BETWEEN: 1936

WALKERVILLE BREWERY LIMITED...SUPPLIANT; April 20-23.

AND 1937 June 12.

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Petition of right—Money paid under compulsion of legal process cannot be recovered.

In October, 1927, the Crown by Information filed in this Court, brought suit against the suppliant herein for the recovery of certain money for sales tax, excise tax, penalties and interest, under the *Special War Revenue Act* 1915, and amendments thereto, in respect to beer manufactured and sold by the suppliant for a period subsequent to January 1, 1924. A settlement was arrived at between the parties and the proceeding was discontinued, the settlement covering a longer period than that actually involved in the Information.

Suppliant now seeks to recover from the Crown the money paid under that settlement, together with a further sum, on the grounds that it was never liable to the Crown; that payment was procured under duress; that where payment was made it was understood between the

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parties that the money so paid would be refunded to suppliant should it later appear that it had overpaid the Crown or that suppliant was not legally liable for any of the taxes claimed in the Information.

The Court found that the money paid by suppliant was paid voluntarily and unconditionally in settlement of the suit brought against it by the Crown.

Held: That money paid under compulsion of a legal process cannot be recovered, although the defendant finds he has paid in error what he was not legally bound to pay, and the rule applies even though the process may never have terminated in a final order or judgment, and although it may have been withdrawn at the date when proceedings are taken for the recovery of the money, and although the payment was made under process.

PETITION OF RIGHT to recover from the Crown certain money paid it by suppliant for sales tax, excise tax, penalties and interest.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

S. L. Springsteen, K.C. and *J. W. Reid* for suppliant.

W. N. Tilley, K.C., A. C. Hill, K.C. and *C. F. H. Carson, K.C.,* for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (June 12, 1937) delivered the following judgment:

The suppliant is a company incorporated under the laws of the Province of Ontario, and at the material time carried on the business of a brewer at Walkerville, in the Province of Ontario. In October, 1927, the Crown filed an Information in this Court claiming from Walkerville Brewery Ltd., the suppliant here, the sum of $212,697.44 for sales tax under sec. 19 BBB, Part IV, of the *Special War Revenue Act,* 1915, and amendments thereto, in respect of beer manufactured and sold by the suppliant for a period subsequent to January 1, 1924, and also for excise tax—sometimes referred to as gallonage tax—under sec. 19 B of the same Act, and amendments thereto, in respect of the same beer and the same period; and interest and penalties in respect thereof. The *Special War Revenue Act,* 1915, as amended by later statutes, imposes the gallonage tax and the sales tax upon specified goods, including beer, manufactured in Canada. It is provided, however, that gallonage tax shall not be payable " when such goods

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are manufactured for export, under regulations prescribed by the Minister of Customs and Excise," and that sales tax shall not be payable on "goods exported," with a provision for a refund "on domestic goods exported, under regulations" similarly prescribed.

When the Crown proceeded against the suppliant, as just mentioned, there was pending in this Court a proceeding by the Crown against Carling Export Brewing and Malting Company, a corporation carrying on the business of a brewer at London, Ontario, wherein the question of the liability of that brewer for excise and sales tax, in respect of beer manufactured by it and alleged to have been exported to the United States, was to be determined; while that action was pending, Walkerville Brewery Ltd. urged upon the Crown that the Information proceeding taken against it should not proceed to trial until the final determination of the *Carling* case. That case was ultimately determined in February, 1931, favourably to the defendant in the action, the Carling Export Brewing and Malting Co., by the Judicial Committee of the Privy Council (1), on grounds which I shall later mention. In the meantime, a settlement was arranged between the Crown and Walkerville Brewery Ltd. in respect of the amount claimed by the former in the Information proceeding taken against the latter, and the Information proceeding, which had then been set down for trial, was discontinued; that settlement, I understand, covered a longer period than that actually involved in the Information. By this petition the suppliant seeks to recover the moneys paid under the terms of the said settlement, $260,000, and a further sum, upon the grounds that it was never liable for the payment of either the gallonage or the sales tax claimed by the Crown in the said Information; that payment of the said sum was procured under duress; and further, that when such payment was made it was upon the condition that if it later transpired that the suppliant had overpaid any moneys to the Department of National Revenue in that connection, or if it were established that the suppliant was not legally liable for any of the taxes it might pay in settlement of the claim set forth in the said Information, the same would be refunded. It is in these circumstances, and upon the

(1) (1931) A.C. 435.

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facts which I have mentioned generally, that the suppliant by this petition now seeks to recover the moneys which it thus paid to the Crown.

It is the contention of the Crown that the beer in question was not manufactured or sold for export to the United States, and that the same was not in fact exported, within the spirit and meaning of the Act; that even if the beer were exported, the true nature of the suppliant's dealings with the same, and that of the alleged United States importers, did not entitle it to the benefit of the statutory exemptions; and that the moneys here sought to be refunded were paid voluntarily and unconditionally in settlement of the action for their recovery, and for taxes then due and payable by the suppliant, and are not now in law recoverable.

It will be convenient first to refer more specifically to the statutory provisions relevant to the controversy. The provisions as to gallonage tax, so far as material, are as follows:

19B 1. (*b*) There shall be imposed, levied and collected upon all goods enumerated in schedule II to this Part, * * * * when any such goods are manufactured or produced in Canada and sold * * * *, the rate of excise tax set opposite to each item in said schedule II.

The said schedule mentions "ale, beer, porter and stout, per gallon * * * twelve and one-half cents," and also cigars and carbonic acid gas. A proviso to the section mentioned is:

Provided that such excise tax shall not be payable when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise.

In the case of the sales tax, which is imposed by s. 19 BBB, subsec. 1, of the same statute as amended, the relevant provision is as follows:

In addition to any duty or tax that may be payable under this Part, * * * there shall be imposed, levied and collected a consumption or sales tax of five per cent on the sale price of all goods produced or manufactured in Canada * * * which tax shall be payable by the producer or manufacturer at the time of the sale by him; * * *. Provided that the consumption or sales tax specified in this section shall not be payable on goods exported.

In the case of the sales tax there is provision for a refund under subsec. 10:

A refund of the consumption or sales tax may be granted on imported goods on which customs duties have been refunded on exportation; and a refund of the said tax may be granted on domestic goods exported under regulations prescribed by the Minister of Customs and Excise.

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This probably would be a convenient and appropriate stage at which to refer to the decision of the Privy Council in the *Carling* case, and which decision plays an important part in one aspect of this case. It was held by their Lordships that an export of beer to the United States was within the exempting provisions although the import was contrary to the law of that country, and that the prohibition laws of the United States affected only the quantum of proof of export; that the exemption from the gallonage tax, like that from the sales tax, applied only to goods actually exported and that it operated although no regulations had been prescribed; that beer sold to a purchaser in the United States was within the exemptions where the same had been consigned to him at a Canadian port, and was proved to have been shipped from there to the United States in smaller consignments, mostly to sub-purchasers, and at an advanced price. The most important evidence in support of proof of export was held to be found in documents relating to the consignments of beer, particularly the bills of lading and the customs forms known as B.13's, and the clearances through customs of the boats carrying the beer from Canadian ports to the United States. Other facts relied upon by their Lordships, in proof of export, were that the beer had been manufactured for export; that the goods were sold under the arrangement that the same were to be exported, and that the Carling Company saw to it that they were so exported. The beer in question was manufactured in London, Ont., where it was put on rail, consigned to the United States purchasers at Windsor, Ont., or one of the adjacent ports on the Canadian border, and from thence shipped to the United States by boats acting on behalf of the sub-purchasers, after entry outwards at and clearance by customs. The practice at the port of export was to split up the bulk consignments into small parcels to suit the capacity of the boats, or the requirements of the sub-purchasers, and accordingly to alter the B.13's which had accompanied the rail shipments from London; in these latter forms the Carling Company certified that the particular parcel was being delivered by them to the particular boat for exportation to the United States, and they were presented to and stamped by the customs officer at the port of exit. Boats acting on behalf of the sub-purchasers

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paid the purchase price, on shipment of the beer at the port of exit, but the designated consignees, Grandi or Savard, were usually extended credit by the Carling Company.

I do not propose reviewing in any great detail the evidence produced in proof of the export of the goods in question by the suppliant. The salient facts are much the same as in the *Carling* case. The goods were manufactured by the suppliant, and sold and consigned to one Clemens of Detroit, U.S.A., the same usually being ordered by Clemens by letter. Generally, the goods, packed in bags, were conveyed from the suppliant's brewery at Walkerville, by its own trucks, either directly to a boat, a United States boat, at some dock at Walkerville, or some other Canadian frontier port in that section of Ontario, or, the goods were temporarily warehoused on a dock pending the arrival of shipping facilities from the United States. Sub-sales were made by Clemens in the United States, as in the *Carling* case, and the quantity of beer carried by any boat clearing from a Canadian port would vary according to its carrying capacity, or according to the quantity of the individual sub-sale. In most instances the goods, as shipped from the brewery, were delivered at the Canadian border port to a company known as the Bermuda Export Company, which concern acted as forwarding agents not only for the suppliant but for other Canadian brewers, and during the period material in the *Carling* case it acted in a similar capacity for the Carling Company. The prescribed customs export entry form, B 13, required in the case of the exportation of domestic goods not subject to "Export, Customs or Excise Duties," accompanied each truck shipment from the brewery to the dock; usually, as I understand it, this B 13 would be held by a representative of the suppliant at the port of export, and fresh B 13's would be issued covering the quantity of each boat shipment, all this being done to the evident satisfaction of customs. After each shipment was loaded aboard a boat at the port of exit, a B 13 applicable to the same would be lodged at the nearest customs office, and by customs duly stamped after examination of the cargo; the stamp would indicate the date and place of exportation. Further, when the cargo was placed on board a boat, a report outwards signed by the master, stating the suppliant to be the shipper of the

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goods and a port in the United States to be the destination, and the nature and quantity of the cargo, would be entered at customs, and on this report a clearance certificate would be granted by customs to the master.

In the *Carling* case, their Lordships of the Judicial Committee discussed the construction of the words: "Provided that such excise tax shall not be payable when such goods are manufactured for export," in the proviso to s. 19 B, subsec. 1, relative to the excise tax, and they held that

> the words used necessarily imply not only, as the bare words might suggest, that the goods are manufactured and sold with an intention of export, but that they must, in fact, have been exported before the benefit of the exemption can be obtained.

The tax, they stated, is imposed "where goods are manufactured or produced and sold in Canada," and the words "and sold" must be held to be implied in the proviso, though the words are not repeated here. They said:

> It is a possible view that subsequent export of the same goods by a purchaser, quite independently of the manufacturer, would sufficiently comply with the terms of the proviso, but their Lordships prefer the view that the tax being levied on sale by the manufacturer, it is for the latter, in claiming exemption, to prove that under the arrangement for sale the goods were to be exported, and that he secured that that condition was in fact carried out.

And their Lordships were of the opinion that "a similar construction applies in the case of the consumption or sales tax," but in respect of subsec. 10 of sec. 19 BBB, which relates to a refund of the sales tax "on domestic goods exported," they expressed the view that this would "apply to goods which, though not manufactured for export in the sense above described, are subsequently exported"; this I construe to mean that in the case of the sales tax, the goods exported need not have been specifically "manufactured for export."

It would seem therefore that, in order to obtain the exemption in respect of goods liable to the gallonage tax, it is necessary not only that they be manufactured and sold with the intention of export, but that before the benefit of the exemption can be claimed, the goods must, in fact, have been exported, or as stated by their Lordships in the *Carling* case, it is necessary in claiming exemption, to prove that "under the arrangement for sale the goods were to be exported, and that the manufacturer saw to it that that condition was in fact carried out"; in respect of goods liable to the sales tax it would not appear to be

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necessary that the goods be manufactured for export. It is a strange provision that makes the exemption in respect of the excise tax available only in the case of goods manufactured and sold with an intention of export; in the case of cigars, for example, it would seem that a wholesale dealer and exporter in that article, who was not the manufacturer, would not be entitled to the exemption, even if in fact he exported such goods, which might place him under a serious disadvantage with exporters from other countries, into neutral markets. The language of their Lordships to the effect that the manufacturer, in claiming exemption, must prove that under the arrangement of sale the goods were to be exported, and that he must see that they were in fact exported, occasion no particular difficulty here because the manufacturer and exporter was one and the same person; the difficulty which would arise in the case where one other than the manufacturer was the exporter does not therefore appear here. No difficulty, I think, arises concerning the requirement that when the goods are sold it must be arranged that they were to be exported. If goods are sold to a person in the United States, for export to that country, then it must be presumed that the arrangement was that they were to be exported, and I can hardly think that the use of the words "understanding," or "arrangement," as to export, can add to or take from that presumption. The requirement that the manufacturer, who sells for export, must see that the goods are in fact exported is not intended to mean that such person must accompany the goods to the importing country, or, in this case, that he should watch them during their entire journey to United States territory. I think it is clear from the language of their Lordships' judgment that all that is expected of the exporter is that he should put in motion the necessary transportation agencies and comply with the customs requirements regarding exportation of goods from Canada, in carrying out the export, and this, I think, would be done in a case of this kind by seeing that the goods left the brewery, and were delivered aboard a boat or boats which cleared for the United States, and that all the legal requirements in respect of shipping and customs documents pertaining to exports were observed.

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In any event, the taxes in question having been levied against and paid by the suppliant, the burden rests upon it to prove that the beer, against the sale of which the taxes were levied and paid, was exported, if it is to recover the taxes so paid. The facts disclosed in this case alone would indicate that no insurmountable obstacle was likely to be encountered, at the period in question, in landing beer in the United States from the section of Canada with which we are here concerned, and abnormal profits were the prize to be won by those willing to engage in that class of trade; the quantity of beer which the suppliant alone alleges to have exported to that country, during the period in question, was quite substantial in volume. If that class of trade at and about the material time here, constituted an "export" under relevant Canadian statutes, and it has been so held by binding authority, then it appears that this "export" trade was carried on in a very substantial way; those about to engage in such a venture did not entertain the idea of participating in a series of magnificent failures, though perhaps realizing there was some risk to be assumed. It seems to have been a business very openly conducted. Accordingly one must not approach the question of proof of export in cases of this kind with the idea that successful export to the United States was something extremely difficult, if not impossible of accomplishment, and I am not disposed to attach any weight to the suggestion that all the motions of export made by the suppliant were mere simulations of export, and that its real and ultimate intention was to land and dispose of the beer in Canada. In the main I am satisfied that the goods in question were sold by the suppliant for export, that it saw the same were exported, and that in fact they were exported, within the meaning of the *Carling* case. The evidence that the goods were manufactured for export, or with the intention of exporting the same, is not very strong, and there is no documentary evidence, so far as I recall, supporting such fact or intention. I would be as readily disposed to believe that the beer was manufactured with the intention of exporting the same as the evidence stands, as if there were evidence of a written contract whereby Clemens undertook to purchase from the suppliant its entire output of beer during the period in question; I would be disposed to sus-

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pect that such documentary evidence was manufactured for the purpose of this case. I cannot believe that there could be any expectation of marketing lawfully for consumption in Canada, at the material time, such quantities of beer as the suppliant was manufacturing, and it would be unlikely that the same would be manufactured solely for unlawful sale in Canada. I have little hesitation in believing that the beer in question was manufactured for export, or with the intention of exporting the same; therefore I would be disposed to give the suppliant the benefit of any doubt that might exist as to this fact.

There is this, however, to be added to what I have just said. It was shown by quite a few witnesses that certain quantities of beer manufactured by the suppliant were sold to Canadians, chiefly residents of Windsor, Ont., from the so-called export docks at frontier ports, and by them resold in Canada. It was established in the *Carling* case that a sale or sales of the same character had been made by the Carling Company to one Bannon, and by him resold in Canada, and Bannon was one of the persons who purchased a quantity of the suppliant's beer, within the material period, from one of the docks from which the suppliant's beer was being exported. In the *Carling* case, the learned trial Judge held that the Carling Company was liable for any tax upon sales of beer diverted apparently from the shipments consigned for export, and this disposition of such irregular sales was not varied by the judgment of the Privy Council. In the event of an appeal from this judgment, and it being held that the suppliant was entitled to succeed in its petition, deductions from the amount sought to be recovered by the suppliant would have to be made, in my opinion, on account of the irregular sales which I have mentioned. How, or by whom the deductions should be ascertained I need not now delay to discuss; that would be determined either by the appellate court or the case would be remitted back to this Court for the determination of this point. If, therefore, I had to dispose of this case solely upon the question of fact as to whether the goods were manufactured and sold for export, and were in fact exported, I would feel obliged to sustain the contention of the suppliant. If the suppliant were here being sued for the

taxes in question, as in the *Carling* case, I would feel obliged to hold that the Crown must fail in its action.

The really important question, in my opinion, for decision here is whether the moneys in question, which the suppliant now seeks to recover, were paid to the Crown voluntarily in settlement of the suit brought against the suppliant, or whether the same were paid under some form of duress, or upon the condition that in a certain event, yet to be mentioned, they were to be refunded.

After the action brought against the suppliant for the recovery of the taxes mentioned was set down for trial, for June 25, 1928, to be exact, counsel acting on behalf of the Crown, Mr. Rowell, was informed by the Minister of National Revenue that certain proposals for settlement had been submitted on behalf of the suppliant and he was instructed to enquire into certain matters relative thereto, and to report to the Minister. Mr. Rowell then, through an auditor, caused an examination to be made of the suppliant's books concerning certain items for which the suppliant was claiming credit, and possibly other matters, and in due course he reported to the Minister. Later, Mr. Rowell was informed that a definite proposal of settlement had been made and he was asked to advise if he would recommend such a settlement; in the end Mr. Rowell recommended a settlement of the amount claimed in the action, up to March 31, 1928, in the lump sum of $260,000, without interest and penalties, and without costs to either party, and he testified that he had never heard of any other condition attaching to the settlement.

The complete terms of settlement it seems were concluded between the Department of National Revenue and the suppliant. On June 7, 1928, the suppliant wrote the Minister of National Revenue as follows:

> Confirming the verbal arrangement arrived at between your Department and our Mr. Thistle, we herewith enclose you our cheque for $200,000. The understanding is that we are to send you a further cheque for $60,000 within sixty days. The last-mentioned cheque, together with the cheque enclosed, is in full settlement of the claim contained in the Information dated 27th of October, 1927, and also other sales and gallons tax, interest and penalties up to the 30th day of April, 1928, and it is understood that the action commenced by the Crown is to be discontinued without costs and that upon payment of the full amount of settlement of $260,000, your Department is to give us a full release of all claims up to the 30th of April, 1928.

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This letter was acknowledged by the Commissioner of Excise in the following terms:

I have for acknowledgment your letter of the 7th instant, enclosing cheque for $200,000 to be applied against arrears of sales and gallonage taxes due by your company.

It is understood that a further payment of $60,000 is to be made within sixty days, which will complete settlement of all sales and gallonage taxes and interest up to the end of March, 1928.

In your letter now under reply, you ask for a full release of all claims by the Department up to the end of April, 1928, but it was distinctly understood with the Honourable N. W. Rowell K.C., that payment of $260,000 would complete the matter until the end of March, this being the date to which the accounts of your company were recently audited. The records for the month of April were not complete at the time Auditor G. N. Leaf was at your office, and consequently no assessment was made for this month.

I would be glad to have you confirm the understanding that after the payment of $60,000 is made, settlement is completed for a period ending 31st March, 1928.

In the latter part of August, 1928, the suppliant requested an extension of sixty days for the payment of the $60,000 instalment; this request the Commissioner of Excise at first refused but apparently an extension was later granted because payment of this instalment was not made until October, 1928. The payment of that instalment was accompanied by a letter, dated October 13, 1928, addressed to the Minister of National Revenue by the suppliant, and which was as follows:

We are enclosing herewith our cheque in the amount of $60,000 in full payment of all claims of your Department against this company in respect to sales and gallonage taxes, this payment being the balance of the $260,000 amount agreed to during the early part of the year.

Kindly acknowledge receipt of this settlement and oblige.

That concluded the payments to be made under the terms of the settlement of the action brought against the suppliant by the Crown.

The dispute as to whether the settlement included any taxes accruing due and payable for the month of April, 1928, was finally settled by the suppliant paying, as I understand it, the further sum of $8,338.32. The month of April, 1928, did not fall within the period covered by the Information proceedings taken against the suppliant. During the negotiations between the parties in respect of this dispute, and which negotiations covered a considerable period, the suppliant was more than once informed in writing that legal action would be taken for the recovery of this claim, and possibly others, unless paid. While the suppliant for

a time was contesting any liability for the April claim, on the ground that it was included in the settlement referred to, still, in the end an agreement, both as to the liability for and the amount of the claim, was ultimately reached, and, the amount was unconditionally paid in June, 1930, and apparently without any formal protest. It is true that in April, 1930, the suppliant was advised that its licence as a brewer would not be renewed unless certain payments were made on account of taxes then claimed to be due the Crown, and this related either to the April claim, or to some claim or claims arising later, or both, exactly which is not quite clear to me. In point of fact the licence was shortly afterwards renewed, and so far as I can see the Crown would have been within its legal rights, at the time, in refusing a renewal of the licence. This incident cannot in my opinion be construed as constituting duress. The suppliant's letter accompanying the remittance in settlement of the April claim, and further balances, is dated June 16, 1930, and is as follows:

> We are forwarding you herewith our cheque for Six thousand and Seventy-one Dollars, and Eighty-two Cents ($6,071.82), being payment in full for all claims in respect to sales and manufacturers taxes, up to, and including September 30, 1929, as per arrangements made.

This settlement covered the period from April 1, 1928, to September 30, 1929, and it is not necessary to enquire just how the amount was reached. But, as I understand it, the amount paid at one time or another in settlement of the April claim amounted to $8,338.32.

The suppliant also claims that the payments in question were made upon a certain condition, which had its origin in negotiations or understandings outside that already referred to, and which were participated in by Mr. Thistle on behalf of the suppliant, the Minister of National Revenue, and Mr. Odette, the representative of the federal electoral division in which was located the suppliant's place of business.

After a conference between Mr. Odette and the Minister of National Revenue the former wrote to the latter on August 3, 1928, as follows:

> Confirming my conversation with you yesterday regarding payment of arrears of sales and gallonage taxes by the Walkerville Brewery Company, Walkerville, on which a final payment of $60,000 is due from the above company, I believe on the 8th of this month. The President of the company is anxious to know what position the company will be in, in the

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event of the Courts deciding that sales and gallonage taxes are not payable on exported goods.

I stated to him that your Department did not desire to collect taxes that were not justly due and that in the event of such an occurrence as above mentioned, or in the event of the Walkerville Brewery over-paying, that they would be in a position to file claim with your Department for refund.

I understand that this is your attitude in the matter, and I would thank you to drop me a line confirming same, so that I can phone the Walkerville Brewery Company previous to the 8th instant, so that their check may go forward to you promptly.

It will be observed that this letter was considerably subsequent to the date of payment of the $200,000 instalment.

The reply of the Minister to this letter was as follows:

You are right in your understanding as to my attitude. We do not desire to collect any taxes not properly due the Crown, and if it can be shown that any overpayment has been made by the company in question, or if it is established that they were not liable for any tax that they may have paid, you can assure them that refund will be made.

It is chiefly upon this letter from the Minister to Mr. Odette that the suppliant, as I understand it, seeks to base the contention that the payments in question were made conditionally. The correspondence referred to does not even remotely suggest that the payments made or to be made were conditional upon any future action the Minister might take. The payments, and the question of a refund, are entirely separate matters. Further, the Minister's letter contains no enforceable agreement to refund the moneys paid, and, in any event, the Minister could not in this way bind the Crown; whatever be the true implications of that letter they remain as they were when the letter was written; that letter, it seems to me, is something that cannot be considered in this case.

An involuntary payment of money under pressure may be recoverable, but as a general rule money paid in satisfaction of a claim for the recovery of which an action is pending cannot be recovered, even though it should afterwards appear that the claim was unfounded. By some it has been stated that a distinction must be made between the compromise of an action and the payment of a claim on the ground, that in the former case the defendant promises to pay a sum of money in consideration of the plaintiff discontinuing his action; it is a contract, with the ordinary incidents of contract, and money paid is paid under the contract and not by compulsion of legal process. It appears to be the general rule that where money has been paid

under compulsion of a legal process it cannot afterwards be recovered, although the defendant finds that he has paid in error what he was not legally bound to pay. It is against public policy, in the absence of fraud, to allow a matter to be reopened after the law had been called in to effect a settlement and a payment has been made under the pressure of the law. The rule that money paid under compulsion of legal process cannot be recovered applies although the process may never have terminated in a final order or judgment, and although it may have been withdrawn at the date when proceedings are taken for the recovery of the moneys, and although the payment was made under protest and that the payer reserved all his rights. In *Moore* v. *Vestry of Fulham* (1), Lord Halsbury discussing this principle stated:

> The principle is based upon this, that when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action.

Lord Halsbury in his judgment refers to such cases as *Milnes* v. *Duncan* (2); *Hamlet et al.* v. *Richardson* (3); see also the judgments of Lindley L.J. and Smith L.J. in the same case, and Bray J. in *Clydesdale Bank Ltd.* v. *Schroder & Co.* (4). These cases seem to me to be conclusive against the suppliant as to the recovery of the payment of $260,000; as to the balance, I do not think it can be said that the payment was made under any form of compulsion, or conditionally. Accordingly, I do not think it necessary to discuss any other grounds of defence raised by the Crown.

In the state of facts, and the law, relative to the payment of the moneys here sought to be recovered, it is my conclusion that the suppliant must fail, and its petition is dismissed with costs.

Judgment accordingly.

(1) (1895) 1 Q.B.D. 399.
(2) (1827) 6 B. & C. 671.
(3) (1833) 9 Bing 644.
(4) (1913) 2 K.B.D. 1 at p. 5.