BETWEEN:

BLAKEY & COMPANY, LIMITED.. SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

1935

* June 17.
Nov. 9.

Revenue—Customs Act—British Preferential tariff—Order-in-Council passed under one statute rendered null and void when that statute repealed unless repealing statute contains a saving clause—Recovery of money paid under compulsion.

Pursuant to an Order in Council dated 18th August, 1931, passed under the authority of s. 43 of the Customs Act, R.S.C. 1927, c. 42, the Minister of National Revenue valued for duty purposes hats imported into Canada from Great Britain by the suppliant, by virtue of which valuation a special duty was imposed and became payable, together with the ordinary customs duty on the amount of said special duty and together with the resulting increased sales tax and excise tax on the amount of both said added duties. By 23-24 Geo. V, c. 7, ss. 1 of s. 43 of R.S.C. 1927, c. 42, was repealed and another section substituted therefor became law on November 25, 1932. The Minister continued to impose and collect the said added duties and taxes on hats imported by suppliant. Suppliant claimed that by virtue of c. 7, 23-24 Geo. V, the hats imported by it were entitled to entry under the British Preferential tariff and that the Minister had no authority to fix their value for duty and to impose and collect the duties, sales tax and excise tax.

Held: That the repeal of an act, or clause of an act, authorizing the passing or adoption of Orders in Council, regulations or by-laws, has the effect of repealing or voiding the Orders in Council, regulations or by-laws passed or adopted under the authority of such act or clause, unless there be in the repealing act a stipulation preserving their validity notwithstanding the repeal.

1935

BLAKEY & CO. LIMITED v. THE KING.

2. That Orders in Council, regulations and by-laws are subordinate to the act and when the act is repealed the Orders in Council, regulations and by-laws made thereunder, unless otherwise expressly provided, lapse.

3. That the Order in Council of the 18th August, 1931, is inconsistent with s. 43, c. 7, 23-24 Geo. V, in the case of goods entitled to entry into Canada under the British Preferential tariff, and therefore null and void.

4. That the payment by the suppliant of the duty and other taxes imposed by the Minister was not voluntary but compulsory and therefore suppliant is entitled to recover the money so paid.

PETITION OF RIGHT by the suppliant claiming a declaration that certain duties and taxes collected by the Minister of National Revenue were collected without authority and that same be returned to suppliant.

The case was heard before the Honourable Mr. Justice Angers, at Ottawa.

H. D. Anger and *A. M. Latchford* for the suppliant.

Glyn Osler, K.C., and *D. Guthrie* for the respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J., now (November 9, 1935) delivered the following judgment:—

The suppliant, Blakey & Company Limited, is a wholesale dealer in men's hats; it has its head office in the City of Toronto, in the Province of Ontario. In pursuance of its business, it imports hats into Canada from Great Britain.

In its petition of right the suppliant alleges in substance that:—

Prior to November 25, 1932, pursuant to Orders in Council passed under the authority of section 43 of the Customs Act (R.S.C. 1927, chap. 42), the Minister of National Revenue valued for duty hats imported by the suppliant, by virtue of which valuation a special duty of $1.50 per dozen hats was imposed and became payable, together with the ordinary customs duty on the amount of said special duty and together with the resulting increased sales tax and excise tax on the amount of both said added duties;

by section 1 of chapter 7 of the Statutes of Canada of 1932, said section 43 of the Customs Act was repealed and

substituted by another one which came into force on November 25, 1932;

by virtue of said substituted enactment all Orders in Council passed prior thereto ceased to have effect in so far as they related to goods entitled to entry into Canada under the British Preferential tariff and thereupon it was not competent for the Governor in Council to thereafter authorize the said Minister to value goods so entitled nor competent for the said Minister to continue to impose or collect said added duties and taxes;

notwithstanding said substituted enactment the Minister has continued and still continues to impose and collect from suppliant the said added duties and taxes on goods imported by him and entitled to entry under said preferential tariff;

pursuant to the regulations of the Minister and under the compulsion thereof and of customs officers entrusted with their enforcement, and in order to avoid the penalties provided for non-payment, including that of seizure or detention, and to obtain its goods, the suppliant was and is compelled to pay said added duties and taxes;

from November 25, 1932, to September 30, 1934, the suppliant has been compelled to pay said special duty of $1.50 per dozen hats in the sum of $1,971.50, ordinary customs duty thereon in the sum of $408.49, sales tax on both said added duties in the sum of $144.56 and excise tax on both said added duties in the sum of $65.33, a total of $2,587.78, to the refund of which the suppliant is entitled.

The suppliant, by his petition, prays for:—

(*a*) a declaration that from and after the 25th of November, 1932, all power of the Governor in Council to authorize the Minister of National Revenue to value goods entitled to entry into Canada under the British Preferential tariff and all power of the said Minister to so value and to impose and collect special duty, ordinary customs duty on said special duty and sales and excise tax on either of said duties did cease and determine;

(*b*) a reference to determine the amount collected from suppliant for said duties and taxes;

(*c*) judgment for the amount found to be due to claimant, with costs.

1935

BLAKEY & CO. LIMITED v. THE KING.

Angers J.

In answer to the suppliant's petition, the respondent says in substance that:—

during the period from November 25, 1932, to September 30, 1934, the Minister of National Revenue, pursuant to an Order in Council passed on August 18, 1931, under the authority of section 43 of the Customs Act (R.S.C. 1927, chap. 42), fixed the value for duty of hats imported by the suppliant at the export or actual selling price thereof to the suppliant plus $1.50 per dozen and there was imposed by virtue of such valuation in addition to duties, sales tax and excise tax on the value so established a special or dumping duty of $1.50 per dozen hats together with the ordinary customs duty, sales tax and excise tax on the said sum of $1.50 per dozen hats;

the amendment to section 43 made by 22-23 Geo. V, chap. 7, s. 1, did not repeal, annul or otherwise affect the validity of the Order in Council of the 18th of August, 1931, and subsequent to the date of the coming into force of said amendment, viz., November 25, 1932, and up to September 30, 1934, the Minister of National Revenue was and still is empowered by the said Order in Council to fix the value for duty of the hats imported by the suppliant at the export or actual selling price thereof to the suppliant plus $1.50 per dozen and to impose and collect the duties, sales tax and excise tax which the suppliant claims therein were improperly imposed and collected;

the suppliant has from time to time voluntarily and with full knowledge of the facts paid the said duties, sales tax and excise tax and cannot now recover back the same.

The suppliant, in its reply, avers that it did not make any payment of duty or taxes voluntarily but that each payment was made under compulsion and under protest.

The parties agreed upon the facts and, at the trial, written admissions were filed as exhibit 1, the material statements whereof read as follows:—

1. During the period extending from the 25th of November, 1932, being the date of the coming into force of the Statute 23-24 George V, chapter 7, to the 30th of September, 1934, being an arbitrary date selected by the suppliant for the preparation of its claim at the inception of these proceedings, the suppliant from time to time imported hats from Great Britain entitled to entry into Canada under the British Preferential tariff

2. On the 18th of August, 1931, on a report from the Minister of National Revenue, an order was made by the Governor in Council, under

the authority of section 43 of the Customs Act, as amended by section 4 of chapter 2 of the Statutes of 1930, Second Session, authorizing the Minister of National Revenue to fix the value for duty of hats (and certain other articles not here in question) and providing that the value so fixed should be deemed to be the fair market value thereof, notwithstanding any other provisions of the Customs Act. The said order in council was duly published in the *Canada Gazette*. . . .

3. On the 18th of August, 1931, under authority granted by the said order in council the Minister of National Revenue fixed the value for duty of hats (and certain other articles not here in question) at the export or actual selling price to the importer in Canada, plus $1.50 per dozen and caused to be issued, for the guidance of Customs and Excise officers, appraisers' bulletin No. 3734. . . .

4. During the period extending from the 25th of November, 1932, to the 30th of September, 1934, and thereafter, the hats imported by the suppliant were valued for duty in accordance with the terms of the said order in council and order of the Minister of National Revenue. During the period extending from the 25th of November, 1932, to the 28th of February, 1934, and also during the period extending from the 15th of June, 1934, to the 30th of September, 1934, and thereafter, the suppliant paid customs duties, sales tax, and excise tax, at the rates from time to time in force on the total value so established, and in addition thereto the said $1.50 per dozen hats as a special or dumping duty.

5. * * * * * * * * * *

6. No claim is made by the suppliant for customs duties, sales tax or excise tax paid in respect of the hats imported during the period extending from the 28th of February, 1934, to the 15th of June, 1934, for the reason that during the said period the Department of Customs did not require payment of the said special duty and taxes, but reserved the right to require payment of the same by amended entries.

7. Upon certain of the customs entries in respect of the said hats there were endorsed the words "duty paid under protest on hats." Attached hereto as Schedule "D" (should be "E") is the first one of the said customs entries endorsed as aforesaid dated the 8th of February, 1934, and thereafter all customs entries were similarly endorsed except five in number.

8. Previous to the said 8th of February, 1934, no protest was endorsed on any of said customs entries.

Copies of the Order in Council of the 18th of August, 1931, of the order of the Minister of National Revenue pursuant thereto bearing the same date, of the appraiser's bulletin No. 3734 and of the customs entry of the 8th of February, 1934 (bearing the words "Duty paid under protest on hats") are annexed to the admissions as schedules A, B, C and E respectively; they offer no particular interest.

Paragraph 9 of the admissions relates the procedure which had to be followed by the suppliant in order to

1935

BLAKEY & CO. LIMITED v. THE KING.

Angers J.

obtain possession of the goods imported by it; it may be summed up briefly as follows:—

upon receipt of an advice note of the carrier that the goods had arrived "in bond," the suppliant had to attend the Customs Office with this advice note and two copies of the vendor's invoice duly certified; the suppliant then had to complete the Departmental entry form (B. 1), showing the goods, the invoice value thereof, the ordinary customs duty thereon, the said special duty and the ordinary customs duty thereon, and excise and sales taxes on the said invoice value and the sum of all said duties; the customs officers then checked the documents to ascertain that the rate of ordinary and special duties and excise and sales taxes were correctly stated and that the said duties and taxes were correctly computed; after the interval required for such checking, the suppliant again had to attend the Customs Office and he was then required to pay the total of said duties and taxes; upon such payment being made, the customs officer issued a delivery warrant (Department form C. 1) authorizing the carrier to deliver the goods to the suppliant.

Section 43 of the Customs Act in force on the 18th of August, 1931, when the Order in Council with which we are concerned was passed, read thus:—

43. (1) If at any time it appears to the satisfaction of the Governor in Council on a report from the Minister that goods of any kind are being imported into Canada, either on sale or on consignment, under such conditions as prejudicially or injuriously to affect the interests of Canadian producers or manufacturers, the Governor in Council may authorize the Minister to fix the value for duty of any class or kind of such goods, and notwithstanding any other provision of this Act, the value as fixed shall be deemed to be the fair market value of such goods.

(2) Every order of the Governor in Council authorizing the Minister to fix the value for duty of any class or kind of such goods, and the value thereof so fixed by the Minister by virtue of such authority, shall be published in the next following issue of the *Canada Gazette*.

This section 43 was enacted by 21 Geo. V, chap. 2, s. 4 (assented to on the 22nd of September, 1930) to replace section 43 of chapter 42 of the Revised Statutes of Canada, 1927.

By 23-24 Geo. V, chap. 7 (assented to on the 25th of November, 1932) subsection 1 of section 43 was repealed and the following substituted therefor:—

43. (1) If at any time it appears to the satisfaction of the Governor in Council on a report from the Minister that goods of any kind not

entitled to entry under the British Preferential tariff or any lower tariff are being imported into Canada either on sale or on consignment, under such conditions as prejudicially or injuriously to affect the interests of Canadian producers or manufacturers, the Governor in Council may authorize the Minister to fix the value for duty of any class or kind of such goods, and notwithstanding any other provision of this Act, the value so fixed shall be deemed to be the fair market value of such goods.

It was argued on behalf of suppliant that the repeal of an act or clause of an act authorizing the passing or adoption of Orders in Council, regulations or by-laws has the effect of repealing or voiding the Orders in Council, regulations or by-laws passed or adopted under the authority of such act or clause, unless there be in the repealing act a stipulation preserving their validity notwithstanding the repeal. This contention seems to me well founded. Orders in Council, regulations and by-laws are subordinate to the act and when the act is repealed the Orders in Council, regulations and by-laws made thereunder, unless otherwise expressly provided, lapse. An Act of Parliament which is repealed must be considered (except as to transactions past and closed) as if it had never existed.

See *Watson* v. *Winch* (1); *Surtees* v. *Ellison* (2); *Kay* v. *Goodwin* (3); *Lemm* v. *Mitchell* (4); *City of St. Catharines* v. *Hydro-Electric Power Commission* (5); *Attorney-General* v. *Lamplough* (6); *The Queen* v. *The Inhabitants* of *Denton* (7); *Bélanger* v. *The King* (8); *The King* v. *National Fish Co.* (9); *Institute of Patent Agents* v. *Lockwood* (10); *Re Drewry* (11).

Counsel for respondent submitted that, when an act or clause of an act is repealed and another one substituted therefor, the Orders in Council, regulations and by-laws made under the act or clause repealed remain in force. This is true in so far as they are not inconsistent with the substituted enactment (section 20 of the Interpretation Act, R.S.C. 1927, chap. 1); if they are, they become null and void. The Order in Council of the 18th of August, 1931, is inconsistent with subsection (1) of section 43, as enacted

(1) (1916) 1 K.B., 688, at 690.
(2) (1829) 9 B. & C., 750, at 752.
(3) (1830) 130 E.R., 1403, at 1405.
(4) (1912) A.C., 400, at 406.
(5) (1927-28) 61 O.L.R., 465, at 475; (1928) 62 O.L.R., 301.
(6) (1878) 3 Ex.D., 214, at 222.
(7) (1852) 18 Q.B., 761, at 770 and 771.
(8) (1916) 54 S.C.R., 265.
(9) (1931) Ex.C.R., 75, at 82.
(10) (1894) A.C., 347, at 360.
(11) (1917) 36 D.L.R., 197, at 199.

1935

BLAKEY & CO. LIMITED v. THE KING.

Angers J.

by 23-24 Geo. V, chap. 7, in the case of goods entitled to entry into Canada under the British Preferential tariff, as were the hats imported by the suppliant from Great Britain.

The only conclusion to draw is that the Crown has, since the 25th of November, 1932, date on which the statute 23-24 Geo. V, chap. 7, repealing subsection (1) of section 43 of the Customs Act, as enacted by 21 Geo. V, chap. 2, s. 4, and substituting therefor the subsection (1) which has since been on the statute book, was assented to and came into force, collected duties on hats imported by the suppliant from Great Britain to which it was not entitled.

The next question to be determined is whether the suppliant has the right to recover these duties from the respondent. In my opinion, it has if the payment were not voluntary but were made under compulsion.

The suppliant, in order to get his goods, had to comply with the requirements of the Customs Act, particularly with regard to the payment of duties; on its failure so to do, the goods were liable to forfeiture and seizure; the provisions of the Act in this respect are imperative and compulsory: see (*inter alia*) sections 19, 20, 21, 22, 23, 27, 112, 245 and 246.

I do not think, in the circumstances, that it can be said that the payments were voluntary, not even those made prior to the 8th of February, 1934, which is the date on which the words "duty paid under protest on hats" were for the first time endorsed on a customs entry (see paragraph 7 of admissions). Protests made prior to the 8th of February would have been of no more avail than the ones made subsequent thereto; considering the evident determination of the Minister of National Revenue to impose and collect, on hats imported from Great Britain after the 25th of November, 1932, duties and taxes computed on the basis of the value for duty fixed by the Minister on the 18th of August, 1931, under the authority of the Order in Council of the same date, notwithstanding the amendment made to section 43 of the Act by 23-24 Geo. V, chap. 7, protests were not only useless, but, in my opinion, they were unnecessary.

The question of the recovery of payments illegally exacted by the creditor and made by the debtor under compulsion has formed the subject of many decisions; it seems

to me convenient to make a brief review of those which are most in point.

In the case of *Maskell v. Horner* (1), the plaintiff, who for a number of years had carried on business as a dealer in produce in the vicinity of Spitalfields Market, sought to recover from the defendant, owner of the market, tolls which had been unlawfully demanded under threat of seizure and which he had paid to the latter under protest during several years, it was held by the Court of Appeal as follows:

1. Affirming the decision of Rowlatt J. on this point, that the plaintiff did not pay under a mistake either of law or fact, but because he found that other sellers were paying tolls and he did not wish to be involved in litigation with the defendant, and that the plaintiff could not recover under this head of claim; but

2. (*Pickford L.J. doubting*), *reversing the decision* of Rowlatt J. on this point, that the circumstances of the payments and the conduct of the plaintiff throughout the period of years showed that he only paid to avoid seizure of his goods and never made the payments voluntarily, or intended to give up his right to the sums paid or close the transaction, and that he was entitled to recover under this head of claim the sums paid during the last six years immediately preceding this action, the earlier payments being barred by the Statute of Limitations.

At page 118 Lord Reading, C.J., expresses his opinion thus:

If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction (per Lord Abinger C.B. and per Parke B. in *Atlee* v. *Backhouse*, 5 M. & W. 633, 646, 650). The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand (per Tindal C.J. in *Valpy* v. *Manley*, 1 C.B. 594, 602, 603).

Lord Reading, after referring to the cases of *Parker* v. *Great Western Ry. Co.* (2) and *Great Western Ry. Co.* v. *Sutton* (3), adds (p. 119):

This principle of law is so well settled that it cannot be challenged, and I find nothing in *Brisbane* v. *Dacres* (5 Taunt. 143) to the contrary. Indeed the general proposition of law is not disputed; but it was con-

(1) (1915) 3 K.B., 106. (2) (1844) 7 Man. and G. 253.
(3) (1869-70) L.R. 4 H.L. 226, 249.

1935

BLAKEY & CO. LIMITED v. THE KING.

Angers J.

tended, and the learned judge found, that the plaintiff had not brought himself within it, mainly because (1) the payments were not accompanied by a declaration or assertion to the defendant that the plaintiff did not intend to give up his right to recover the money, and (2) the protests for a period of years had degenerated into a sort of grumbling acquiescence and were ineffective. I doubt whether Rowlatt J. intended to find that there must be anything in the shape of an express notice or declaration to the defendant of the plaintiff's intention to keep alive his right to recover. It is clear, and was indeed admitted at the Bar, that no express words are necessary and that the circumstances attending the payments and the conduct of the plaintiff when making them may be a sufficient indication to the defendant that the payments were not made with the intention of closing the transactions. I do no think that the mere fact of a payment under protest would be sufficient to entitle the plaintiff to succeed; but I think that it affords some evidence, when accompanied by other circumstances, that the payment was not voluntarily made to end the matter.

Another recent case which offers a great deal of interest is that of *T. & J. Brocklebank, Ltd.*, v. *The King* (1). The head-note states the facts concisely but clearly and I think I had better quote it:

The Defence of the Realm Acts and Regulations did not empower the Shipping Controller to require, as a condition of a licence to sell a British ship to a foreign firm, that a percentage of the purchase money should be paid to the Ministry of Shipping.

Where, therefore, such a condition had been imposed by the Shipping Controller and the proportion of the purchase money had been paid by the vendors to the Ministry:—

Held, that the imposition of the condition was illegal, and that the payment was not a voluntary payment.

Attorney-General v. *Wilts United Dairies Ld.* (1921, W.N. 252; 1922, W.N. 217; 37 Times L.R. 884, 38 ibid. 781) applied.

In his judgment Avery J. says (p. 652):

I have now to consider whether the money in this case was paid under compulsion within the meaning of the authorities or whether it was a voluntary payment as contended on behalf of the Crown. The case of *Maskell* v. *Horner* (1915, 3 K.B. 106, 118), which was relied on by the suppliants, does not, in my opinion, govern this case.

The learned judge then cites the passage of the judgment of Lord Reading hereinabove reproduced and continues:

That passage must be read in connection with the facts of that case, which was decided on the ground that the tolls had been paid under threat of seizure of the plaintiffs' goods and to avert that threatened evil, and the judgments had no reference to the case of money extorted by a person *colore officii*.

On behalf of the Crown it was contended that the payment in this case was not made under protest, and the judgment of Walton J. in *William Whiteley, Ld.* v. *The King* (101 L.T. 741) was relied on; but an express protest is not necessary if the compulsion is apparent from the circumstances of the case: *Maskell* v. *Horner*. The learned judge in *Whiteley's* case, while holding that money paid to the Commissioners of

(1) (1924) 1 K.B., 647.

Inland Revenue under threat that, if not paid proceedings would be taken for penalties, was not recoverable as money paid under compulsion, was careful to distinguish the case of money extorted by a person for doing what he is legally bound to do without payment, and upon this point the case of *Morgan* v. *Palmer* (2 B. & C. 729) is a direct authority. It may be said that the Shipping Controller was not legally bound to grant a licence, but in granting or refusing it, he was bound, I think, to exercise a judicial discretion and not to impose a condition of payment which was unlawful: *Rex* v. *Athay* (1758, 2 Burr. 653) and *Parker* v. *Great Western Ry. Co.* (1844, 7 Man. & G. 253, 292, 293). The money in the present case was not paid under any mistake of fact, nor was it, in my opinion, paid under any mistake of law, but adapting the words of Littledale J. in *Morgan* v. *Palmer* (2 B. & C. 729, 739) the suppliants were merely passive and submitted to pay the sum claimed as they could not otherwise procure the licence, and subject to the further point taken by the Attorney-General under the Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48), I think the suppliants would be entitled to recover the sum claimed as money received to their use.

An appeal was taken from the judgment of Avery, J. resulting in a reversal on another point irrelevant to the issue herein (1). The judges of the Court of Appeal agreed with the trial judge that the payment had not been a voluntary one. Bankes, L.J., at page 61, makes the following observations:

> The learned judge came to the conclusion after considering the evidence, and the authorities which were cited to him and to us, that the payment was not a voluntary one. I entirely agree with this view. The payment is best described, I think, as one of those which are made grudgingly and of necessity, but without open protest, because protest is felt to be useless. I do not propose to go through the evidence or to discuss the authorities, as upon the materials before the Court it seems to me impossible to disturb the judge's conclusion on this point.

Scrutton, L.J., who also sat in Appeal, arrived at the same conclusion (p. 67):

> Further, I am clear that the payment by the petitioners in this case was not a voluntary payment so as to prevent its being recovered back. It was demanded by the Shipping Controller *colore officii*, as one of the only terms on which he would grant a licence for the transfer. It was a case where in Abbott C.J.'s language in *Morgan* v. *Palmer* (2 B. & C. 729, 735, 739): "One party has the power of saying to the other 'that which you require shall not be done except upon the conditions which I choose to impose'," or, in the language of Littledale J. in the same case, "The plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his licence." In fact here the petitioners made several inquiries and protests as to the legality of the claim.

See also the remarks of Sargant, L.J., in the same sense at page 72.

The case of *Morgan* v. *Palmer* (2) was an action of assumpsit for the recovery of a sum paid by the plaintiff, a

(1) (1925) 1 K.B. 52.

(2) (1823-24) 2 B. & C. 729.

1935

BLAKEY & CO. LIMITED v. THE KING.

Angers J.

publican in the borough of Great Yarmouth, to the defendant as mayor of that borough and claimed by the latter as having become due to him on granting to the plaintiff his annual licence as a publican. At the trial before Garrow, B., a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench. The Court held that the payment made by the plaintiff to the defendant was not voluntary so as to preclude the plaintiff from recovering the money.

Abbott, C.J., says (p. 734):

It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, "that which you require shall not be done except upon the conditions which I choose to impose," no person can contend that they stand upon anything like an equal footing. Such was the situation of the parties to this action. The case is therefore very different from *Brisbane* v. *Dacres,* and our judgment must be in favour of the plaintiff.

Littledale, J., dealing with the same subject, expresses a similar opinion (p. 738):

Then comes the objection, that this was a voluntary payment. In *Bilbie* v. *Lumley* (2 East, 469), *Brisbane* v. *Dacres,* and *Knibb* v. *Hall* (D1 Esp. 84), both parties might, to a certain extent, be considered as actors. Here, the plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his licence. I think, therefore, that he is entitled to recover it back in this action.

Another action of assumpsit to recover money received by the defendant, in which the question of compulsory payment arose is that of *Parker* v. *The Great Western Ry. Co.* (1). By the acts of Parliament under which a railway company was incorporated, it was provided that the charges for the carriage of goods should be reasonable and equal to all persons and that no reduction or advance should be made in favour of or against any person. The company acted as carrier for the public and issued scales of charges for carriage of goods, including collections, loading, unloading and delivery of parcels. The company also carried goods for other carriers to whom it made certain allowances as an equivalent for the trouble of collection, loading, unloading and delivery of parcels, these being performed by the carriers. In its dealings with plaintiff, a particular carrier, the company refused to make such allowances but

(1) (1844) 7 M. & G., 253.

was willing to perform for him the things which formed the consideration for such allowances.

Tindal, C.J., dealing with the right of the plaintiff to recover the amount paid to defendant in excess of the regular charges to carriers, says (p. 292):

But it remains to be considered whether the money so paid can be recovered by the plaintiff, in this action.

It was argued for the defendants that it cannot; for, that the payments were made voluntarily, with a full knowledge of all the circumstances; and that the plaintiff was not compelled to make those payments, but, in each case, must be considered as having made a contract with the company to pay them a certain sum of money as the consideration for the carriage of his goods; and that, having made such contracts, he cannot now retract, and recover the money paid in pursuance of them. In support of this argument, *Knibbs* v. *Hall* (1 Esp. N.P.C. 84), *Brown* v. *McKinally* (1 Esp. N.P.C. 279), *Bilbie* v. *Lumley* (2 East, 469), and *Brisbane* v. *Dacres* (5 Taunt. 143) were cited. On the other side, it was urged, that these could not be considered as voluntary payments; that the parties were not on an equal footing; that the defendants would not, until such payments were made, perform that service for the plaintiff which he was entitled by law to receive from them without making such payments; and that, consequently, he was acting under coercion; and in support of this view of the case, *Dew* v. *Parsons* (2 B. and Ald. 562, 1 Chitt. Rep. 295), *Morgan* v. *Palmer* (2 B. & C. 729, 4 D. & R. 283), and *Waterhouse* v. *Keen* (4 B. & C. 200, 6 D. & R. 257) were referred to.

We are of opinion that the payments were not voluntary. They were made in order to induce the company to do that which they were bound to do without them; and for the refusal to do which, an action on the case might have been maintained, as was expressly decided in the case of *Pickford* v. *The Grand Junction Railway Company* (10 M. & W. 399).

In the case of *Hooper* v. *The Mayor and Corporation of Exeter* (1), in which the plaintiff was seeking to recover from the defendants harbour dues exacted in respect of exempted articles, Lord Coleridge, C.J., said (p. 458):

From the case cited in the course of the argument it is shewn that the principle has been laid down that, where one exacts money from another and it turns out that although, acquiesced in for years such exaction is illegal, the money may be recovered as money had and received, since such payment could not be considered as voluntary so as to preclude its recovery.

The doctrine concerning the recovery of money paid under compulsion was ably and fully expounded by the Appellate Division of the Supreme Court of Ontario in *re Pillsworth* v. *Town of Cobourg* (2). The head-note is as follows:

The plaintiff, believing that certain taxes imposed upon his land by the council of the municipality in which he lived were illegally imposed under the Local Improvement Act (as was found to be the fact), declined to pay them, but subsequently paid them under protest in order to rid

(1) (1887) L.J. 56 Q.B., 457. (2) (1930) 65 O.L.R., 541.

1935

BLAKEY & CO. LIMITED v. THE KING.

Angers J.

his land of the burden of the taxes, which he was obliged to do in order to obtain a loan of money upon a mortgage of the land:—

Held, that the plaintiff, being in immediate need of the loan and not being able to obtain it for a year or more if he brought an action to have the registration in the municipal treasurer's office of these taxes declared a cloud on his title, was under such compulsion as prevented the payment made by him under protest from operating as a voluntary payment, and was entitled to recover the money paid.

The strict rules of the earlier cases have been substantially modified by more recent decisions, such as *Mackell* v. *Horner* (1915), 3 K.B. 106, and *Pople* v. *Town of Dauphin* (1921), 31 Man. R. 125, 60 D.L.R. 30.

Masten, J.A., who delivered the judgment of the Court, made a review of the more recent decisions, which indeed throws much light on the subject (p. 545 *et seq.*).

The following cases may be consulted with profit: *Pople* v. *Dauphin* (1); *Campbell* v. *Halverson* (2); *Cushen* v. *City of Hamilton* (3); *North* v. *Walthamstow Urban Council* (4); *Atlee* v. *Backhouse* (5); *Steele* v. *Williams* (6). See also Halsbury's Laws of England, 2nd edition, vol. 7, p. 279, para. 390.

After careful consideration of the facts and of the law, I have reached the conclusion that the payment by the suppliant of the special duty, the ordinary customs duty thereon and the sales tax and excise tax on either of said duties at issue was not voluntary but compulsory and that the suppliant is entitled to the relief sought by his petition.

There will be judgment declaring that from and after the 25th of November, 1932, all power of His Majesty's Governor in Council to authorize the Minister of National Revenue to value goods entitled to entry into Canada under the British Preferential tariff and all power of the said Minister to so value and to impose and collect special duty, ordinary customs duty on said special duty and sales and excise tax on either of said duties ceased and determined.

If the parties cannot agree, within fifteen days from the date hereof, upon the amount of the special duty, of the ordinary customs duty thereon and of the sales and excise tax on either of said duties paid by the suppliant between

(1) (1921) 60 D.L.R., 30.
(2) (1919) 49 D.L.R., 463.
(3) (1902) 4 O.L.R., 265, at 267.
(4) (1898) L.J., 67 Q.B., 972.
(5) (1838) 3 M. & W., 633, at 645.
(6) (1853) 8 Ex., 625.

the 25th of November, 1932, and the 30th of September, 1934, inclusive, there will be a reference to the Registrar of this Court for inquiry and report.

The suppliant will be entitled to its costs.

Judgment accordingly.

1935

BLAKEY & CO. LIMITED v. THE KING.

Angers J.