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Coram HENRY, J.

July 19.

THE QUEEN, ON THE INFORMATION OF }
 THE ATTORNEY-GENERAL FOR THE DO- } PLAINTIFF;
 MINION OF CANADA..... }

AND

CHARLES WHITEHEAD, HENRY }
 N. RUTTAN AND JOHN RYAN.... } DEFENDANTS.

Demurrer—Claim for timber unlawfully cut on Dominion lands—Pleading set-off against the Crown—Running accounts—Practice.

An information was filed on behalf of the Crown seeking judgment against the defendants for entering upon certain Dominion lands and cutting thereon and converting to their own use a quantity of timber and railway ties, contrary to the provisions of 46 Vic., c. 17, s. 60; and also for money owing to the Crown for dues in respect of the timber and ties so cut by the defendants. The defendants specially denied the allegations of the information, and in their 12th plea substantially alleged that the claims sought to be maintained by the Crown arose out of, and were connected with, certain contracts between them and the Crown, in respect of which the Crown was indebted to them in an amount greater than the sum claimed from them in the information; and in their 13th plea substantially alleged that the Crown was then also indebted to them in an amount of money other than that above mentioned, which last mentioned sum was larger than the amount claimed from defendants; and that, before the information was filed it was agreed between the Crown and the defendants that in consideration of the defendants forbearing to sue the Crown until their claims could be investigated, the Crown would not, before such investigation had been made, demand from the defendants, or sue them, for the claims set out in the information. It was further alleged by the defendants in their 13th plea that the Crown had never caused such investigation to be made, although they had theretofore been, and were then, ready and willing that such investigation should be had; and that the amount thereupon found due to them from the Crown, or a proper proportion thereof, should be applied by way of set-off towards payment and satisfaction of the alleged claims of the Crown.

To these pleas the plaintiff demurred on the ground that set-off cannot be pleaded against the Crown.

Held:—(1) That the rule in such a case is not to set aside the plea demurred to unless it is clearly bad.

(2) That, inasmuch as the claim against the Crown set out in defendants' 12th plea arose out of the same contracts between the parties in respect whereof the claims sought to be enforced in the information had arisen, and as the dealings of the parties thereunder were so continuous and inseparable 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 over-ruled.

(3) That, as there was no allegation to the contrary, it must be presumed that the claim set up in the first part of the 13th plea was one unconnected with, and distinct from, the transaction in respect of which the claims sought to be enforced in the information arose; and that so much of the plea as dealt therewith, being simply a matter of set-off, was bad in law.

(4) That a promise of forbearance to sue, such as that alleged in the concluding portion of defendants' 13th plea, could not be successfully pleaded in bar of an action between subject and subject, nor would such a defence be available against the Crown.

THIS was a case on demurrer.

By an information filed by the Attorney-General for the Dominion of Canada, on behalf of the Crown, the court was informed as follows:—

“ 1. That the defendants, contrary to the form of the statute in that behalf made and provided, did without authority cut and cause to be cut certain timber and tamarac trees, to wit: 16,389 lineal feet of timber and 100,000 tamarac ties upon certain lands belonging to Her Majesty the Queen, within the Dominion of Canada, and known as Dominion lands, and the said timber and ties have been removed out of the reach of the Crown timber officers, and it has been found impossible to seize the same; whereby the defendants have forfeited a sum not exceeding three dollars for each tree, which, or any part of which, they so cut, but have not paid the same.

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“2. That the said defendants, contrary to the form of the statute in that case made and provided, did, without authority, remove and carry away, and employ others to remove and carry away, certain timber and tamarac ties, to wit: 16,389 lineal feet of timber and 100,000 tamarac ties, the produce of trees belonging to Her Majesty and growing and being upon certain the belonging to Her Majesty the Queen within lands Dominion of Canada, and known as Dominion lands, and which timber and ties had been, without authority, cut on such lands, and said timber and ties have been removed out of the reach of the Crown timber officers, and it has been found impossible to seize the same; whereby the defendants have forfeited a sum not exceeding three dollars for each tree which, or any part of which, they so carried away, but have not paid the same.”

“3. That the defendants did cut and cause to be cut and carried away certain timber and tamarac ties belonging to Her Majesty the Queen, and being the produce of certain trees then growing and being upon certain lands in the Dominion of Canada belonging to Her said Majesty, and known as Dominion lands, and the said defendants promised Her Majesty the Queen to pay, and became liable to pay, the Crown dues upon the timber and ties so cut and carried away, yet they have not paid the same.”

“4. That the defendants converted to their own use and wrongfully deprived Her Majesty the Queen of certain timber and tamarac ties, to wit: 16,389 lineal feet of timber and 100,000 ties belonging to Her Majesty.”

“5. That the defendants did agree with Her Majesty the Queen, that in consideration of Her Majesty permitting the defendants to cut timber and railway ties upon certain lands belonging to Her Majesty and

known as Dominion lands, they would pay to Her Majesty the sum of one cent per lineal foot for the timber, and the sum of three cents for each tie eight feet long so cut; and Her Majesty did permit the defendants to cut, and the defendants did cut, upon the said lands, a large quantity of timber, to wit: 16,389 lineal feet, and a large number of ties, to wit: 100,000 tamarac ties, but the defendants did not pay the said sums therefor."

"6. The defendants are indebted to Her Majesty for money payable by the defendants to Her Majesty the Queen for Crown dues upon certain timber and railway ties, belonging to Her Majesty, which had been growing upon certain lands in the Dominion of Canada belonging to Her Majesty and known as Dominion lands, and which timber and ties were cut and caused to be cut and carried away by the defendants, and for money paid by Her Majesty for the defendants at their request, and for money received by the defendants for the use of Her Majesty, and for interest upon money due by the defendants to Her Majesty and forborne at interest by Her Majesty to the defendants, at their request, and for money found to be due by the defendants to Her Majesty on accounts stated between the defendants and Her Majesty."

"Whereby Her Majesty the Queen is entitled to demand judgment against the defendants:"—

"1. Judgment against the defendants for a sum not exceeding three dollars for each tree, which, or any part of which, they cut, as in the first count mentioned."

"2. Judgment against the defendants for a sum not exceeding three dollars for each tree, which, or any part of which, they carried away, as in the second count mentioned."

"3. Judgment against the defendants for the sum of \$4,000, being the Crown dues upon the timber and

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“4. Judgment against the defendants for the sum of \$10,000, being the value of the timber and ties converted by the defendants to their own use, as in the fourth count mentioned.”

The defendants, in their answer, after denying all the allegations in the information, pleaded as follows:—

“And for a twelfth plea, the defendants as to the said third, fifth and sixth counts of the said information further say, that the said alleged claims were incurred by the defendants and arose out of, and were connected with, certain contracts between Her Majesty and the defendants, for the performance of work and the erection of bridges on Her Majesty’s Canadian Pacific Railway, and for the manufacture and delivery of material for use on the said railway; and the defendants say that before the filing of the said information herein, Her Majesty was and still is indebted to the defendants in the sum of one hundred thousand dollars, and upwards, for work done and materials provided by the defendants for Her Majesty in pursuance of the said contracts, and which said sum is greater than the claims and demands of Her Majesty against the defendants mentioned in the said counts; and the defendants say that the said claims of Her Majesty against them and their said claim against Her Majesty are one continued transaction, and that the one cannot be properly investigated without the other; and the defendants say that they were always ready and willing, and they do hereby offer, that a sufficient portion of their said claims against Her Majesty should be set off and applied towards the satisfaction and payment of the said claims of Her Majesty against them, and the defendants for that purpose, pray that an account may be taken of all their said claims against

Her Majesty ; and if necessary, that the amounts found due, or proper proportions thereof, may be set off against, or applied in satisfaction of, the said claims of Her Majesty against them.”

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“And for a thirteenth plea, the defendants, as to the said third, fifth and sixth counts of the said information, further say that before the filing of the information herein, Her Majesty was and still is indebted to the defendants in the sum of one hundred thousand dollars, and upwards, as a balance for work done and materials provided by the defendants for Her Majesty, and which said amount is greater than Her Majesty’s said claims against the defendants ; and before the commencement of this suit it was agreed between Her Majesty and the said defendants that, in consideration of the defendants forbearing to sue Her Majesty for the said claims until Her Majesty’s officers should investigate the said claims of the defendants against Her Majesty, Her Majesty would not, until such investigation by Her Majesty’s officers of the defendants’ said claims, demand from the defendants, or sue them, for the said alleged claims in the said counts mentioned, and that after such investigation of the defendants’ said claims, the amount found due to the defendants from Her Majesty on such investigation, or a proper proportion thereof, would be applied by Her Majesty towards satisfaction and payment of Her Majesty’s said alleged claims in the said counts mentioned ; and the defendants say that Her Majesty’s officers did not, before the filing of the information, nor have they yet, investigated the said claims of the defendants against Her Majesty, and that the defendants, in pursuance of the said agreement have not sued Her Majesty for their said claims against Her Majesty, or for any part thereof, and the same are still unpaid and outstanding, and Her Majesty is still indebted to the

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defendants therefor in the sum of one hundred thousand dollars, and upwards, and the defendants say that they were always ready and willing, and they hereby offer, that their said claims against Her Majesty should, in pursuance of the said agreement, be investigated and the amount found due to the defendants therefor, or a proper proportion thereof, applied towards satisfaction and payment of the said alleged claims of Her Majesty in the said counts mentioned; and the defendants now pray that an account may be taken by this Honourable Court of all such accounts, respectively, and that the sum, or a proper proportion thereof, respectively, may be set off, one against the other, so that right may be done."

To these two pleas a demurrer was filed on behalf of the Crown, as follows:—

"1. As to the twelfth plea:—

"Set-off cannot be pleaded against Her Majesty, and the said plea, while admitting that the defendants are liable to Her Majesty, shews no defence to the claim.

"2. As to the thirteenth plea:—

"That the said plea amounts to a plea of set-off, which cannot be pleaded against Her Majesty, and the said plea while admitting that the defendants are liable to Her Majesty, shews no defence to the claim."

The demurrer was argued before Mr. Justice Henry.

Hogg in support of demurrer.

O'Gara, Q.C. *contra*.

HENRY J. now (July 19th, 1884) delivered judgment.

The demurrer in this case was argued before me. It was to the twelfth and thirteenth pleas. The action was brought by information. The first count charges that the defendants, without any authority, cut and caused to be cut, timber and railway ties upon certain lands belonging to Her Majesty, within the Dominion of Canada, known as Dominion lands.

The second count charges that the defendants removed and carried away certain timber and railway ties, the produce of trees belonging to Her Majesty within the Dominion of Canada, and known as Dominion Lands.

The third is for the recovery of Crown dues, which it is alleged the defendants promised to pay on certain timber and ties produced from timber growing on the Dominion lands.

The fourth is for the alleged conversion of timber and ties belonging to Her Majesty.

The fifth is to recover for certain timber and ties which Her Majesty is alleged to have permitted the defendants to cut on Dominion lands at the rate of one cent per lineal foot for the timber, and three cents for each tie eight feet long.

The sixth alleges that the defendants are indebted to Her Majesty for money payable by them to Her Majesty for Crown dues upon certain timber and ties cut and carried away by the defendants, for money paid by Her Majesty for the defendants, for money had and received for the use of Her Majesty, and for money due on accounts stated.

The defendants, in answer thereto, filed thirteen pleas I need only refer to those which have been demurred to,—the twelfth and thirteenth.

The twelfth is to the third, fifth and sixth counts of the information, and alleges that the claims of Her Majesty arose out of and were connected with certain contracts between Her Majesty and the defendants for the performance of work and the erection of bridges on the Canadian Pacific Railway, and for the delivery of materials for the railway. It further alleges that Her Majesty was indebted to the defendants for work done and materials provided by them for Her Majesty, under the contract, to a greater extent than the amount of the claims and demands of Her Majesty against them ;

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that the claims of Her Majesty against them and their claim against Her Majesty are one continual transaction, and that the one cannot properly be investigated without the other; that the defendants were always ready and willing that a sufficient portion of their claims should be set off and applied towards the satisfaction and payment of the claims of Her Majesty against them; and prays that an account may be taken of all the defendants' claims against Her Majesty in order that the amounts found due, or a proper proportion thereof, might be set-off against, or applied in satisfaction of, the claims of Her Majesty against them.

Issue was taken upon all the pleas, and, as to the twelfth plea, the demurrer is that:

Set-off cannot be pleaded against Her Majesty, and the said plea, while admitting that the defendants are liable to Her Majesty, shows no defence to the claim.

The rule in such a case is not to set aside the plea demurred to unless it is clearly bad.

The set-off provided for by the statutes in England was of independent debts or claims, but running accounts of debit and credit were treated differently. *Snell on Equity*, (7th Ed.) at page 524 says:—

As regards connected accounts of debit and credit, both at law and in equity, and without any reference to the statutes 4 Ann c. 17, sec. 11; 2 Geo. II, c. 22, sec. 13; 8 Geo. II, c. 24, sec. 4, the balance of the accounts only is recoverable; which is, therefore, a virtual adjustment and set-off between the parties. *Dale v. Sollet* (1).

The plea shows that the claims on each side were under contracts, and that they are not independent. It alleges this fact, which is admitted by the demurrer, and also alleges that the claims on both sides were one continued transaction, and that the one could not properly be investigated without the other. It appears to me that the claim of the defendants is not an independent one, but that it comes within the rule applicable to connected accounts. The contracts are not set out in the pleadings, and I have therefore no

guide on the point except what I find in the plea, by which I have been governed. Entertaining the views I have expressed, the demurrer to the plea in question must be over-ruled.

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The demurrer to the thirteenth plea is :

That the said plea amounts to a plea of set-off, which cannot be pleaded against Her Majesty, and that the said plea, while admitting that the defendants are liable to Her Majesty, shows no defence to the claim.

The first part of the plea is a plea of set-off, and as the contrary is not alleged, it must be presumed to apply to a claim independent of that for which the information was filed to recover.

The Sovereign not being named therein, is not affected by the statutes relating to set-off, and I can find no authority for a plea of set-off against the Crown. I, therefore, think the plea in question bad in that respect.

The concluding part of the plea, however, raises another issue on an alleged agreement on the part of Her Majesty to forbear bringing a suit for the claim now sought to be established, as therein stated, in consideration that the defendants would forbear to sue Her Majesty for their claims against Her, pending an investigation thereof. The consideration of forbearance to bring a suit against a third party for a stipulated period is a sufficient consideration for a promise to pay money ; but I know of no such agreement as the one here put forward ever having been successfully pleaded in bar of an action between subject and subject, nor can I conclude that such a defence is available against the Crown. I consider the plea bad also in that respect.

Demurrer to the twelfth plea over-ruled, and that to the thirteenth plea sustained, without costs on either side.

Solicitor for plaintiff : *D. O'Connor.*

Solicitor for respondents : *O'Gara, Lapierre & Remon.*