

1895. THE QUEEN, ON THE INFORMATION OF }
 April 1. ATTORNEY-GENERAL FOR THE DOM- } PLAINTIFF;
 INION OF CANADA..... }

AND

THE MONTREAL WOOLLEN MILLS }
 COMPANY } DEFENDANTS.

Incidental demand—Counter-claim—Right to plead same to information by the Crown—Substantive action—Fiat—Reference to court—50-51 Vict. c. 16, sec. 16, sub-sec. (e) and sec. 23.

A substantive cause of action cannot be pleaded as an incidental demand or counter-claim to an information by the Crown.

THIS was a motion to set aside an incidental demand. The motion was made at Ottawa on the 7th and 28th days of March, 1895.

W. D. Hogg, Q.C., in support of motion :—

This action arose out of a break in the bank of the Lachine Canal at Montreal. It was discovered that the accident was owing to the defendants having their works so improperly constructed that the water found its way from the flumes through the foundations, and so undermined the wall of the canal. The Government expended \$15,878.97 in repairing the canal. The Crown brought an action against the Woollen Mills Company for such amount, and the company in their defence plead that the cause of the leak was the negligence of Her Majesty, and Her Majesty's officers. Besides denying their liability the defendants constitute themselves plaintiffs by virtue of an incidental demand which they file and in which they bring an action against the Crown founded upon a cause of action arising out of the same leak or injury of which the Crown complains in the information. They say it was in consequence of the negligence of the Crown's

servants that they had to expend a large sum of money in repairing their works damaged by the break, and they seek to recover it. This motion is for the purpose of setting aside the incidental demand upon several grounds.

Now the Code of Procedure allows and provides for incidental demands in proper cases. (He cites Articles 149 and 151 C. C. P. L. C.) Article 152 of the Code provides that an incidental demand must be made on petition. The first objection I take is that this is an incidental demand made by filing a statement of claim. While under the practice in the province of Quebec an incidental demand must be made on petition.

Then rule 37 of the Superior Court Practice of the province of Quebec provides that an incidental demand or cross-demand shall be deemed to be a distinct action. There are several grounds upon which the incidental demand here set up cannot be allowed. In the first place the incidental demand here is equivalent to a counter-claim, and as such it is in the nature of a new action.

By our statute 50-51 Vict., chapter 16, section 16, subsection (e), the whole jurisdiction of this court is set out in respect of matters of counter-claim. While the Crown is given the right to set up a counter-claim against the subject the statute is silent as to a cross-demand or counter-claim being allowed to the subject against the Crown, and it is not to be found in any place in this statute that a person against whom the Crown has a right to set up a set-off or counter-claim has in turn the right to set up one against the Crown.

This is a question not of procedure, but it is a question of jurisdiction simply. I submit that it is entirely out of the jurisdiction of this court to hear anything in the way of a counter-claim set up by a subject in an action at the suit of the Crown.

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Secondly, I submit that no subject has the right to bring an action against the Crown by filing a statement of claim. There is a mode provided as to the way in which an action is to be brought against the Crown, that is by petition of right or by reference under the 23rd section of the Act. I submit that as this is a new action the only way to bring it before the court is by reference or by fiat. This is simply a new action, the defendants constitute themselves plaintiffs and ask for judgment. And apart from this they are pleading as a set-off what would not be allowed to prevail as such. Besides this there is the general rule that a set-off cannot be asserted against the Crown.

I submit that this is merely a question of jurisdiction, and at all events that there is no rule of procedure which allows it.

F. S. Maclellan, contra:—I submit that the defendants have a right to make an incidental demand in respect of the same cause of action as the information is based upon. The procedure of the province of Quebec must be applied to this case, and I submit that the Code of Procedure permits the filing of an incidental demand in such a case as this.

One of the contentions of my learned friend was that this incidental demand could not be made unless upon petition, and he cites article 152 of the Code of Procedure in support of this contention. I refer your lordship to the rules of practice in the Superior Court (he reads rule 36). The incidental demand in this case was filed with the plea, now the practice in the province of Quebec is that an incidental demand may be filed with the plea as was done here. A practice has grown up in cases such as this to put in an incidental demand with the plea and not by petition. (He cites *Lionnais v. Lamontagne*) (1).

(1) 20 L.C.J. 303.

In the province of Quebec the defendant has a right to make an incidental demand in exactly the same form as we have done here. I have never known an objection to be taken in the province of Quebec because the defendant has not put in his incidental demand by petition. In the case of libel he might require a petition, but in cases such as the present one Art. 152 of the Code of Procedure seems to have been departed from.

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The second point of counsel for the Crown was, that this was not a question of procedure, but of jurisdiction. I think it is entirely a question of procedure.

[*By the Court.*—I think Mr. Hogg's objection was that I had no jurisdiction because there was no petition having a fiat thereon nor any reference of the claim.]

But the Crown has consented to this proceeding.

[*By the Court.*—But the rule of English law is that jurisdiction cannot be given by consent.]

I think your lordship could go on without a fiat if they have taken further steps in the cause. I think that as we were brought into court that we are entitled to all the privileges that a subject would have in an ordinary action in the way of defence. If the subject is entitled to exercise certain rights in regard to the same subject-matter as the one before the court, and there is no limitation either in the rules of court or in *The Exchequer Court Act*. I do not see why the subject should be deprived of this right against the Crown. I was going to say that this objection is analogous to an exception to the form. Art. 107 of the Code of Procedure requires the exception to be made not more than four days after the filing of the incidental demand in court, and also in the case of persons suing in the province of Quebec if they do not take advantage of the right of objection before taking new steps in the cause, any objection they might raise will be taken to be waived.

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[*By the Court.*—What is the other step taken in the cause here ?]

The demand for particulars of the incidental demand. The incidental demand was filed on the 7th of February, 1895, and on the 12th of February we were served with a demand of particulars of the incidental demand, and having given particulars two days afterwards we were served with a summons for this motion.

I say that the demand for particulars was a waiver of the right to object to the sufficiency of the incidental demand. [He cites *Munro v Laliberté* (1); *Brisson v. McQueen* (2)]. Rule 166 of the Exchequer Court seems to contemplate that an incidental demand or some such procedure on behalf of the subject may be made against the Crown. (He reads the rule). It seems that the subject may get judgment for something more than costs, because he could only get judgment for more than costs upon something in the nature of an incidental demand. If the defendants' incidental demand were struck out under this rule he would get judgment for costs only, but if sustained he might have judgment for damages as well as costs. I submit that the incidental demand under the procedure of the Exchequer Court rules is well founded. Rule 166 is one of the rules that applies to cases in the province of Quebec. I think the effect of rules 256 and 257 is to give the court considerable scope in applying rules of procedure in cases between the Crown and the subject where they both have causes of action in respect of the same subject-matter.

Mr. *Hogg*, replied.

THE JUDGE OF THE EXCHEQUER COURT now (April 1st, 1895) delivered judgment.

(1) 3 Rev. de Leg. 72.

(2) 7 L. C. J. p. 7.

This is an application for an order to strike out the incidental demand or counter-claim pleaded by the defendants in this case. To the application, which is made upon the ground, among others, that the incidental demand is a set-off or counter-claim, and cannot be pleaded according to the rules of this court, the defendants answer that according to the practice and procedure in force in the Superior Court of Quebec, which apply to this case, an incidental demand such as this now filed may be pleaded; and that by demanding particulars of the incidental demand the plaintiff has waived any objection that otherwise might have been taken thereto.

The real difficulty, however, that the defendants have to meet is that the question is one of jurisdiction. In their incidental demand they set up a claim against the Crown which, while it may have its origin in some of the facts, or even in the same state of facts, as those on which the Crown's claim rests, is wholly independent of such claim.

By the 23rd section of *The Exchequer Court Act* it is provided that any claim against the Crown may be prosecuted by petition of right, or may be referred to the court by the Head of the Department in connection with the administration of which the claim arises, and there is no other way in which the court can acquire jurisdiction in respect of such a claim. The incidental demand or counter-claim filed in this case must be struck out with costs to the Crown.

Judgment accordingly.

Solicitors for plaintiff: *O'Connor & Hogg.*

Solicitors for defendants: *Macmaster & Maclellan.*

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