THE ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY..... } SUPPLIANTS; 1903 Jan. 26.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Petition of Right—Costs—Application for security by Crown—Limited Company—25-26 Vict. (U.K.) c. 89, s. 69—Practice.

Section 69 of *The Companies Act*, 1862 (25-26 Vict. (U.K.) c. 89) provides that, where a limited company is plaintiff in any action, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

By the 7th section of the English Petition of Right Act (23 & 24 Vict. c. 34), it is, among other things provided, that the statutes and practice in force in personal actions between subject and subject shall, unless the court otherwise orders, extend to petitions of right. The practice in the Exchequer Court is in this respect the same as the practice in England.

In a proceeding by Petition of Right in the Exchequer Court, application was made for security for costs under the provision first mentioned. There was nothing to show that it had ever been acted on in a proceeding by Petition of Right in England.

Held, that the question as to whether the provision first mentioned applied to such cases was not sufficiently free from doubt to justify the granting of the application for security.

APPLICATION, in a proceeding by Petition of Right, for security of costs to be given to the Crown.

The grounds upon which the application was based are stated in the reasons for judgment.

January 19th, 1903.

E. L. Newcombe, K.C., in support of the application.

This is an application conformably to the English practice for security for costs. The Crown feels that

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it is necessary as the case stands to obtain security from the suppliants, as in the event of the Crown succeeding in the action, the assets of the suppliant company may not be sufficient to pay costs.

The practice which we invoke is that prevailing in the High Court of Justice in England—there being no express provision for the same in the Rules of the Exchequer Court—under the 69th section of *The Companies Act*, 1862. This refers to limited companies, and I submit is the proper practice of the High Court to be applied to the case arising upon petition herein. I do not know whether the action is being carried on by the receiver or by the company. If the receiver is carrying it on for the estate or the bond-holders that would be an additional ground for security. Then there is no property or assets of the company to respond a judgment for costs if the Crown is successful, and in such case it is clear that security would be ordered under the authorities.

W. D. Hogg, K.C., contra:

I submit upon the facts set out here that there is a complete answer to the affidavit read by Mr. Newcombe. The affidavits I have read show that there are sufficient funds in the hands of the Government belonging to the suppliants under a contract for the carriage of His Majesty's mail to respond any costs in this action. Then again this company is not in the position my learned friend asks you to believe. They have assets and they have money in the Crown's hands.

[BY MR. NEWCOMBE: If mails are being carried they are carried by the receiver.]

The property is the property of the company; there is a board of directors.

[BY MR. NEWCOMBE: I do not deny that you have a paper company, but as to its property I do not know.]

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The Companies' Act, 1862, is not applicable to this case. The rule of practice in the High Court of Justice also does not make the bankruptcy or the insolvency of a company a ground upon which security will be ordered. (*Cowell* v. *Taylor* (1); *Cook* v. *Whellock* (2); *Rhodes* v. *Dawson* (3); *Annual Practice*, 1903, (4). The general rule of the High Court of Justice in England is where litigation is carried on for the plaintiff's benefit and he is not a man of straw, his bankruptcy or insolvency will not be a ground for ordering security. I submit that *The Companies' Act*, 1862, and the practice thereunder, cannot be invoked except in the case of a limited company incorporated under that Act. The present company is one incorporated under an Act of Parliament of Canada, and it is not affected by the English Act. While *The Exchequer Court Act* is in terms confined to the practice of the High Court of Justice in England, still the reasons which are given by the Ontario judges are applicable to cases arising in this court. (He cites *Walbridge* v. *Trust & Loan Co* (5); *Major* v. *McKenzie* (6).

E. L. Newcombe, K.C., in reply: So far as the facts are concerned I submit that my learned friend has stated nothing to show that costs could be realized if we got judgment against the suppliants. I may perhaps state this fact that they rented an office from the Government and never paid the rent, and the agent of the department said that it was not worth while issuing an execution against them. As to the post office contract, any business that is being done is not being done for the benefit of the stock-holders, but for the bond-holders through a receiver.

(1) 31 Chan. Div. 34.
(2) 24 Q. B. D. 658.
(3) 16 Q. B. D. 548.
(4) Pp. 935, 936.
(5) 13 Ont. P. R. 67.
(6) 17Ont. P. R. 18.

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As to the other point raised by my learned friend, we follow the practice and procedure of the High Court of Justice whether provided by the Judicature Act or any other Act. My contention is that the practice in English cases which is most applicable to the case arising upon the petition of right must prevail. This practice applies to a limited company, it does not matter whether it was incorporated under the English Act or under a colonial statute. I submit that there are various sections in the Act which clearly apply to a limited company incorporated otherwise than under the provisions of that Act.

As to the amount of security it should undoubtedly be large. There will have to be evidence under commission, as the statements complained of were made in London.

THE JUDGE OF THE EXCHEQUER COURT now (January 26th, 1903) delivered judgment.

This is an application, on the part of the respondent, for security for costs on the ground that there is reason to believe that if the respondent is successful in his defence the assets of the suppliant company will not be sufficient to pay his costs.

The application is based upon the 69th section of *The Companies' Act*, 1862 (1), which it is argued is in force as part of the practice and procedure in this court under the 21st section of *The Exchequer Court Act* and the Rules of Court (See *Audette's Practice*, page 217, Rule 1), which provide that the practice and procedure in the Exchequer Court shall, so far as they are applicable and unless otherwise provided for, be regulated by the practice and procedure in similar suits, actions and matters in the High Court of Justice in England. The case is not otherwise provided for; but the proceeding being by petition of right, it is necessary

(1) U. K. 25-26 Vict. c. 89.

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in the first instance to see what the practice is in England in such a proceeding. By the seventh section of the English Petition of Right Act (1), it is, among other things, in effect provided that the laws and statutes and the practice and course of procedure in force as to security for costs in suits in equity and personal actions between subject and subject shall, unless the court otherwise orders, be applicable and apply and extend to petitions of right. Under that provision the Crown may call upon the suppliant to give security for costs in any case in which if it were an action between subject and subject, an order for security for costs would be granted. The right of the Crown to obtain such an order is also recognized in the twenty-eighth section of *The Exchequer Court Act*.

So far no difficulty arises, and if the provision relied upon were a general rule applicable to all companies, or if it had been expressly made a rule of procedure in this court, there would perhaps be no good reason against following it in this case; but it is not a general rule applicable to all companies, but only to "limited companies" within the meaning of that expression as used in the section referred to; and while it is a provision which relates to practice and procedure in the case provided for, it is a provision that affects substantive rights. It constitutes a limitation upon the right which limited companies otherwise would have to bring actions or proceedings in the court upon the same terms as individuals or other companies.

Then the provision occurs in a statute relating to companies, and not in one dealing principally with procedure or practice in the courts; and while too much weight should not be given to that consideration, and none of the others may be absolutely con-

(1) 23 & 24 Vict. c. 34.

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clusive against the contention set up for the respondent, the matter does not, on the whole, appear to be sufficiently free from doubt to justify the granting of the application.

The application should, I think, be refused, with costs in any event to the suppliants, to be allowed or set off, as the case may be.

Application dismissed.

Solicitors for suppliants: *O'Connor, Hogg & Magee.*

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