HER MAJESTY THE QUEEN .....APPELLANT;

AND

PREMIER MOUTON PRODUCTS INC. ..... } RESPONDENT.

1960
*Oct. 31
Nov. 1

1961
Mar. 27

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Excise tax—Tax paid on "mouton" under protest—Product not taxable—Petition of right to recover amounts—Whether paid under mistake of law or fact—Whether under duress or compulsion—Whether refund provisions of statute applicable—The Special War Revenue Act, R.S.C. 1927, c. 179, ss. 80A, 105(5) and 105(6) (Excise Tax Act, R.S.C. 1952, c. 100, ss. 24(1) [repealed in 1954], 46(5) and 46(6)).

The respondent company was engaged in the business of processing sheepskins into "mouton". From March 30, 1950, to January 29, 1952, it was compelled to pay excise tax on this product which was considered to be a fur under the *Excise Tax Act*. After being threatened with the cancellation of its licence, the respondent paid the tax demanded "under protest", and its cheques were so marked. In 1956, it was decided by this Court in *Universal Fur Dressers and Dyers Ltd. v. The Queen*, [1956] S.C.R. 632, that mouton was not a fur and therefore not subject to excise tax. In October 1957, by petition of right, the respondent sought to recover the moneys paid under protest. The petition was granted by the Exchequer Court of Canada. The Crown appealed to this Court.

Held (Kerwin C.J. and Abbott J. dissenting): The respondent was entitled to recover from the Crown the amounts paid as taxes.

Per Taschereau and Cartwright JJ.: The refund provisions of the *Excise Tax Act*, which refer to taxes imposed by the Act, paid or overpaid by "mistake of law or fact", did not apply since the amounts were not paid by mistake of law or fact. The evidence was clear that there was on the part of the officers of the respondent no error of law. The failure of the respondent to make an application for refund within the time limit specified in the Act was not, therefore, a bar to the present proceedings. The true reason why the payments were made under protest was that the respondent wished to continue its business and feared that it would be "closed". The payments were not prompted by the desire to discharge a legal obligation, or to settle definitely a contested claim. The pressure which was exercised was sufficient to negative the expression of free will of the respondent's officers. It flowed from the circumstances of this case that the respondent clearly intended to keep alive its right to recover the sum paid.

The consent not having been legally and freely given, an essential requisite to the validity of the payment was therefore lacking. Moreover, art. 998 of the *Civil Code* applied as the respondent, who did not owe any money to the Crown, was unjustly and illegally threatened in order to obtain its consent.

*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux and Abbott JJ.

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Per Cartwright and Fauteux JJ.: The payments were not voluntary payments, but involuntary payments made because of fear of the serious consequences threatened. Under the general law, and more particularly under art. 998 of the *Civil Code,* the respondent had the right, in the circumstances of this case, to recover the moneys paid. This right was not barred in the present instance by any of the statutory provisions of the *Excise Tax Act*. The refund provisions, contained in s. 105(6) of this Act, had no application as they apply only where the refund claimed is for moneys paid under a mistake of law or fact. Nor was s. 105(5) applicable, since the refund was not for taxes imposed by this Act but for moneys exacted without legal justification.

Per Kerwin C.J. and Abbott J., *dissenting*: The payments implied a reservation by the respondent of its right to claim repayment of the amounts paid. In the circumstances here, they also implied a doubt on its part as to its right to recover these amounts. The payments clearly fell within the terms of s. 46(6) of the Act. The amounts paid were claimed by the Crown as taxes due by the respondent, were accepted and dealt with by the Department as such, and it was not possible to limit the operation of s. 46(6) to claims for the repayment of taxes validly imposed.

Assuming that duress was raised or argued in the Court below, in any event, these payments were not so made by the respondent. The respondent paid the tax claimed in the mistaken belief that it was obliged to do so. The respondent paid the amount claimed as tax because it found it expedient to do so, and not under duress or through fear within the meaning of arts. 994 et seq. of the Code.

APPEAL from a judgment of Fournier J. of the Exchequer Court of Canada[1], granting a petition of right. Appeal dismissed, Kerwin C.J. and Abbott J. dissenting.

Paul Ollivier, for the appellant.

Roch Pinard, for the respondent.

The judgment of Kerwin C.J. and of Abbott J. was delivered by

ABBOTT J. (*dissenting*):—Respondent is a processor of sheepskins, and during a period between March 1950 and January 1952, was engaged in the city of Montreal, in processing such skins into what are known in the trade as mouton products, which in their finished state closely resemble certain types of fur such as beaver or seal.

During the period referred to, respondent paid to the Department of National Revenue, as tax claimed on the processing of sheepskins into mouton products, sums totalling $24,681. These amounts were claimed by the Department under the provisions of s. 80A of the *Excise Tax Act,*

[1] [1959] Ex. C.R. 191, 59 D.T.C. 1199.

R.S.C. 1927, c. 179, as amended (now R.S.C. 1952, c. 100, s. 24), which imposes an excise tax calculated upon the current market value of "all dressed furs, dyed furs, and dressed and dyed furs . . . dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him".

The said payments, totalling $24,681, were so paid by respondent by means of cheques bearing on the back thereof, in almost every case, such words as "paid under protest" or "tax paid under protest", and the total amount so paid is not in issue. No further objection, verbal or written, was made to payment of the tax claimed until the present proceedings were taken some five years later. These payments "under protest" implied a reservation by respondent of its right to claim repayment of the amounts paid. In the circumstances here, in my view, they also implied a doubt on the part of respondent as to its right to recover these amounts.

The circumstances under which these payments were thus made were found by the learned trial judge[1] to have been as follows:

Lorsque la requérante commença ses opérations, en 1950, elle reçut la visite de deux inspecteurs du ministère qui venaient faire l'évaluation ou l'estimation de ces marchandises pour fin d'imposition de la taxe d'accise. Il y eut discussion entre les inspecteurs et un représentant de la requérante. Ce dernier a exprimé l'opinion que les peaux de mouton n'étaient pas soumises à la taxe d'accise sur les fourrures. L'inspecteur lui aurait répondu "qu'il fallait payer cette taxe, que c'était la loi".—S'il faut payer, nous paierons *sous-protêt*." "Très bien, payez comme vous voudrez, mais payez." L'inspecteur se rappelle avoir discuté avec les représentants de la requérante, mais il ne peut se souvenir si ces derniers lui ont dit que la taxe n'était pas exigible. Toutefois, vers ce temps-là, il avait entendu dire par des personnes intéressées dans l'industrie et le commerce de fourrures que les peaux de mouton séchées, apprêtées et transformées n'étaient pas imposables.

Un autre directeur de la requérante a souvent pris part aux discussions avec les officiers du ministère. Il prétend qu'il y était question des évaluations et cotisations et de la taxe. Dès les débuts, les paiements ont été faits sous protêt parce que la requérante croyait que les peaux de mouton apprêtées n'étaient pas des fourrures et qu'elles étaient, par conséquent, non imposables. Les gens du métier partageaient cette opinion. Même les inspecteurs auraient entendu des remarques à ce sujet.

A la suite de ces discussions et après avoir été informée que ses permis pourraient être annulés si elle ne se conformait pas à la loi, la requérante décida de payer les montants cotisés, mais par chèques endossés "Taxe payée sous protêt" ou "Payé sous protêt". La requérante a produit

[1] [1959] Ex. C.R. 191 at 194, 59 D.T.C. 1199.

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une liasse de chèques comme pièce P-1, lesquels portent l'endos susdit, sauf quelques exceptions. D'ailleurs, l'intimée dans sa défense admet que le montant payé par la requérante pour taxe, du 30 mars 1950 au 29 janvier 1952, s'élève à $24,681.

In April 1953 an action—apparently in the nature of a test case—was brought in the Exchequer Court in which the Crown claimed from Universal Fur Dressers and Dyers Limited, a sum of $573.08 as taxes under s. 80A of the *Excise Tax Act,* together with certain penalties. The purpose of this litigation appears to have been to determine whether the product described as "mouton" was to be considered as a fur, and therefore subject to tax under the Act. That question was decided in the affirmative in the Exchequer Court in 1954: *The Queen v. Universal Fur Dressers and Dyers Limited*[1], but on June 11, 1956, that judgment was reversed by this Court: *Universal Fur Dressers and Dyers Limited v. The Queen*[2]. More than a year later, on October 8, 1957, respondent instituted these proceedings, to recover the amounts paid by it as aforesaid.

Before this Court it was conceded by counsel for appellant that, in view of the decision rendered in *The Queen v. Universal Fur Dressers and Dyers Limited, supra,* the respondent was not legally liable for the amounts paid by it, and the sole question in issue here is as to the right of respondent to be reimbursed the amounts so paid. The relevant statutory provision is subs. 6 of s. 46 of the *Excise Tax Act,* R.S.C. 1952, c. 100, which reads as follows:

> (6) If any person, whether by mistake of law or fact, has paid or overpaid to Her Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

The learned trial judge found that the payments made by appellant were so made in error, but that s. 46 had no application because it applied only in the case of the payment of taxes validly imposed. Relying upon the provisions of the *Civil Code* and more particularly upon arts. 1047 and 1048 he maintained the petition of right and declared respondent entitled to recover the sum of $24,681.

[1] [1954] Ex. C.R. 247, [1954] C.T.C. 78, 54 D.T.C. 1069.
[2] [1956] S.C.R. 632, 56 D.T.C. 1075.

With respect, I am unable to agree with the finding that s. 46(6) had no application. In my view, the payments made by respondent clearly fall within the terms of that section. The amounts paid were claimed by the Crown as taxes due by respondent, were accepted and dealt with by the Department as such, and with great respect for the view expressed by the learned trial judge, I am unable to limit the operation of the said section to claims for the repayment of taxes validly imposed. Moreover, I think it is clear from the decision of this Court in *The Queen v. Beaver Lamb and Shearling Co. Ltd.*[1], that no such limitation exists.

Before this Court, counsel for respondent also urged that the payments in question were made under duress and for that reason recoverable. This ground does not appear to have been raised or argued in the Court below, and I question whether it is open to respondent on the pleadings. However, in any event, I am satisfied that these payments were not so made by respondent. As found by the learned trial judge: «Sa décision de payer résulte du fait que les autorités l'ont convaincue que c'était la loi et qu'elle a craint de voir ses opérations industrielles et commerciales mises en danger.»

Whether or not mouton products were liable to tax as fur under section 80A of the *Excise Tax Act,* remained in doubt until judgment was rendered by this Court in the *Universal Fur Dressers and Dyers Limited* case, *supra,* reversing the judgment of the Exchequer Court which had held that they were so liable, and in my opinion the respondent paid the tax claimed in the mistaken belief that it was obliged to do so.

There is no doubt that the officers of the Department were in good faith in claiming payment of the tax from respondent and the trial judge so found. They were doing no more than their duty in insisting upon payment of a tax, which they believed to be exigible from respondent as well as from all other like processors. To have allowed those who were unwilling to pay, to postpone or avoid payment of the tax, while receiving payment from those who did not dispute liability, would have been manifestly unfair, since

[1] [1960] S.C.R. 505, 23 D.L.R. (2d) 513.

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it is a reasonable inference that those who paid would be obliged to try to recover the tax paid in the resale price of the finished product.

The distinction made in the common law between a voluntary payment which is not recoverable and an involuntary payment which is, does not exist in the civil law of Quebec. Under art. 1047 of the *Civil Code,* he who receives what is not due to him through error of law or of fact is bound to restore it. Generally speaking, the payment of any sum claimed as tax is made under compulsion of the taxing statute which usually contains an appropriate penalty for non-payment, and in my opinion respondent paid the amount claimed as tax here because it found it expedient to do so, under the circumstances found by the learned trial judge, and not under duress or through fear within the meaning of arts. 994 *et seq.* of the *Civil Code.* At any time within two years after the payments were made, appellant could have taken advantage of the provisions of s. 46(6) of the *Excise Tax Act* and made written application for a refund of the amounts so paid. It failed to do so and first claimed repayment some five years later, when it instituted these proceedings.

I would allow the appeal and dismiss the petition of right with costs throughout.

TASCHEREAU J.:—During the relevant periods, the respondent was engaged in the processing of raw sheepskins which it transformed into finished mouton skins and shearling. It alleges in its petition that from March 30, 1950, to January 29, 1952, it was *called upon and forced* to pay to the Department of National Revenue a total excise tax amounting to $25,269.76, which it did not owe. It was its contention that sheepskins, as processed and sold to its clients, were not subject to the excise tax claimed by the appellant. The Exchequer Court[1] allowed the petition and held that the respondent had the right to claim from the appellant $24,681 with costs.

[1] [1959] Ex. C.R. 191, 59 D.T.C. 1199.

The tax is imposed by the *Excise Tax Act*, R.S.C. 1952, c. 100, s. 24 (formerly R.S.C. 1927, c. 179, s. 80A) which reads as follows:

> 1. There shall be imposed, levied and collected, an excise tax equal to fifteen per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,—
>
> (i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer; or
>
> (ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him.

In *Universal Fur Dressers and Dyers Limited v. The Queen*[1], it was held that sheepskin cannot be described as a fur, and that therefore, in that case, s. 80A of the *Excise Tax Act* could not find its application. In the present case, the appellant admits that mouton is not a fur and that no tax is payable on the processing of sheepskin into mouton products. The grounds on which the appellant relies are the following, with which I will presently deal.

It is first submitted on behalf of the appellant that the respondent is barred from claiming any refund as it failed to make any application in writing within two years after the moneys were paid or overpaid. (Section 46, para. 6 of the Act, 1952 R.S.C., c. 100). This section applies, when the payment has been made by mistake of law or fact, but I do not think that such is the case here. The officers of the company were not mistaken as to the law or the facts. They had been in the fur business since many years, and it was in 1950 that they commenced the processing of raw sheepskins.

When they started that business, they immediately received the visit of two inspectors of the Excise Department, with whom they had numerous discussions in the course of which they continuously maintained that mouton was not a fur, and therefore not subject to the tax. After being told that they would be "closed up" if they did not pay, they decided, with the agreement of the inspectors, to pay "under protest". This was done from March 23, 1950, until September 7, 1951, and all the fifty-eight cheques were endorsed "paid under protest" or "tax paid under protest".

[1] [1956] S.C.R. 632, 56 D.T.C. 1075.

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The evidence is clear to me that there was on the part of the officers of the company no error of law. They had the conviction that they did not owe the tax, and their numerous discussions with the departmental officers, and the payments made under protest, negative any suggestion of a mistake of law.

At that time, other firms engaged in the same business as the respondent had contested the validity of this tax and had refused to pay it. A test case was made, and a few years later this Court, in *Universal Fur Dressers and Dyers Ltd. v. The Queen*[1], held that the tax was not payable. The respondent's officers were aware of the position taken by the others operating in the same field, and of their refusal to comply with the request of the Department. When the respondent finally decided to pay under protest, I am quite satisfied that it was not because the officers were mistaken as to the law; they were fully aware of their legal position, and had repeatedly set forth their contentions to the Department's officers from the beginning of the discussions in 1950. There being no mistake of law or fact, s. 46(6) does not apply, and therefore the failure by the respondent to give a written notice is not a bar to the present proceedings.

I do not agree with the trial judge who says in his reasons, although he allows the claim, that the respondent paid as a result of a mistake of law. The respondent is not bound by this pronouncement, and is of course entitled to have the judgment upheld for reasons other than those given in the Court below. The true reason why the payments were made under protest, is that the respondent wished to continue its business and feared that if it did not follow the course that it adopted, it would be "closed". Eli Abramson, one of the officers of the respondent says in his evidence:

> Q. What were you told by the officers of the Department with whom you were discussing this?
>
> A. Well, they told me I have to pay the tax. So, I says, 'Why do I have to pay the tax?' They said 'If you don't pay the tax we will close you up, because that is the law, and you must pay the tax.'

This statement is not denied by the two inspectors who were called as witnesses. Instead of seeing their business ruined, which would have been the inevitable result of their

[1] [1956] S.C.R. 632, 56 D.T.C. 1075.

refusal to pay this illegal levy, they preferred, as there was no other alternative, to comply with the threatening summons of the inspectors. As Abramson says: "Well, if I have to pay, I feel I am going to pay it under protest". This is what was done, and I am satisfied that the payments made were not prompted by the desire to discharge a legal obligation, or to settle definitely a contested claim. The pressure that was exercised is sufficient, I think, to negative the expression of the free will of the respondent's officers, with the result that the alleged agreement to pay the tax has no legal effect and may be avoided. The payment was not made voluntarily to close the transaction. Vide *Maskell v. Horner*[1], also *Atlee v. Backhouse*[2], *Knutson v. Bourkes Syndicate*[3], *The Municipality of the City and County of St. John et al. v. Fraser-Brace Overseas Corporation et al.*[4] As it was said in *Valpy v. Manley*[5], the payment was made for the purpose of averting the threatened evil, and not with the intention of giving up a right, but with the intention of preserving the right to dispute the legality of the demand. The threats and the payments made under protest support this contention of the respondent. Vide: *The City of London v. London Club Ltd.*[6]. Of course, the mere fact that the payment was made "under protest" is not conclusive but, when all the circumstances of the case are considered, it flows that the respondent clearly intended to keep alive its right to recover the sum paid. Vide *supra.*

In *Her Majesty the Queen v. Beaver Lamb and Shearling Co. Ltd.*[7], decided by this Court, the situation was entirely different. The majority of the Court reached the conclusion that the company paid as a result of a compromise and that there was no relation between the agreement that was reached and the threats that had been made. The payment was made voluntarily to prevent all possible litigation, and to bring the matter to an end.

[1] [1915] 3 K.B. 106 at 118.
[2] (1838), 3 M. & W. 633, 646, 650, 150 E.R. 1298.
[3] [1941] S.C.R. 419, 3 D.L.R. 593.
[4] [1958] S.C.R. 263, 13 D.L.R. (2d) 177.
[5] (1845), 1 C.B. 594, 602, 603, 135 E.R. 673.
[6] [1952] O.R. 177, 2 D.L.R. 178.
[7] [1960] S.C.R. 505, 23 D.L.R. (2d) 513.

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I must add that in the province of Quebec, the law is substantially in harmony with the authorities that I have already cited. The consent to an agreement must be legally and freely given. This is an essential requisite to the validity of a contract. Moreover, I think that art. 998 of the *Civil Code* applies, as the respondent who did not owe any amount to the appellant was unjustly and illegally threatened in order to obtain its consent. Articles 1047 and 1048 of the *Civil Code* do not apply, and are not a bar to respondent's claim. These sections suppose the existence of an error of law or of fact, which does not exist here.

It has been submitted by counsel for the appellant that the pleadings are insufficient and not specific enough to justify a finding of duress or compulsion. In paragraph 6 of its petition, the respondent alleges that it was "called upon and *forced to pay*" the tax. The respondent could have been asked to furnish particulars, but the appellant did not choose to follow that course of action. I am, therefore, of the opinion that this allegation is sufficient to allow the evidence that was adduced at trial.

I would dismiss the appeal with costs.

CARTWRIGHT J.:—For the reasons given by my brother Taschereau and those given by my brother Fauteux I would dismiss the appeal with costs.

FAUTEUX J.:—This is an appeal from a judgment of the Exchequer Court[1] maintaining respondent's claim and declaring that it is entitled to recover from appellant the sum of $24,681.

It is admitted that this amount was paid by respondent to appellant, between March 1950 and January 1952; that the payment of that sum was exacted from the former by the latter as excise tax purported to be imposed, under the *Excise Tax Act,* R.S.C. 1927, c. 179 and its amendments, on the processing of sheepskins into mouton products; that these moneys were paid by means of a number of cheques issued every month throughout the period, all of these cheques, with very few exceptions, bearing on the back the words "paid under protest" or "tax paid under protest"; and that, at all relevant times, no such tax was imposed by the

[1] [1959] Ex. C.R. 191, 59 D.T.C. 1199.

Excise Tax Act on the processing of sheepskins into mouton products, as it was indeed eventually decided by this Court in *Universal Fur Dressers and Dyers Ltd. v. The Queen*[1].

The only question in issue is as to the right of respondent to obtain reimbursement of these moneys.

It is convenient to say immediately that the claim of respondent is not that it paid these moneys by mistake of either law or fact, but under illegal constraint giving a right of reimbursement. That this is really the true nature of the claim appears from the petition of right. It is therein alleged that from the beginning and throughout the period during which these moneys were exacted, there were, between the officers of the Department of National Revenue and those of the respondent company, numerous discussions in the course of which the latter (i) claimed that no excise tax could be imposed on these sheepskins; (ii) demanded that the officers of the Department alter their illegal attitude; (iii) opposed the payment of such tax which it was "forced" to pay and which it did pay under protest at the suggestion of the officers of the Department. Surely, one who makes such allegations and says that he did pay under protest does not indicate that he was under the impression that he owed the money and that he paid through error. As was said by Taschereau J. in *Bain v. City of Montreal*[2], at the bottom of page 285:

> Of course, one who pays through error, cannot protest: he is under the impression that he owes, and has nothing to protest against, or no reasons to protest at all.

Furthermore, the evidence adduced by respondent is consistent with this view as to the nature of the claim. Indeed the evidence accepted by the trial Judge shows that, to the knowledge of the officers of the Department, other processors in the trade entertained the view that such a tax was not authorized under the Act. It also shows that respondent, who was opposed to its payment, would not have paid it, as it did under protest, had not its officers been intimidated, threatened by those of the Department, and in fear of the greater evil of having their business closed up.

[1] [1956] S.C.R. 632, 56 D.T.C. 1075.
[2] (1883), 8 S.C.R. 252.

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The trial Judge so found and, in this respect, expresses himself as follows:

> Il n'y a pas de doute qu'elle ne les aurait pas payés si elle n'avait pas été intimidée par les remarques et informations des officiers du Ministère du Revenu National, à l'effet qu'elle devait payer parce que c'était la loi et qu'au cas de refus, elle pourrait voir son entreprise close.

Having said this, the trial Judge continues:

> La preuve m'autorise, je crois, à conclure qu'elle a réellement pensé qu'elle devait payer et que la taxe était exigible; le paiement a donc été fait par erreur. Dans ces circonstances, il est logique de croire que son consentement au paiement a été vicié par les représentants de l'autorité et que les paiements n'ont pas été faits volontairement mais par suite d'erreur et *de crainte d'un mal sérieux.*
> (The italics are mine).

I agree with the trial Judge that these payments were not voluntary payments, but involuntary payments made because of fear of the serious consequences threatened. I must say, however, that I find it difficult to reconcile that conclusion, which is supported by the evidence, with the statement that these payments were made through error. And if the trial Judge really meant that the payments were made through error, in the sense that respondent officers really thought that they owed these moneys to the appellant, I must say, with deference, that such an inference is not supported by the evidence.

The right of respondent to be reimbursed these moneys, which it paid to appellant, involves the consideration of two questions:—(i) Whether, under the general law, there is, in like circumstances, a right to recover moneys paid, and, in the affirmative, (ii) Whether this right to recover, under the general law, is barred, in the present instance, by any of the statutory provisions of the *Excise Tax Act.*

The first question must be decided according to the principles of the Civil Law of the province of Quebec where the facts leading to this litigation took place and where, in particular, these payments were made.

Article 998 of the *Civil Code,* relating to the incidence of constraint as affecting consent, reads as follows:

> If the violence be only legal constraint or the fear only of a party doing that which he has a right to do, it is not a ground of nullity, but it is, if the forms of law be used or threatened for an unjust and illegal cause to extort consent.

In *Wilson et al. v. The City of Montreal*[1], the Superior Court condemned respondent to repay to appellants moneys it had collected from them under an illegal assessment roll made to defray the costs of certain municipal improvements. These moneys were paid under protest, as evidenced by the receipt obtained from the City and which read:

> Received from the Hon. Charles Wilson, the above amount which he declares he pays under protest and to save the proceedings in execution with which he says he is threatened.

This judgment, being appealed, was confirmed by the Court of Appeal[2].

In *The Corporation of Quebec v. Caron*[3], the Court of Appeal again confirmed a judgment condemning the City to reimburse a payment made, not by error, but "sciemment" by Caron, under protest. The claim of the City was for arrears of water rate and it had, in like cases, the power to shut off the water. The claim, however, was prescribed. Caron was threatened, on the one hand, by his tenant, to be sued in damages in the event of a stoppage of water and was threatened, on the other hand, by the City, of a stoppage of water unless payment was made. The Court of Appeal said:

> It is true that there was no physical force employed to compel the payment but there was a moral force employed which compelled the respondent to choose one of two evils, either to pay a debt which he could not by law be forced to pay, or to pay damages which he desired to avoid; in neither case could the payment have been voluntary; it was the effect of moral pressure, and would not have been made without it. It was an influence which took away the voluntary character from the payment and yet which could not be ranked with «crainte et violence». Under these circumstances, this payment was not being voluntary but was made under pressure; the plaintiff's action must stand and the appeal be dismissed.

Baylis v. The Mayor of Montreal et al.[4] This was an action brought to recover from the City an amount collected from the appellant for assessment not legally due, the assessment roll, under which the payment was exacted, being a nullity. The appellant did not protest or make any

[1] (1878), 24 L.C.J. 222, 1 L.N. 242.
[2] (1880), 3 L.N. 282.
[3] (1866), 10 L.C.J. 317.
[4] (1879), 23 L.C.J. 301.

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reserve when he paid. He paid only when compelled to do so by warrant of distress. Sir A. A. Dorion, C.J. said, at the bottom of page 304:

* * *

> And it has repeatedly been held that a payment made under such circumstances is not a voluntary payment and did not require that the party making it should pay, under protest, to enable him to recover back what has been illegally claimed from him.

In *Bain v. City of Montreal, supra,* the above decisions are referred to, with virtual approval, by Taschereau J., at page 286, where he makes the following comments as to the significance and necessity, or non necessity, of protest:

> I cannot help but thinking that, that when a party pays a debt which he believes he does not owe, but has to pay it under *contrainte* or fear, he ought to accompany this payment with a protest, if not under the impossibility to make one, and so put the party whom he pays under his guard, and notify him that he does not pay voluntarily, if this party is in good faith. If he is in bad faith and receives what he knows is not due to him, he is, perhaps, not entitled to this protection. A distinction might also perhaps be made between the case of a payment under actual *contrainte,* and one made under a threat only of *contrainte,* or through fear.
>
> If there is an actual *contrainte,* a protest may not be necessary, and in some cases, it is obvious, may be impossible, but if there is a notice of threat only of *contrainte,* then, if the party pays before there is an actual *contrainte,* he should pay under protest. *Demolombe* Vol. 29 No. 77 seems, at first sight, to say that a protest is not absolutely necessary, but he speaks, it must be remarked, of the case of an actual *contrainte.*
>
> Of course, each case has to be decided on its own facts. It is not as a rule of law that a protest may be said to be required. For a protest is of no avail when the payment or execution of the obligation is otherwise voluntary. *Favard de Langlade,* Rép. Vo. *Acquiescement,* Par. XIII; *Solon,* 2 Des Nullités, No. 436; *Bédarride* De La Fraude, Vol. 2, No. 609.

Being of opinion that, under the general law, respondent is entitled to be reimbursed of the moneys it paid to appellant, there remains to consider the contention of the Crown that this right is barred under the provisions of s. 105 of the *Excise Tax Act.*

Appellant relies on s. 105(6):

> 6. If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

The French version of s. 105(6) reads:

(6) Si quelqu'un, par erreur de droit ou de fait, a payé ou a payé en trop à Sa Majesté des deniers dont il a été tenu compte à titre de taxes imposées par la présente loi, ces deniers ne doivent pas être remboursés à moins que demande n'ait été faite par écrit dans les deux ans qui suivent le payement ou le payement en trop de ces deniers.

The two texts make it clear that these provisions apply only where the refund claimed is for moneys paid under a mistake of law or fact. They have no application in this case.

The other provisions of the Act, which may be referred to, are in s. 105(5) reading:

5. No refund or deduction from any of the taxes imposed by this Act shall be paid unless application in writing for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act or under any regulation made thereunder.

These provisions are also inapplicable to the present case. The refund claimed is not for "taxes imposed by this Act" but for moneys exacted without legal justification.

It was further conceded that s. 105 is not exhaustive of the cases where refund may be made. Indeed one would not expect the Act to provide that moneys exacted under threat as a tax not imposed under the Act, may be reimbursed.

For these reasons, I am of the opinion that the respondent's petition of right is well founded.

I may add that this case is entirely different from the case of *The Queen v. Beaver Lamb & Shearling Co. Ltd.*[1] In that case, the payments of the moneys claimed were found to have been made long after and not consequential to the alleged duress, but under a mistake of law.

I would dismiss the appeal with costs.

Appeal dismissed with costs, KERWIN C.J. *and* ABBOTT J *dissenting.*

Solicitor for the appellant: W. R. Jackett, Ottawa.

Solicitor for the respondent: R. Pinard, Montreal.

[1] [1960] S.C.R. 505, 23 D.L.R. (2d) 513.