prosecute a claim against the Crown; but if a Reference is made, then proceedings by way of Petition of Right are barred. I am not aware of any statute or other authority which enables the Crown of its own motion to withdraw a Reference, any more than it could withdraw a Fiat, and that cannot be done except under the terms of the statute amending the

(1) (1846) 9 Beavan 579.

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Petition of Right Act, to which I have already referred. The tendency in legislation has been to increase and broaden the avenues by which the subject may seek his remedies against the Crown, and to extend the discretionary powers of the executive in granting facilities to the subject for pursuing his claim against the Crown. It would seem rather extraordinary in view of the trend of developments in this direction, that Parliament should ever have contemplated the bestowal of an arbitrary power of withdrawing a Reference by the executive once it is made.

Regarding the other objections made to the motion on behalf of the respondent, and which I have mentioned, I have merely to observe that in my opinion the same can only be considered on a substantive application by the Crown to withdraw the Reference, or the same may be pleaded in the Statement of defence if filed, and considered upon the trial.

In the circumstances, I do order that if the respondent does not file a Statement of Defence on or before March 15 next, then at any time subsequent to that date, the claimant may move for judgment and to fix a date to proceed with the proof of his claim. I reserve for the present the question of costs.

*Judgment accordingly.*