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* March 2, 3.
* June 23.

WALKERVILLE BREWERY LTD. (SUPPLIANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Contract—Crown—Petition of right to recover from the Crown sum paid in settlement of prior action by the Crown on claim for revenue taxes—Suppliant claiming refund under alleged oral condition of settlement—Evidence—Letter from Minister of the Crown subsequent to settlement, not enforceable as an agreement binding the Crown.

Appellant company sought to recover from the Crown, in right of the Dominion, a sum paid in settlement of a prior action brought by the Crown to recover revenue taxes alleged to have been due and payable by appellant. In the present suit, appellant claimed that said settlement had been subject to the (oral) condition that a refund would be made to appellant if it were later established that it was not liable for the taxes. At the time of the settlement there was pending a similar action by the Crown against another company, which action was ultimately decided largely against the Crown; and appellant contended that on the application of the law therein determined to the facts in appellant's case, it would not be liable for the taxes claimed against it in the action in which the settlement had been made, and that under the alleged condition to the settlement it was now entitled to a refund. Subsequent to the said settlement, in reply to a letter from the member of Parliament for the district in which appellant carried on business, the Minister of National Revenue wrote to said member that "we do not desire to collect any taxes not properly due the Crown, and if it can be shown that any overpayment has been made * * * or if it is established that they [appellant] were not liable for any tax that they may have paid, you can assure them that refund will be made." There was no reference in said correspondence to any alleged condition of the settlement (and appellant did not base a claim upon the Minister's said assurance as an independent agreement).

Held: On the evidence, appellant had failed to establish that the settlement was subject to the alleged condition.

Held also: The minister's said letter could not be a basis for claim by appellant. The moneys paid by appellant became part of the consolidated revenue fund of Canada and it would require a statute, or something of like force, to clothe the minister of a department with authority to agree to repay to a subject moneys voluntarily paid by the subject in settlement of an action brought by the Crown for payment of taxes alleged to have become due and payable. The Minister's assurance in said letter, once it was determined that it was not confirmation of a condition to the original settlement, could not be sued upon as an independent agreement, because it was not competent for the Minister to fetter the future executive action of the Government.

* PRESENT:—Duff C.J. and Cannon, Davis, Kerwin and Hudson JJ.

Judgment of Maclean J., President of the Exchequer Court of Canada, [1937] Ex. C.R. 99, dismissing appellant's petition of right, affirmed.

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APPEAL by the suppliant company from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing its action. The action was brought by way of petition of right to recover from the Crown moneys paid by the suppliant to the Crown under a settlement made in a prior action taken by the Crown against the present suppliant to recover payment of certain sales taxes and excise taxes under the *Special War Revenue Act*, 1915, as amended, alleged to be due and payable in respect of beer manufactured and sold, and for interest and penalties in respect thereof. In the present action the suppliant alleged (and the Crown denied) that the said settlement in the prior action had been subject to the condition that a refund would be made to the suppliant if it were later established that the suppliant was not liable for the taxes. The suppliant claimed exemption from the taxes under provisions in the said Act. At the time of the said settlement there was pending a similar action by the Crown against another company in which questions were involved which were ultimately decided against the Crown (2). In the present action the suppliant contended that on the application of the law determined in the said action by the Crown against the other company to the facts of the present suppliant's own case (which facts, it was contended by the suppliant, but disputed by the Crown, were similar in effect to those in the said action against the other company), the suppliant would not be liable for the taxes which the Crown had claimed against it in the action in which said settlement had been made; and that under the alleged condition to the settlement, the suppliant was now entitled to a refund.

By the judgment now reported, the appeal to this Court was dismissed with costs (on the ground that said alleged condition to the settlement was not established).

S. L. Springsteen K.C. for the appellant.

W. N. Tilley K.C., A. C. Hill K.C., and *C. F. H. Carson K.C.* for the respondent.

(1) [1937] Ex. C.R. 99; [1937] 4 D.L.R. 81.
(2) *Carling Export Brewing & Malting Co. Ltd.* v. *The King,* [1931] A.C. 435.

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The judgment of the court was delivered by

DAVIS J.—The appellant in this action by way of Petition of Right seeks to recover from the Crown, in right of the Dominion, the sum of $268,338.32 paid by it to the Crown in settlement of a prior action brought by the Crown against the appellant in respect of non-payment of certain revenue taxes alleged to have been due and payable by the appellant to the Crown. The prior action was commenced in October, 1927, and the period covered was from January 1st, 1925, to May 1st, 1927. The settlement of that action in June, 1928, at $260,000 included the Crown's further claims in respect of the period from May 1st, 1927, to March 31st, 1928. The amount of the settlement, though large, was considerably less than the total claim for taxes, interest and penalties in respect of the period covered by the settlement. The balance of the sum sought to be recovered in this action, $8,338.32, is the amount subsequently agreed upon and paid for the month of April, 1928. There was considerable discussion between the parties, after the settlement, as to the claim for April, 1928, to which we shall refer later.

The appellant was a brewery company incorporated under the laws of the province of Ontario and carried on business at the town of Walkerville near the international boundary between Canada and the United States across the river from the large city of Detroit, Michigan. This action is founded upon the allegation that the settlement of the prior action was subject to the condition that, broadly speaking, the appellant was to be entitled to the return of the moneys paid under the settlement in the event that a similar action which was then pending against the Carling company should be finally determined in favour of the contention of both companies that the taxes sought by the Crown were not in law recoverable because the beer in question had been manufactured and sold for export. The Carling company subsequently carried its litigation through to the Judicial Committee of the Privy Council and successfully resisted the claim against it for payment of the taxes. *Carling Brewing and Malting Company Ltd.* v. *The King* (1).

(1) [1931] A.C. 435.

There was no formal agreement of settlement of the first action. On June 7th, 1928, the appellant sent the Minister of National Revenue its cheque for $200,000 with the following letter:

Walkerville Brewery Limited
Walkerville, Ontario

June 7, 1928.

The Minister of National Revenue,
Ottawa, Canada.

Dear Sir,—

Confirming the verbal arrangement arrived at between your Department and our Mr. Thistle, we herewith enclose you our cheque for $200,000. The understanding is that we are to send you a further cheque for $60,000 within sixty days. The last mentioned cheque, together with the cheque enclosed is in full settlement of the claim contained in the Information dated 27th of October, 1927, and also all other sales and gallons tax, interest and penalties up to the 30th day of April, 1928, and it is understood that the action commenced by the Crown is to be discontinued without costs and that upon payment of the full amount of settlement of $260,000, your Department is to give us a full release of all claims up to the 30th day of April, 1928.

Yours truly,
Walkerville Brewery Limited.
(Sgd.) H. Radner.

The Commissioner of Excise in acknowledging the letter and cheque pointed out that the settlement did not go beyond the end of March, 1928, in that the records for April had not been completed and consequently no assessment for April had been made at the time.

Mr. Thistle mentioned in the letter was an officer of the appellant company but he died before the trial of this action, which did not commence until April 20th, 1936. There is nothing in the letter itself to indicate that the settlement was in any way subject to the condition which is now alleged.

The further payment of $60,000 that was to have been made within sixty days was not in fact made until October 13th, 1928. On August 20th, 1928, the appellant telegraphed the Minister of National Revenue:

Would appreciate extension of sixty days on balance owing on sales and manufacturers taxes wire reply collect.

The Commissioner of Excise replied the same day as follows:

Department regards terms of settlement reached with your company as being exceedingly liberal and is not prepared to grant any extension of time whatever for payment of sixty thousand dollars due ninth instant.

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Subsequently the Commissioner telegraphed the appellant on September 4th as follows:

> Reference my wire twentieth ultimo regarding payment sixty thousand dollars stop unless Department hears from you relative to settlement by eighth instant legal proceedings for recovery of balance due will be proceeded with immediately thereafter.

And again on September 14th the Commissioner telegraphed the appellant:

> As previously stated Department not prepared to grant delay of sixty days for payment of sixty thousand dollars balance sales tax stop Necessary legal action being proceeded with at once to collect this amount.

The $60,000 payment was finally made on October 13th, 1928, with the following letter from the appellant:

> Oct. 13, 1928.
>
> Minister of National Revenue,
> Ottawa, Canada.
>
> Dear Sir,—
>
> We are enclosing herewith our cheque in the amount of $60,000 in full payment of all claims of your Department against this company in respect to sales and gallonage taxes, this payment being the balance of the $260,000 amount agreed to during the early part of the year.
>
> Kindly acknowledge receipt of this settlement and oblige,
>
> Yours very truly,
> The Walkerville Brewery Limited.
> (Sgd.) E. Thistle.

It is to be observed that this letter was signed by Mr. Thistle, with whom it is now alleged an arrangement for the conditional payment had been made. Here again there is nothing in the letter to indicate that the settlement had been made upon the condition now alleged by the appellant. The Hon. N. W. Rowell was counsel for the Government in the first action and in his evidence at the trial of this action he said that the Minister, shortly after the case had been fixed for trial, had informed him that certain proposals for settlement had been submitted and had asked him to look into and report upon certain matters in connection with the proposed settlement. Mr. Rowell said he went into the matter and approved and recommended a settlement for the lump sum of $260,000 for the period up to March 31st, 1928; that he never heard of any condition to the settlement and if there was any condition it was not submitted to him when he was asked to recommend a settlement.

The position taken by the appellant in this action was stated very plainly in the Information and in the appel-

lant's factum and was not departed from by the learned counsel for the appellant before us, that the alleged condition was made with the Minister prior to the settlement and, of course, prior to the payment of $200,000 under the settlement on June 7th, 1928. The letters to which we shall shortly refer between the Minister and Mr. Odette in August, 1928, are not relied upon as evidence of any agreement made at that time but as confirmation of the oral agreement alleged to have been made prior to June 7th, 1928, as a condition of the settlement. The appellant does not seek to obtain the repayment of the moneys upon any assurance or promise of the Minister subsequent to the settlement, but upon a promise which, it is said, formed a term or condition of the settlement of the first action at $260,000. It is not unnatural that there is always some suspicion attached to a claim based upon an alleged oral agreement set up as a term or condition of an agreement that had been put in writing, but evidence directed to prove such an oral agreement is, of course, admissible. We should not find it difficult as a matter of law to enforce against the Crown on a Petition of Right an oral condition to a settlement if it is firmly established in fact that the condition was made as part of the settlement and that the condition has been satisfied. Therefore we have carefully analyzed and examined the evidence tendered in proof of the alleged condition.

Mr. Odette, who gave evidence on behalf of the appellant, was at the time of the settlement the Member of the House of Commons for the district in which the appellant was carrying on its business. We quote from his evidence:

> Mr. Thistle, of the Walkerville Brewery, telephoned me at my office in Ottawa, the Parliament Buildings, and asked me to arrange an appointment. At the request of Mr. Thistle I arranged an appointment with Mr. Euler, Minister of National Revenue, and, at Mr. Thistle's request, I accompanied him to Mr. Euler's office and Mr. Thistle requested Mr. Euler to withhold the present claim until a similar claim against Carling's Brewery was settled. It was then before the Court. Mr. Euler declined to do that, he declined to withhold action; he was pressing for payment of the claim. If my recollection serves me rightly, Mr. Euler told Mr. Thistle that if payment was made the Department would waive the interest and penalties. Mr. Thistle asked Mr. Euler what the position would be if the court determined these taxes were not payable. Mr. Euler said if the court determined that these taxes were not payable then the amount paid could be refunded as the Department did not wish to collect from any one taxes that were not just.

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Q. Do you recall the final amount that was agreed upon between the Minister and Mr. Thistle; were you present?

A. I do not know about that.

Q. Were you familiar with the fact as to whether all of the payment that was agreed upon was made in one sum or otherwise?

A. I know it was not, because later on, after Parliament had adjourned, either Mr. Radner or Mr. Thistle telephoned me at Tilbury that the final payment on this claim was due and asked me if I would be good enough to write Mr. Euler and ask him to write me and confirm the understanding reached between the representative of the brewery and Mr. Euler when I was present.

While the exact date of the interview with the Minister is not given, it was admittedly earlier than June 7th, 1928, when the payment of $200,000 was made.

Mr. Odette was speaking at the trial in April, 1936, of an interview that had taken place eight years before. He was in no way personally concerned in the matter but was present, as he says, "more or less for the purpose of introducing the parties." In attempting to recall the details of the interview, he said very frankly, "if my recollection serves me rightly." He admitted that he was speaking "largely from the letters, as to the matter" and would have to go back to the letters to refresh his memory. Before we look at the letters themselves, it is to be observed that Mr. Odette's recollection was that Mr. Thistle asked the Minister what the position "would be" if the Court determined the taxes were not payable and that the Minister said that in that event the amount paid "could be refunded" as the Department did not wish to collect from any one taxes that were not just.

We now turn to the letters. On August 3rd, 1928, Mr. Odette wrote a personal letter to the Minister which was as follows:

Tilbury, Ontario,
August 3rd, 1928.

Personal.
Honourable W. D. Euler,
Minister of National Revenue,
Ottawa, Ontario.

Dear Mr. Euler:—

Confirming my conversation with you yesterday regarding payment of arrears of sales and gallonage taxes by the Walkerville Brewery Company, Walkerville, on which a final payment of $60,000 is due from the above Company, I believe on the 8th of this month. The President of the Company is anxious to know what position the Company will be in, in the event of the courts deciding that sales and gallonage taxes are not payable on exported goods.

I stated to him that your Department did not desire to collect taxes that were not justly due and that in the event of such an occurrence as above mentioned, or in the event of the Walkerville Brewery over-paying, that they would be in a position to file claim with your Department for refund.

I understand that this is your attitude in the matter, and I would thank you to drop me a line confirming same, so that I can phone the Walkerville Brewery Company previous to the 8th instant, so that their check may go forward to you promptly.

Your usual prompt attention will be appreciated. With kind regards, I am,

Yours very truly,

And on August 14th, 1928, the Minister, in a personal letter to Mr. Odette, replied as follows:

Minister of National Revenue
Canada

Ottawa, August 14, 1928.

Personal.
Mr. E. G. Odette, M.P.,
Tilbury, Ont.

Dear Mr. Odette,

Absence from Ottawa has prevented my replying earlier to your letter of the 3rd inst. with reference to arrears of Sales and Gallonage Taxes due by the Walkerville Brewery Company, Walkerville.

You are right in your understanding as to my attitude. We do not desire to collect any taxes not properly due the Crown, and if it can be shown that any overpayment has been made by the company in question, or if it is established that they were not liable for any tax that they may have paid, you can assure them that refund will be made.

Yours very truly,

(Sgd.) W. D. Euler.

Mr. Odette did not ask the Minister to confirm in writing some oral understanding or agreement that had been made prior to or at the time of the settlement. He wrote that the president of the appellant company "is anxious to know what position the company will be in" in the event of the courts deciding that the taxes were not payable. He states what he understands the Minister's "attitude" in the matter to be and, while he asks the Minister to confirm that understanding "so that" the appellant's "check may go forward to you promptly," the letter does not even suggest the then existence of an oral agreement by way of a condition to the settlement that had been made in June and under which $200,000 had already been paid. Nor does the Minister's reply even suggest that there had been, up to that time, any promise or assurance that in certain events the moneys would be refunded. Mr. Euler, who was the Minister

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at the time of the settlement in 1928 and was again a Minister of the Crown at the time of the trial of this action in 1936, was not called at the trial.

It is convenient at this point to refer to the letter that Mr. Thistle wrote on behalf of the appellant on January 9th, 1930, to the Department of National Revenue when there was a dispute as to the taxes for the month of April, 1928. In that letter Mr. Thistle advised the Department that the matter had been referred to the company's solicitor, Mr. Barnes of Windsor, and that the Department would hear from him. In a letter of Mr. Barnes to the Commissioner of Excise on January 6th, 1930, he said in part:

> It is our contention that the Department, having accepted the cheque so enclosed with the letter of June 7th, 1928, above mentioned and the further cheque of $60,000, which was sent on October 13th, 1928, cannot now take the position that the terms of settlement were not as set out in our client's letter of June 7th, 1928.

The appellant was at that time insisting that its letter of June 7th, 1928, be treated as setting out the terms of settlement. There was no suggestion that the settlement was subject to the condition now alleged.

Notwithstanding the letter of the Minister to Mr. Odette of August 14th (a copy of which Mr. Odette sent the appellant by letter dated August 17th), there is not a word in the subsequent letter of the appellant of October 13th (above set out) to the Minister enclosing the final cheque of $60,000 to indicate that the settlement had been made on the condition that the payments would be refunded if it were later established that the appellant had not been liable for the taxes claimed in the action.

The appellant has failed to establish its claim that the settlement at $260,000 was subject to the condition which it now alleges. The entire basis of this action is the existence of an arrangement or understanding made prior to or contemporaneous with the settlement as a condition for the repayment of the moneys. It was not contended that the $60,000 payment could be recovered on any other basis; that is, that it could be treated separately and recovered upon the letter of the Minister of August 14th. The settlement, of course, had been made in June and $200,000 on account had been paid at that time. Payment of the balance of $60,000, had it been withheld, could have been enforced under the settlement.

We do not overlook the fact that the Minister in his personal letter to Mr. Odette of August 14th, 1928, said that

> if it can be shown that any overpayment has been made by the company in question, or if it is established that they were not liable for any tax that they may have paid, you can assure them that refund will be made.

But the appellant does not seek to recover the moneys upon the basis of that assurance as an independent agreement. The learned counsel for the appellant no doubt fully recognized the difficulty there would have been in any such claim, in that the Minister had not authority to make any such agreement independent of the settlement, binding upon the Crown. The moneys paid became part of the Consolidated Revenue Fund of Canada and it would require a statute, or something of like force, to clothe the Minister of a Department with authority to agree to repay to a subject moneys voluntarily paid by the subject in settlement of an action brought by the Crown for payment of taxes alleged to have become due and payable. It may be useful to mention some of the authorities which we have considered: *Commercial Cable Co.* v. *Government of Newfoundland* (1); *Mackay* v. *Attorney-General for British Columbia* (2); *Auckland Harbour Board* v. *The King* (3); *Attorney-General* v. *Great Southern and Western Ry. Co. of Ireland* (4).

It is not for us to consider whether the appellant company has just cause for complaint against the Government outside a court of law—that is to say, assuming the facts to be the same as those in the *Carling* case (5), whether the Government is acting arbitrarily and is morally in the wrong in declining to implement the assurance of the Minister. That would be something altogether outside our province. All we have to determine as a court of law is whether there was an enforceable agreement made by the Minister binding upon the Crown to refund the moneys in question. The assurance given by the Minister in his letter to Mr. Odette, once it is determined that it was not confirmation of a condition to the original settlement, cannot be sued upon in a court of law as an independent agreement, for the reason that it was not competent for

(1) [1916] 2 A.C. 610.
(2) [1922] 1 A.C. 457.
(3) [1924] A.C. 318.
(4) [1925] A.C. 754.
(5) [1931] A.C. 435.

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the Minister to fetter the future executive action of the Government.

The appellant further contended in the action that in any event the payments had not been made voluntarily but by force of threats by the Minister and officers of the Department that unless payment were made the appellant's licence to carry on the trade or business of a brewer would be revoked and would not be renewed and the appellant would thereby be forced to discontinue its business as a brewer. It may well be that the appellant had some fear that if it did not settle the Government's action against it, the Government might not renew its licence, and there is evidence that the renewal of the licence in 1928 was held up for some little time. But the evidence does not establish any threats against the appellant or that there was any involuntary action on its part in entering into the settlement or in making the payments sought to be recovered.

In view of our conclusions, it is unnecessary for us to consider the question of fact whether the goods in this case were manufactured and sold for export as was proved in the *Carling* case (1).

The learned trial judge concluded:

> In the main I am satisfied that the goods in question were sold by the suppliant for export, that it saw the same were exported, and that in fact they were exported, within the meaning of the *Carling* case (1) * * * If, therefore, I had to dispose of this case solely upon the question of fact as to whether the goods were manufactured and sold for export, and were in fact exported, I would feel obliged to sustain the contention of the suppliant. If the suppliant were here being sued for the taxes in question, as in the *Carling* case (1), I would feel obliged to hold that the Crown must fail in its action.

Mr. Tilley made a powerful attack upon this finding of fact of the learned trial judge, but we do not find it necessary to examine all the evidence to ascertain whether we should come to the same conclusion. We have assumed, for the purpose of determining the legal question involved in the appeal, that the facts were favourable to the appellant.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McTague, Springsteen & McKeon.*

Solicitor for the respondent: *A. C. Hill.*

(1) [1931] A.C. 435.