

HIS MAJESTY THE KING.....PLAINTIFF;

1928
March 2.

v.

THE COSGRAVE EXPORT BREWING }
CO., LTD. } DEFENDANT.

AND

HIS MAJESTY THE KING.....PLAINTIFF;

v.

JOHN LABATT, LIMITED.....DEFENDANT.

Practice—Crown—Information—Set-off—Fiat—Jurisdiction

The Crown by its information claimed that the defendants were indebted to it for certain duties and asked for judgment accordingly. By its answer to said information defendant set off a claim to recover certain other duties that had been paid to the Crown, and which were absolutely distinct from what was claimed by the information.

Held, that the set-off and counter-claim confer definite and independent remedies upon a defendant against the plaintiff, and are two separate claims or causes of action, and as one cannot sue the Crown without a fiat, such set-off or counter-claim could not be pleaded by way of answer to the information. (*The Queen v. Whitehead* (1884) 1 Ex. C.R. 134 distinguished.)

2. That to allow a counter-claim or set-off the court must as a condition precedent be vested with the jurisdiction of hearing both the action and the counter-claim or set-off, and that this court has no jurisdiction to hear the counter-claim until a fiat has been given to hear the same.

MOTION by the Crown to strike out paragraph 11 from the defence in the first case and paragraph 12 from the defence in the second case.

The motion was heard before the Honourable Mr. Justice Audette at Ottawa.

F. P. Varcoe for the Crown.

George Macdonnell for the defendants.

The facts are stated in the reasons for judgment.

AUDETTE J., now (March 2, 1928), delivered judgment.

The question of set-off and counterclaim against the Crown was settled in this Court in its early days.

Dealing first with the point relied on by Mr. Macdonnell that technical objections to the pleadings after they are

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closed are excluded from consideration, this Court is not much concerned with technical objections. The Court wants to go to the pith and marrow and merits of the case, and endeavours to do justice between the parties. We have a special rule, Number 338, enacting that no proceeding in the Exchequer Court shall be defeated by any mere formal objection. That takes care of Mr. Macdonnell's last argument.

Dealing now with the matter on its merits one must bear in mind that this is a claim for duties that have not been paid but were due. Now, you want me to allow you to set off a claim to recover back some other duties that have been paid and that are absolutely distinct from what is claimed in the present action.

And coming to the case of *The Queen v. Whitehead* (1) cited by Mr. Macdonnell, I may preface my remarks by saying that this is a case of special circumstances which must be distinguished from the present one. Whilst in the present case the amounts of the claim are not mixed or interwoven with the matter set forth in the paragraph of the defence above mentioned, in the *Whitehead* case the items or amounts were inseparable.

Indeed the *Whitehead* case is a case of special circumstances, so to speak. The head-note reads as follows:

Where the dealings of the parties thereunder were so continuous and inseparable—[*Inseparable* does not meet this case, because the taxes to be paid as absolutely distinct to the taxes that have been paid long before.]—that the claims on one side could not properly be investigated apart from those of the other, the rule against pleading a set-off to a declaration for money due to the Crown did not apply, and the demurrer to said plea should be overruled.

Yet the *Whitehead* case recognizes the rule against pleading set-off against the Crown, but decides that when the amounts are so linked and interwoven that you could not deal with one part without dealing with the other you had to let in the set-off.

Under the present system of practice in England I find that set-off and counterclaim must be regarded as conferring definite and independent remedies upon a defendant against the plaintiff. They are two separate claims or causes of action. And until the fences of the prerogatives of the Crown are removed one cannot sue the Crown with-

(1) (1884) 1 Ex. C.R. 134.

out a *fiat*. That comes back to a fundamental principle. No counterclaim can be set off at common law against the Crown. The subject must proceed by petition of right.

There can be no set-off against the Crown in so far as it is a substantive course of action.

The case of *Fortier v. Langelier* (1) which also deals with a matter of this kind, holds: 1st that compensation does not take place between a debt due to the government for a direct personal tax and a debt due by the government to the person owing such tax; and 2nd, no action can be sustained against the government except by petition of right allowed by the express consent or *fiat* of the Lieutenant-Governor, and to permit a plea of compensation to be set up, would be equivalent to permitting a suit to be prosecuted against the government without such consent or *fiat*.

There is a similar decision in the case of *Côté v. Cie du chemin de fer du comté de Drummond* (2).

Juge: 1. On ne peut plaider compensation à une demande de la couronne sans avoir recours à la pétition de droit.

A *substantive cause* of action cannot be pleaded as an incidental demand or counterclaim to an information by the Crown. *Queen v. The Montreal Woollen Mills Co.* (3). The same principle was also recognized in the two cases: *Hogaboom v. The King* (4); and *The King v. British American Bank Note Co.* (5).

To allow a counterclaim or set-off the court must as a condition precedent be vested with the jurisdiction of hearing both the action and the counterclaim or set-off, and that this court has no jurisdiction to hear the counterclaim until a *fiat* has been given to hear the same; it is the *fiat* that gives the court jurisdiction to hear it.

Following the judgment of Lord Gorell, in the case of *Bow McLachlan et al v. Ship Camosun* (6), I have come to the conclusion that the real contest between the parties in the present instance, is with regard to a matter which is not a defence proper, and over which, if put forward as a claim, the Exchequer Court has no jurisdiction until a *fiat*

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(1) (1895) Q.R. 5 K.B. 107.

(2) (1898) Q.R. 15 S.C. 561.

(3) (1895) 4 Ex. C.R. 348.

(4) (1901) 7 Ex. C.R. 292.

(5) (1901) 7 Ex. C.R. 119.

(6) (1909) A.C. 597 at p. 613.

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 THE KING. is obtained to so hear the claim. The contest should be
 v. left to be settled by a cross action in a court having juris-
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 THE KING. The motions to strike out are granted and paragraph 11
 v. in the first case of the statement of defence, and paragraph
 JOHN 12 in the second case in the statement of defence, are
 LABATT, stricken out and deleted from the plea. The whole with
 LTD. costs of the application in favour of the plaintiff.

Judgment accordingly.

Audette J.
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