

IN THE MATTER OF THE PETITION OF RIGHT OF

1902

Jan. 15.

JAMES ROSS AND WILLIAM }
 McKENZIE } SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Customs duties—Importation of steel rails—Return of duties paid under protest—Interest—Law of Province of Quebec.

The suppliants had imported at different times during the years 1892-1893 large quantities of steel rails into the port of Montreal to be used by them as contractors for the construction of the Montreal Street Railway. The Customs authorities claimed that the rails were subject to duty, and refused to allow them to be taken out of bond until duties, amounting in the aggregate to the sum of \$53,213.54, were paid. The suppliants paid the same under protest. After the decision by the Judicial Committee of the Privy Council of the case of *The Toronto Railway Company v. The Queen* ([1896] A. C. 551), and some time in the year 1897 the Customs authorities returned the amount of the said duties to the suppliants. The suppliants claimed that they were entitled to interest on the same during the time it was in the hands of the Crown, and they filed their Petition of Right therefor.

Held, that as the duties were paid at the port of Montreal, the case had to be determined by the law of the Province of Quebec.

2. That on the particular question as to interest at issue in this case the law of the Province of Quebec is the same as the laws of the other Provinces of the Dominion.
3. That as the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought there was no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not liable for the interest claimed it could not be made liable by the institution or commencement of an action. *Lains v. The Queen* (5 Ex. C. R. 128), and *Henderson v. The Queen* (6 Ex. C. R. 39) distinguished.

Algoma Central Railway Co. v. The King (ante p. 239) referred to.

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PETITION OF RIGHT for interest upon moneys wrongfully exacted for customs duties at the port of Montreal, P.Q., and subsequently returned to the sup-
 pliants.

The facts of the case are stated in the reasons for judgment.

June 17th, 1901.

The case was heard at Ottawa.

I. F. Hellmuth for the suppliants: We submit that under the decisions of the Supreme Court of Canada and the Privy Council we are entitled to interest. In *The Queen v. Henderson* (1) the Supreme Court decided that interest was recoverable against the Crown without contract therefor, and their lordships of the Privy Council in *The Toronto Railway Company v. The Queen* (2) decided also interest should be allowed to the suppliants, who demanded it in the petition. I do not think that the case of *Page v. Newman* (3) enunciates a rule at all applicable to this case, because interest was there sought to be obtained in respect of a debt secured by a written instrument. (See the opinion of this case expressed by Lords Herschell and Watson in *London, Chatham & Dover Railway Co. v. South Eastern Railway Co.* (4). *Page v. Newman* is only authority for the proposition that where no interest is provided for upon a written instrument you cannot get interest in such a case by way of damages. In the case of *The Caledonian Railway Co. v. Carmichael* (5) Lord Westbury held that where money has been wrongfully withheld, interest is recoverable. (He also cited *Webster v. British Empire Life Ins. Co.* (6); *Marsh v. Jones* (7); *In re Metropolitan Coal Con-*

(1) 28 S. C. R. 425.

(4) [1893] A. C. 440, 441.

(2) Unreported, *quoad* this ques-
 tion.

(5) L. R. 2 H. L. Sc. Ap. 56.

(6) 15 Ch. D. 169.

(3) 9 B. & C. 378.

(7) 40 Ch. D. 563.

sumers Co.: ex parte *Wainright* (1). *In re Gosman* (2); *Attorney-General v. Partington* (3); *Rodger v. Le Comptoir D'escompte de Paris* (4); *Bower v. Mitford* (5); *Turner v. Maule* (6).

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 of Counsel.

We submit that the Crown is in the same position as the subject in respect of liability to pay interest on money wrongfully withheld.

A. Saunders followed for the suppliants, citing *Mayne on Damages* (7); *Grand Trunk Railway Co. v. The Queen* (8).

E. L. Newcombe K.C., for the respondent, relied upon the cases of *The London, Dover & Chatham Railway Co. v. The South Eastern Railway Co.* (9) and *In re Gosman* (10) as to interest. Upon the question of the non-liability of the Crown to pay damages for the withholding of moneys or property from the subject, he cited *Julien v. The Queen* (11); *Tobin v. The Queen* (12), and *Rishton v. Grissell* (13).

THE JUDGE OF THE EXCHEQUER COURT now (January 15th, 1902) delivered judgment.

For the reasons stated in the case of *The Algoma Central Railway Co. v. The King* (14), which without repeating them, I desire to make, in part, my reasons for the judgment about to be given, I am of opinion that the Crown is not liable for the interest claimed in the petition of right filed in this case.

As the duties on which interest is claimed were paid at the port of Montreal, it is contended, and I think rightly, that the case is to be determined by the

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| (1) 59 L. J. Ch. 281. | (7) 6th ed. 165. |
| (2) 17 Ch. D. 772; 29 W. R. 14 and 793; 45 L. T. N. S. 267. | (8) 2 Ex. C. R. 132. |
| (3) L. R. 4 H. L. 100. | (9) [1893] A. C. 429. |
| (4) L. R. 3 P. C. 465. | (10) 17 Ch. D. 772. |
| (5) 3 L. T. N. S. 575. | (11) 5 Ex. C. R. 238. |
| (6) 18 L. J. Ch. N. S. 454. | (12) 16 C. B. N. S. 353. |
| | (13) L. R. 10 Eq. 393. |
| | (14) <i>Ante</i> p. 239. |

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law of the Province of Quebec, but on the particular question at issue the law of that province is, I think, the same as the law of the other provinces of the Dominion.

In the case of *St. Louis v. The Queen* (1) the suppliant was allowed interest on his claim from the commencement of his action. In accordance with the rule adopted in that case interest was allowed in the case of *Lainé v. The Queen* (2), and in *Henderson v. The Queen* (3). The latter case was brought to recover the value of goods sold and delivered, and on appeal to the Supreme Court it was held by the majority of the court that the plaintiffs were entitled to interest from the commencement of the action on the amount they recovered (4). By Article 1067 of the Civil Code of Lower Canada a debtor is put in default by the commencement of a suit, or by a demand in writing, and by Article 1077 damages to consist of interest may be allowed from the time of the debtor's default. By the 9th Article of the Code it is provided, in accordance with a well settled rule that no Act of the legislature affects the rights or prerogatives of the Crown unless they are included therein by special enactment. By the 6th Article of the Code the law of Lower Canada is to be applied whenever the question involved relates, among other things, to public policy and the rights of the Crown, and in all cases specially provided for by the Code. In the case of *The Exchange Bank of Canada v. The Queen* (5), it was held that the Crown is bound by the two Codes of Lower Canada. The proposition is stated in general terms and without any qualification, but it is probable that it should be read subject to the question then under consider-

(1) 25 S. C. R. 665.

(3) 6 Ex. C. R. 39.

(2) 5 Ex. C. R. 128.

(4) 28 S. C. R. 425.

(5) 11 App. Cas. 164.

ation as a decision that in respect of the subject of priorities, which it is said is exhaustively dealt with by the Codes, the Crown is bound by them, and that in regard to other provisions of the Codes the question as to whether the Crown is bound is not concluded. But that is a matter that need not now be considered; for *Henderson's case* is an authority binding on this court that the Crown is, to the extent at least to which that case goes, bound by Articles 1067 and 1077 of the Civil Code.

In the present case, however, the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought, and there is no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not, as I think it was not, liable for the interest now claimed, it could not be made liable by the institution or commencement of an action.

The judgment is that the suppliants are not entitled to any portion of the relief sought by the petition, which is dismissed with costs.

*Judgment accordingly.*

Solicitors for suppliants: *Kingsmill, Hellmuth, Saunders & Torrance.*

Solicitor for respondent: *E. L. Newcombe.*

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