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*Oct. 10.

JAMES ROSS AND WILLIAM MACKENZIE (SUPPLIANTS)..... } APPELLANTS;

AND

HIS MAJESTY THE KING (RESPONDENT)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Customs duties—Lex fori—Lex loci—Interest on duties improperly levied—Mistake of law—Répétition—Presumption as to good faith—Arts. 1047, 1049 *C. C.*

The Crown is not liable, under the provisions of articles 1047 and and 1049 C. C., to pay interest on the amount of duties illegally exacted under a mistaken construction placed by the customs officers upon the Customs Tariff Act. *Wilson* v. *The City of Montreal* (24 L. C. Jur. 222) approved, Strong C.J. *dubitante.*

Per Strong C.J. The error of law mentioned in arts. 1047 and 1049 C. C. is the error of the party paying and not that of the party receiving. Money paid under compulsion is not money paid under error within the terms of those articles.

The Toronto Railway Co. v. *The Queen* (4 Ex. C. R. 262; 25 Can. S. C. R. 24; [1896] A. C. 551) discussed. *The Algoma Railway Co.* v. *The King* (7 Ex. C. R. 239) referred to.

Judgment appealed from (7 Ex. C. R. 287) affirmed.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard and Davies JJ.

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APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the Petition of Right of the appellants with costs.

During the years 1892 and 1893 the suppliants imported into Canada at the Port of Montreal, a quantity of steel rails for use in the construction of tramways which were considered dutiable by the customs officers at that port, and, accordingly, duties were levied on the rails, and the amount thus exacted was paid by the suppliants under protest to the collector of the port. Subsequently, in the case of *The Toronto Railway Company* v. *The Queen* (2), it was held by the Judicial Committee of the Privy Council, (reversing the decisions of the Supreme Court of Canada (3) and of the Exchequer Court (4),) that duties levied and collected under similar circumstances had been improperly imposed, and that, under the true construction of the tariff, such rails were not subject to customs duties. The Crown accordingly, on 22nd January, 1897, refunded to the suppliants the duties which they had so paid under protest upon the rails in question in this case, but without interest on the money which had been so levied and collected during the time it had been retained. The suppliants by Petition of Right claimed interest on the amount of the duties from the date when the payment under protest had been made. The Exchequer Court dismissed the petition with costs and the suppliants now appeal.

During the hearing of the appeal, the question was raised as to whether the rights of the parties were to be decided according to the laws of the Province of Ontario or of the Province of Quebec, or whether the law of England should apply. The court unanimously

(1) 7 Ex. C. R. 287.
(2) [1896] A. C. 551.
(3) 25 Can. S. C. R. 24.
(4) 4 Ex. C. R. 262.

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decided that as the duties upon which the interest was claimed had been levied and collected at the City of Montreal, the law of the Province of Quebec alone applied in the decision of the appeal.

Campbell K.C. and *Helmuth K.C.* for the appellants (*Saunders* with them). The customs officers must be presumed to have known the law and, in consequence of such imputed knowledge, there is a presumption, technically, of bad faith on the part of the officers of the Crown. If the question were one between subject and subject, and the claim against a fellow subject, then the appellants would undoubtedly be entitled to succeed. We deny that provisions of the Civil Code of Lower Canada apply to this case; but, even if the Quebec law applies, under arts. 6, 412, 449, 451, 1047, 1048, 1049, 1077 C. C.; and the decision in *The Exchange Bank of Canada* v. *The Queen* (1), then interest is due by the Crown.

There was no error of fact; the appellants insisted that the duties were illegally imposed and paid under pressure in order to obtain delivery of the rails, protesting at the same time against the payments thus exacted. The Crown is consequently charged with bad faith. Larombière, "Obligations," commenting on arts. 1373 & 1379 of the Code Napoléon, at para. 14; *Wilson* v. *The City of Montreal* (2) *per* Monk J. at page 225; *The City of Quebec* v. *Caron* (3); *Bain* v. *The City of Montreal* (4); Pand. Fr. *vo.* "Obligations" n. 2347; *The Algoma Central Railway Co.* v. *The King* (5) *per* Burbidge J. at page 272.

The Crown upon the facts and under the circumstances disclosed does not occupy a position which affords exemption by reason of its perogatives, or other-

(1) 11 App. Cas. 157.
(2) 24 L. C. Jur. 222.
(3) 10 L. C. Jur. 317.
(4) 8 Can. S. C. R. 252.
(5) 7 Ex. C. R. 239.

wise, from the liability which, under similar circumstances, would exist against the subject. The Crown has accepted the benefit of what was done and is responsible to the full limit of the liability for interest to which its officers personally would have been obliged. The Crown cannot take advantage of all the wrongful acts of its officers and be only liable for the consequence of those acts so far as it may be willing to admit. This position is borne out by *Turner* v. *Maule* (1); *Edgar* v. *Reynolds* (2); *Attorney-General* v. *Kohler* (3); *Bauer* v. *Mitford* (4); *Partington* v. *The Attorney-General* (5).

Under any circumstances any good faith there may have been on the part of the Crown or the officers of the Crown ceased upon the rendering of the judgment in *The Toronto Railway Co.* v. *The Queen* (6) and from that date, 31st July, 1896, we ought to have our interest.

The Attorney General of Canada and *Newcombe K.C.* for the respondent (*Lafontaine K.C.* with them). Interest, as such, in cases where there is no statute affecting the common law rule, can only be recoverable where there is a contract to pay interest. It is not pretended that there is any contract in this case and the claim therefore fails, unless bad faith is proved. There is entire absence of any such proof, even if bad faith could, in any case, be attributed to or presumed against the Crown.

The cause of action arose in the Province of Quebec and it is submitted that there the jurisprudence is clearly settled against the appellants' contention by the decisions in *Wilson* v. *The City of Montreal* (7) and a long series of cases which have followed the

(1) 18 L. J. Ch. 454.
(2) 27 L. J. Ch. 562.
(3) 9 H. L. Cas. 654.
(4) 3 L. T. 575.
(5) L. R. 4 H. L. 100.
(6) [1896] A. C. 551.
(7) 24 L. C. Jur. 222.

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principle there laid down by Chief Justice Dorion. We also refer to *Baylis* v. *The City of Montreal* (1); *Buckley* v. *Brunelle* (2); *The Queen* v. *Henderson* (3); *The Queen* v. *St. Louis* (4).

The CHIEF JUSTICE.—This appeal must be decided by the law of the Province of Quebec in which province the cause of action arose inasmuch as the duties were received by the Collector of Customs at Montreal. The suppliants themselves allege in their Petition of Right that the cause of action arose in Quebec.

I rest my judgment entirely on the authority of *Wilson* v. *The City of Montreal* (5) and the cases which have followed that decision.

Had it not been for the jurisprudence thus established and acted on by the courts of the Province of Quebec for a long series of years I might have come to a different conclusion.

Independently of authority I should have thought that the law was as laid down by Merlin and Rolland de Villargues in the quotation from their works in the judgment of Chief Justice Dorion. In other words, I should have considered that the rule that interest was recoverable in respect of money paid under compulsion was general and not confined, as the Chief Justice held it to be, to the single case of money paid under pressure of a judgment afterwards reversed in appeal. I confess I see no reason apart from authority why it should have such a restricted application.

Articles 1047 and 1049 of the Civil Code, in my opinion have no application to the present case. The

(1) 23 L. C. Jur. 301.
(2) 21 L. C. Jur. 133.
(3) 28 Can. S. C. R. 425.
(4) 25 Can. S. C. R. 649.
(5) 24 L. C. Jur. 222.

money exacted by the Collector of Customs which the Judicial Commitiee have held to have been illegally demanded, was not paid by the suppliants under any error of fact or law but with full knowledge of the facts and accompanied by a protest insisting that it was, (as it was ultimately judicially determined to have been), illegally claimed. It was, therefore, not paid in error, but under compulsion. The error mentioned in Articles 1047 and 1049 is clearly the error of the party paying, not that of the party receiving.

The *condictio indebiti* of the Roman law is no doubt the source from which the French law, on this head, is derived. The *condictio indebiti* would not, however, be the appropriate action in a case of this kind. The *condictio ob turpem vel injustam causam* was the proper action according to the Roman law to recover money not paid voluntarily, in error of fact or law, but illegally exacted and paid under compulsion such as duress of person or goods (1). It is also to be remarked that where money is paid for an illegal cause where the party making the payment was not a participator in the illegality but has paid innocently under such pressure as was used in the present case, interest is not according to the Roman law recoverable, although the natural fruits of a thing unduly given in payment under such conditions are recoverable (2). This would tend to confirm the view taken in *Wilson* v. *The City of Montreal* (3) were it not that the Roman law of actions has no application in French law (4). I am, it is true, not bound by the case referred to, but any decision of Chief Justice Dorion carries with it such great weight that, in view of that authority and the constant jurisprudence which has followed it for

(1) Dig. 12-5-2 ; Molitor (2 ed.) vol. 2, pp. 243-274 ; Maynz, Droit Rom. (5 ed.) vol. 2, 485.

(2) Code 4-4-7 ; Molitor, (2 ed.) vol. 2, p. 274.

(3) 24 L. C. Jur. 222.

(4) Garsonnet, Procédure, vol. 1, 246.

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twenty-two years, and further, considering that my learned brothers Taschereau and Girouard think *Wilson* v. *The City of Montreal* (1) rightly decided, I do not feel inclined to differ from them by holding that the judgment of the Court of Queen's Bench in the case cited should be overruled. I have, however, I must admit, grave doubts.

It was argued that if articles 1047 and 1049 applied, there could be no right to recover interest because bad faith could not be attributed to the Crown. If, however, the officer of the Crown by whom payment was compelled was in bad faith, I am at a loss to see why interest should not be recovered by Petition of Right. I find no authority on this point in the decisions of the Quebec courts possibly for the reason that it has been the usual course in this and all other jurisdictions for the Crown to pay interest on money received for duties afterwards found to have been illegally imposed by customs officers, thus renouncing any advantage which the public might have derived from the use of money illegally exacted and withheld from the individual subject paying it. So far, however, as the facts of this case are before us in evidence, there is nothing to show that the Collector of Customs was otherwise than in good faith in insisting on the payment of these duties before permitting the appellants to take possession of the goods.

The observations of the Judicial Committee in dismissing the petition to vary the order in appeal in the case of *The Toronto Railway Company* v. *The Queen* (2) according to the shorthand writer's notes, as stated by the judge of the Exchequer Court in *The Algoma Central Railway Company* v. *The King* (3) were not intended as a decision on the law as to the question

(1) 24 L. C. Jur. 222. (2) [1896] A. C. 551.
(3) 7 Ex. C. R. at page 272.

of interest. The petition was dismissed for the reason that it was not presented until the order in council adopting the report of the Judicial Committee had been signed.

The appeal is dismissed with costs.

TASCHEREAU, SEDGEWICK and DAVIES JJ. concurred in the judgment dismissing the appeal with costs for the reasons stated by His Lordship Mr. Justice Girouard.

GIROUARD J.—We have already held in the course of this argument that this case must be decided according to the laws of the Province of Quebec, where the Customs entries and the payment of the duties were made to the Customs authorities under protest. Article 1047 of the Civil Code of that province says:

He who receives what is not due to him, through error of law or of fact, is bound to restore it, or if it cannot be restored in kind, to give the value of it. If the person receiving be in good faith, he is not obliged to restore the profits of the thing received.

Article 1049 C. C. says:

If the person receiving be in bad faith he is bound to restore the sum paid or the thing received, with the interest and profits which it ought to have produced from the time of receiving it, or from the time that his bad faith began.

These articles dispose of this appeal.

Under error of law the Crown, acting through its representatives, levied a duty which was not authorised by Parliament. So the Judicial Committee held in *The Toronto Railway Company* v. *The Queen* (1). But in so doing the Crown cannot be in a worse position than individuals. Was the money received in good faith? That is the point. Good faith was so apparent that the Exchequer Court and this court upheld the interpretation given by the officials to the statute. *The Toronto Railway Company* v. *The Queen* (2).

(1) [1896] A. C. 551. (2) 25 Can. S. C. R. 24.

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It is contended that the Crown, like subjects, is presumed to know the law. Granting this proposition for argument's sake yet, as a matter of fact, the Crown, or rather its officials, like individuals, commit errors of law and it is to meet such cases that article 1047 C. C. and other provisions of the Civil Code have been enacted. Mere ignorance of law does not constitute bad faith. Good faith is always presumed and it ceases only from the moment the error of law is made known by judicial authority. Art. 412 C. C. No interest is recoverable on moneys received under a mistake of law till that mistake has been pronounced. The court of Quebec have so decided in a long array of well considered decisions which will be found in *Wilson* v. *The City of Montreal* (1).

Possibly an action may lie for interest running after judicial determination if there be unnecessary delay in refunding, but the demand made by the appellant is not one of that character. The circumstances of the repayment are not set up; unnecessary delay is neither alleged nor proved, and, in consequence, we are not in a position to say that the good faith of the Crown or its representatives had ceased at any time after the rendering of the judgment of the Judicial Committee.

For these reasons the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Kingsmill, Hellmuth, Saunders & Torrance.*

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

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(1) 24 L. C. Jur. 222.