1935
Mar. 4.
Mar. 19.

BETWEEN:

THE UNIVERSITY OF MANITOBA. SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

AND

THE BANK OF NOVA SCOTIA..... THIRD PARTY.

Jurisdiction—Third party procedure—Crown a defendant claiming indemnity against third party by virtue of regulations made under the provisions of the Consolidated Revenue and Audit Act, R.S.C. 1927, c. 178, s. 15—Jurisdiction of Exchequer Court in respect to claim against third party—Exchequer Court Act, R.S.C. 1927, c. 34, s. 30—British North America Act.

The University of Manitoba took an action against the Crown to recover certain moneys, the proceeds of Dominion of Canada bonds which had been registered in the name of the University, alleging that the Crown had wrongfully, and in breach of the contract contained in the bonds, transferred the same to third parties, or, in the alternative, that the Crown had cancelled such bonds without the presentation of a written instrument or transfer executed by or on behalf of the University.

The Crown served a third party notice on the Bank of Nova Scotia claiming to be indemnified by the Bank against liability to the University under the bonds on the ground that the Bank, by contract, guaranteed to the Crown the signatures and authority of the officers of the University who had executed the form of transfer (for which claim the Crown relied upon the regulations respecting the transfer or exchange of such bonds, made under the provisions of the Consolidated Revenue and Audit Act, R.S.C. 1927, c. 178, s. 15).

The Bank moved to set aside the third party notice on the ground that the Court was without jurisdiction.

Held: That since this Court has jurisdiction to entertain an action by the Crown against the Bank, on the guarantees, if the petition were finally disposed of adversely to the Crown, it follows that the Court has jurisdiction to entertain the third party proceeding between the Crown and the Bank.

2. That the operation of the third party rule is not excluded by the Exchequer Court Act, R.S.C. 1927, c. 34, s. 30, ss. d.

(1) (1924) 2 Ch. D. 33.

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MOTION to set aside third party notice.

The motion was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

W. N. Tilley, K.C., for the motion.

P. M. Anderson, contra.

M. B. Gordon for the suppliant.

THE PRESIDENT now (March 19, 1935) handed down the following reasons:

This is a motion made on behalf of the Bank of Nova Scotia, hereinafter called the Bank, to set aside a third party notice, served on the Bank, at the instance of the Crown under the provisions of the Exchequer Court Rules.

To apprehend clearly the submissions made on behalf of the Bank in support of the motion it becomes necessary to state the material facts upon which the main proceeding, a Petition of Right brought by the University of Manitoba, hereinafter called the University, is grounded.

The University was the registered holder of three bonds issued by the Dominion of Canada, under the authority of a statute of the Dominion, in the principal sum of $100,000 each, bearing interest at the rate of five and one-half per cent payable semi-annually, the maturity date of each bond being November 1, 1934.

For the purpose of transferring or exchanging the bonds there was printed thereon a form to be signed or executed by the registered holder. Regulations as to the transfer or exchange of such bonds were prescribed and they are in part as follows:

(1) In order to effect the transfer of a Dominion of Canada War or Victory Loan Bond, it must be presented at the office of the Minister of Finance and Receiver General at Ottawa or at the office of the Assistant Receiver General at . . . , accompanied by a written instrument of transfer in form approved by the Minister duly executed by the registered holder.

(2) The signature of the transferor must be guaranteed.

(3) Guarantees will be accepted from the following:—

(a) Canadian Chartered Banks;

* * * * * * * * *

(6) Where a transfer form is signed by a person acting for the registered owner under a power of attorney there must be produced to the Department with the transfer form a properly authenticated copy of the power of attorney together with clear and unequivocal evidence that the power of attorney was at the time of the signing of the transfer form still in force; provided however that such evidence will not be

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required if the party guaranteeing the signature on the transfer form guarantees also the authority of the attorney to sign for the registered owner. The following form of words must be used: "Signature and authority to sign guaranteed."

The regulations just mentioned were made under the provisions of section 15 of chapter 178, Revised Statutes of Canada (1927), the Consolidated Revenue and Audit Act, and which section reads as follows:

(15) The regulations made or to be made by the Governor in Council, as to the inscription, transfer, management and redemption of any Canada Dominion stock, debentures or other Canada securities hereinbefore mentioned, shall, in so far as they are not inconsistent with the Act under which they are made, have the same force and effect as if embodied and enacted in an Act of the Parliament of Canada.

The three registered bonds in question were in fact transferred or exchanged, and it is to be inferred from the petition that the University proposes to contest the authority of the officers of the University purporting to execute the transfers on behalf of the University. The transfers of the said bonds, before the same were presented to the respondent, had affixed thereto the seal of the University and were executed and signed as follows:

The University of Manitoba,
"John A. Machray"
Chairman Board of Governors.
"W. B. H. Teakles"
Asst. Registrar.

and in each case the transfer had endorsed thereon a guarantee by the Bank in the following or similar words: "Signature of Transferor and authority to sign guaranteed," followed by the signature of the Bank.

The University now claims that the Dominion of Canada did wrongfully and in breach of its contract transfer to some person or persons unknown to the suppliant, the said three bonds, or in the alternative did cancel such bonds without the presentation of a written instrument or transfer executed by or on behalf of the University, and that the respondent has, since a date mentioned, failed to pay to the University the interest payable under such bonds; and the suppliant seeks a declaration that it has been at all times material, and still is, the registered holder of the three bonds in question and is entitled to payment of the principal sum and interest secured thereby, or to a delivery up of the said bonds and the payment of the accrued

interest thereon, or in the alternative to damages in the sum of $352,250 being the amount of the principal secured by the said bonds and accrued interest.

The Crown, by its third party notice, claims to be indemnified by the Bank against liability to the University under the said bonds, or to relief over against the Bank, and the grounds for the claim to indemnification against the Bank are set forth in the third party notice, but essentially they are that the Bank, by contract, guaranteed to the Crown the signatures and authority of Machray and Teakles, and that if the transfer of the three bonds in question were unauthorized by the University, or is held to be void, then the Bank is responsible to the Crown upon the guarantees, for not having such transfers properly executed by the University, and for its negligence in respect of such transfers.

Mr. Tilley, in support of the motion to strike out the third party notice, contended that the Crown's claim to indemnification by the Bank was virtually an action based on a contract, or representation, or guarantee, as to the signatures of the transferors and their authority therefor, which was not a subject matter upon which the Dominion was competent to legislate, and that it was only within the competence of the Provincial legislatures to say what are the rights of parties under a guarantee of the nature here in question; and generally he contended that the Exchequer Court was without jurisdiction to entertain the claim of the Crown to be indemnified by the Bank, in respect of the guarantees as to signatures and authority, and that the issue could only be litigated in the Provincial courts. Mr. Tilley relied upon sec. 101 of the British North America Act and the decision of the Judicial Committee of the Privy Council in the case of *Consolidated Distilleries Ltd., et al,* v. *The King* (1); the Crown also relied upon the same case.

The question of jurisdiction depends upon a consideration of the British North America Act, and the Exchequer Court Act, chap. 34, R.S.C. 1927. The Provincial legislatures have exclusive power to make laws under the British North America Act in respect of "Property and Civil rights in the Province," and "The administration

(1) (1933) A.C. 508.

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of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts." Sec. 101 however provides that: "The Parliament of Canada may, *notwithstanding anything in this Act,* from time to time provide for the . . . establishment of any additional courts for the better administration of the laws of Canada," and it was in the exercise of this power that the Exchequer Court of Canada was created in 1875.

The matter of jurisdiction then resolves itself into the question as to whether the language of the Exchequer Court Act confers the necessary jurisdiction. It was not contended that here the Exchequer Court was without jurisdiction to entertain the petition itself. The important section of the Act to consider upon the motion, it was said by both Mr. Tilley and Mr. Anderson, was the following:—

30. The Exchequer Court shall have and possess concurrent original jurisdiction in Canada

(*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

Whatever be the true interpretation of the words "the laws of Canada," as found in sec. 101 of the British North America Act, they must, I think, be held to embrace a case of the kind here, where the bonds were issued under the authority of a Dominion statute undoubtedly within the legislative competence of Parliament, and where the regulations concerning their transfer and the required guarantee as to signature and authority have the force of statute; in fact the documents, that is the bonds, each contain the obligations of the Dominion of Canada to pay the registered holder the face value thereof, the written transfer itself, and the obligation of the Bank guaranteeing the signature and authority of the transferors, all of which were prescribed by a Dominion statute or by regulations having the force of statute.

In the two cases of *The King* v. *Consolidated Distilleries Ltd.* (1), actions were taken by the Crown upon bonds entered into by the defendants pursuant to the provisions of the Excise Act, and it was held, on appeal, by the Supreme Court of Canada, that the Exchequer

(1) (1931) Ex. C.R. 85 and 125; (1932) S.C.R. 419.

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Court had jurisdiction to hear and determine the claims. The present Chief Justice of Canada, then Duff J., upon the appeal, stated:—

> I do not doubt that "the better administration of the laws of Canada," embraces, upon a fair construction of the words, such a matter as the enforcement of an obligation contracted pursuant to the provisions of a statute of that Parliament or of a regulation having the force of statute,

and he held that while something might be said for the view that the case did not fall within subsection (*a*) of sec. 30, it was plainly within subsection (*d*). On further appeal to the Privy Council their Lordships of the Judicial Committee sustained the judgment of the Supreme Court of Canada. They declined to decide whether subsec. (*a*) of sec. 30 of the Exchequer Court Act conferred jurisdiction and stated that while these actions were no doubt "cases relating to revenue" it might perhaps be said that no law of Canada was sought to be enforced in them, but they held that these actions fell within subsec. (*d*). They further stated:—

> Their Lordships, however, do not think that subsec. (*d*) in the context in which it is found, can properly be read as free from all limitations. They think that in view of the provisions of the three preceding subsections the actions and suits in subsec. (*d*) must be confined to actions and suits in relation to some subject matter, legislation in regard to which is within the legislative competence of the Dominion. So read the subsection could not be said to be *ultra vires*, and the present actions appear to their Lordships to fall within its scope.

In the petition herein the Crown appears as defendant, and not as plaintiff, and subsec. (*d*) of sec. 30 purports to confer jurisdiction where the "Crown is plaintiff or petitioner." The primary object of the third party procedure is to prevent the necessity of two actions. In the first place, it is for the determination of all questions between the plaintiff and the defendant who brings in the third party, and in the second place for the determination of questions between the defendant and the third party against whom the defendant claims contribution or indemnity. It appears to me that upon the facts here this is a case in which the Crown may properly invoke the third party procedure. The effect of it is that the Crown becomes a plaintiff as against the Bank. If this Court would have jurisdiction to entertain an action by the Crown against the Bank, on the guarantees, if the petition herein were finally disposed of adversely to the Crown and

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in favour of the University—and, I think, the Court would undoubtedly have such jurisdiction—then, I think, it follows, that the Court has jurisdiction to entertain the third party proceeding between the Crown and the Bank. I do not think subsec. (*d*) of sec. 30 was intended to exclude the operation of the third party rule. The precise point involved here has apparently not arisen for consideration before this, so far as I know. In the unreported case of *Magee* v. *The Queen* (1896), the City of Saint John was, on motion of the Crown, joined as a third party on an order made by Burbidge J., but this was by consent of counsel; the consent order would not confer jurisdiction, but evidently Burbidge J. was of the opinion that there was jurisdiction to entertain the third party notice. See Audette's Exchequer Court Practice, page 504. In the case of *The King* v. *Consolidated Distilleries Ltd.* (1), a third party notice was set aside, but that involved an issue between subject and subject and did not relate to the original subject-matter of the action.

I am therefore of the opinion that the Bank has been properly joined as a third party and that the motion to set aside the third party notice must be refused with costs.

Judgment accordingly.