BETWEEN:

1913
April 5.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA.....PLAINTIFF;

AND

N. L'HEUREUX.....DEFENDANT.

Constitutional Law—Seizure of liquor in possession of Dominion officers under authority of Provincial Statute—Illegality—Notice of action—Prescription.

1. The provisions of the *Quebec Liquor License Act*, (R. S. Que. (1909) Part 2, Sec. 14, Chap. 5, Title IV) are not binding upon the Crown in right of the Dominion of Canada. Hence, where a person enters a building of the Intercolonial Raiway of Canada and seizes and carries away therefrom certain liquors constituting freight consigned to third persons, he cannot justify such seizure and conversion by invoking the authority of the said Act.
2. Want of notice, under Art. 88 C.C.P. (P.Q.), in an action for damages against an officer, if not specially pleaded by the defendant, may be raised at the trial, and evidence then adduced showing that the requisite notice was in fact given.
3. The prescription arising under R.S.Q. (1909), Art. 3387 must be raised by his pleading if defendant relies upon it as a ground of defence.

THIS was an information filed by the Attorney-General of Canada for damages and the recovery of certain goods unlawfully seized by the defendant, a Quebec revenue officer, on the Intercolonial Railway, a public work of Canada.

The facts are stated in the reasons for judgment.

February 14th, 1913.

The case was heard at Ottawa.

E. L. Newcombe, K. C., for the plaintiff, contended that the provincial statute (1), cannot be invoked to justify a seizure of goods in the hands of the Dominion

(1) R.S.Q. 1909, secs. 1097 and 1098.

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Argument of Counsel.

Crown while being carried on a government railway. Under the terms of the *British North America Act, 1867*, sec. 145, the Intercolonial Railway is one of the great public works of the Dominion, and is especially within the protection of the prerogative. Section 91 of the *British North America Act, 1867*, defines and delimits the legislative powers of the Dominion, and the first clause thereof declares that "*The Public Debt and Property*" of Canada is within the exclusive legislative authority of the Parliament of Canada. The station at Ste. Flavie is part of the Intercolonial railway. The intention of the provincial legistature not to bind the Crown is manifest in the fact that the Crown (i.e. the Crown in the right of the province,) is expecially exempt from the provisions of the Act. *A fortiori* the Dominion Crown ought to be held to be outside its provisions. In so far as provincial legislation confronts public property of Canada, it must be held not to apply. "*Property*" as mentioned in sec. 92 of the Act, clause 13, does not extend to property belonging to the Dominion, because that subject is wholly withdrawn from local jurisdiction. Any attempt on the part of the provincial legislatures to deal with it is *ultra vires*.

Where the Dominion Parliament and the local legislatures come into conflict, the legislation of the Dominion prevails. The local legislature has no paramount authority. In *Burrard Power Company Limited*, v. *The King* (1), proprietary rights of the Dominion Crown were upheld in preference to rights of property arising under the statutes of the Province of British Columbia. The province has no control over the Dominion Government in its capacity as carrier; and in the execution of the provisions of the *Quebec*

(1) (1911) A. C. 87.

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Liquor License Act, the province has no power to touch the property of Canada.

He relied upon Art. 9, C.C. (P.Q.) as to the immunity of the property where the seizure was made: Steamship *"Furnesia"* v. *Steamship "Scotia"* (1);

On the question of notice of action, C.C.P. (P.Q.), Art. 88, he maintained and that the plaintiff was clearly not obliged to give notice of action. (*Price* v. *Perceval* (2); R.S.Q. (1909) Sec. 3384 does not apply in an action against an Inland Revenue officer.

A. Marchand, for the defendant, submitted that the defendant was an authorized constable acting under the orders of the collector of provincial revenue for the District of Rimouski, and as such he was merely the arm of the government of Quebec, and was in the lawful performance of his statutory duties. The Intercolonial Railway is not a part of the Federal Government. It is merely a common carrier when engaged in the transmission of goods. When the Province of Quebec legislates on the subjects enumerated in section 92 of the *British North America Act*, 1867, it operates absolutely against any government. He cited, *Hodge* v. *The Queen* (3); *The Attorney-General of Manitoba* v. *The Manitoba Licence Holders' Association* (4). He maintained that the station agent was not part of the federal or executive government, and had no right to interfere with the course of justice. He should have facilitated the seizure of the goods in question.

But the decisive objection to maintaining this action, is that no notice was given to the officer whose acts are complained of, as required by Art. 88, C.P.C. (P.Q.), viz.:

(1) (1903) A.C. 501.
(2) Math. 1 R. J. R. 201.
(3) 9 A.C. 117 and 132.
(4) (1902) A.C. 73.

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"No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons. Such notice must be in writing; it must specify the grounds of the action, and state the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile."

We did not raise this point by our plea, but we raise it now as we lawfully may.

Lastly, the action is prescribed under sections 3384 to 3387 of R.S.Q., 1909.

He referred to *Rex* v. *Meikleham* (1); *The Government Railways Act* (2); *The American and English Encyclopædia of Law* (3); *The Quebec License Act* (4).

Mr. *Newcombe* replied.

AUDETTE, J., now (April 5th, 1913) delivered judgment.

This matter came before the court under the provisions of Rule 126, (5) whereby both parties, by consent, submitted, before trial, the points of law raised by the pleadings on the record at the time of the argument. On the hearing of the argument, two technical questions, perhaps more of form than of substance, are met with. One is the question of want of notice to the defendant required under Article 88 of the Code of Procedure, P.Q., and the other the question of prescription or limitation arising under Article 3387, R.

(1) 11 Ont. L. R. 366.
(2) R.S.C. (1906) chap. 36, sec. 37, 1098.
(3) 2nd, Ed. Vol. 22, pp. 926 and 941.
(4) R.S.Q. (1909), secs. 1097 and (2).
(5) Audette: *Exchequer Court Pratice*, p. 450.

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S.Q. 1909. Neither of these questions is raised by the pleadings.

Is this court to pronounce upon those two preliminary and technical questions when they are not raised by the pleadings? The answer is that under Rule 126 the court must limit its consideration to such facts as appear by the pleadings.

As the case comes before me under the provisions of Rule 126, these two questions cannot now be considered. The question of want of notice is one which if not pleaded may, under the authority of *Léveillé* v. *Lévy* (1) and *Simard* v. *Tuttle* (2), be raised at the trial and evidence then adduced showing that notice was in fact given. Then, the question of limitation or prescription is not one coming within Articles 2267 and 2188, Civil Code, P.Q., and must therefore be pleaded; and to be so set up, the pleading will have to be amended. This question may be also brought up at the trial.

The three questions, (*a*) of want of notice, (*b*) prescription and (*c*) damages, if any, are questions which will therefore be dealt with at the trial, as they cannot be considered on the disposition of the points of law.

Here follows a summary of the pleadings:

The information exhibited by the Attorney-General of Canada alleges, *inter alia*, that the Crown owns and operates the Intercolonial Railway between Halifax and Montreal,—that the said railway is vested in the Crown, and is a public work of Canada.

It is further alleged that the Intercolonial Railway passes through or near the village of Ste. Flavie station, in the District of Rimouski, in the Province of Quebec, and on or about the 17th May, 1911, one Joseph N. Anctil, of Rivière du Loup, P.Q., shipped therefrom by the Intercolonial Railway one jar of

(1) 9 R. de J. 528 (2) 4 L.C. Rep. 193; 4 Math. R.J.R. 150..

liquor, said to be whisky, consigned to one Elzear Coté, together with two cases, said to contain bottled gin, consigned to J. N. Coté, both of Ste. Flavie aforesaid.

The information further alleges that the goods arrived at Ste. Flavie on the 19th May, 1911, when the defendant went to the Intercolonial Railway station at Ste. Flavie, and unlawfully, by force and arms, seized the box containing the jar of liquor, and the two boxes, said to contain bottles of gin, and stated his intention of holding the same and depriving His Majesty the King of the possession which he then lawfully had of the said goods. The defendant did not then remove the goods from the station.

It is further alleged that on the 19th May, 1911, one J. Ad. Thibault, of Fraserville, P.Q., shipped by the Intercolonial Railway two barrels, in the bill of lading said to contain ginger ale, consigned to François Damien, at Ste. Flavie, and arriving at their destination on or before the 23rd May, 1911,—when before any of the goods hereinbefore mentioned had been taken away by the parties to whom they were respectively consigned, and whilst the same were still in the lawful possession of His Majesty the King, the defendant came in again to the Ste. Flavie station, and demanded of J. Lavoie, the agent in charge of the railway station, possession of the jar of liquor and the two boxes of gin, which he had seized on the 19th of the same month, but which were still lying at the station in a locked room. The station agent refused to give up possession of the said goods or to open the doors of the room in which the same were deposited. The defendant thereupon by force and arms and using great violence, and to the great injury of the property of His Majesty, broke open the door of the room in

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which the goods were so deposited, and seized and took possession of the said jar of liquor and the two cases of gin.

The plaintiff further alleges that the defendant then demanded of the said J. Lavoie that he should open the door of the freight shed, adjoining the station, to enable the defendant to see what goods were deposited therein. The said J. Lavoie refused to open the door and the defendant by force and arms and with great violence, and to the injury of the property of His Majesty the King, broke open the doors of the freight shed and found therein the two barrels of liquor consigned to François Damien: and thereupon seized and took possession of the same and deprived His Majesty The King, in whose possession up to that time they lawfully were, of his property and possession in the same. The said defendant, moreover, then removed the whole of the said goods.

The Attorney-General therefore concludes asking that it may be declared:

(a) That the defendant unlawfully entered and broke and opened the premises of His Majesty the King in His property of the said Intercolonial Railway.

(b) That the defendant unlawfully seized and deprived His Majesty the King of the property and possession of the goods so seized and taken away by him.

(c) That the defendant may be ordered to pay to His Majesty damages for the injury done by him to the railway property.

(d) That the defendant may be ordered to give up and restore to His Majesty The King the goods so seized, with damages for the unlawful detention,

or, in the alternative, damages for the value and unlawful seizing and detention of the same.

(e) Such further or other damages as may be found due to His Majesty The King in respect of the said trespass and unlawful seizure and conversion of the said property.

The defendant by his plea avers among other things that the said boxes, jars, bottles and barrels or vessels containing intoxicating liquors were brought into the revenue district of Rimouski, P.Q., from another district of the same province, in sufficient quantity to warrant the presumption that they were so brought in for the purpose of sale, and were addressed to persons not licensed under the *Quebec License Act* (1) to sell intoxicating liquors;—

That the collector of provincial revenue and his officers had reason to suspect that the persons to whom said liquors were addressed were obtaining them for the purposes of sale;—

That the defendant was an officer and constable and deputy of the collector of provincial revenue, duly authorized by him, and was acting in that capacity and according to orders from the said collector:— ;

That the said goods so seized were taken, carried away, and placed in the care and possession of the collector of provincial revenue for the said district, and that he, acting under the authority of the law, had the right to proceed as he did;—

That the Ste. Flavie station is within the limits of a municipality where the sale of intoxicating liquors is prohibited, and that the defendant was authorized and acting in his official capacity as aforesaid, at the time of the said seizure, and that the station agent was duly informed thereof.

(1) R.S.Q. 1909, vol. 2, Sec. 14, Chap. 5, Title IV.

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As has been stated the questions of law raised by the pleadings were by consent of parties, argued before coming to trial, and for the purposes of the said argument the facts as alleged were admitted by and between counsel for the respective parties.

Now the only question to be at present decided is whether, all these proceedings taken, assuming under the said Quebec License Law, to be duly authorized and regular in an ordinary case against a subject, can be invoked to justify a seizure of goods in the hands of the Dominion Crown.

In other words, can a constable, under the circumstances above recited, break into the property vested in the Crown in the right of the Dominion and seize and take away the goods in question?

Now, the Intercolonial Railway is a public work of Canada and is vested in the Crown, in the right of the Dominion under Sections 55 and 80 of *The Government Railways Act* (1). As such it therefore enjoys all the prerogatives and immunity attaching to Crown property, as is very clearly shown in the case of the *S. S. "Scotia"* (2). The property of Canada, in the right of the Federal Crown, is exempt from provincial legislative jurisdiction, and the *Quebec License Act* by any forced construction of its provisions cannot be made to apply to it. See *Burrard Power Co. Ltd.*, v. *The King* (3). The Crown is not bound by any such statute. See *The Interpretation Acts*, (4).

It is, in effect, contended by counsel for the defendant that, when a train of the Intercolonial Railway is in motion through the Province of Quebec, for the purpose of Provincial jurisdiction in general, the status of such train as a piece of property is not to be complicated by

(1) R.S.C. (1906) Chap. 36.
(2) (1903) A.C. 501.
(3) (1911) A.C. 87.
(4) R.S.C. (1906) ch. I, sec. 16; R.S.Q. (1909) ch. I, sec. 14; C.C. (P.Q.), Art. 9.

considerations of prerogatival immunity, but is to be accorded nothing more than the status of a train on any ordinary railway operating in such province. The weakness of the argument is radical, amounting as it does, to a denegation of the status given the Dominion property by the *B.N. America Act of 1867*. Under the provisions of Sub-Sec. 1 of Sec. 91 of the said Act, legislative control over public property of the Dominion is exclusively vested in the Parliament of Canada, while by the intendment of Section 145 thereof, the Intercolonial Railway is not merely to be treated (as in law and practice it has been treated) as a portion of the public property held by the Dominion Government, but conspicuously so, inasmuch as its construction was stipulated for as one of the fundamental conditions of Confederation.

Might not the refutation of the argument that the Crown be liable in such a case as the present one be also found, by analogy, in the fact that seizure by garnishment, which may be fairly said to be a cognate matter, cannot issue against moneys in the hands of the Crown?

Therefore, this Court declares that the provincial Crown officer, unlawfully broke into the premises of the Crown. The Court further declaring unlawful the seizure and conversion of the goods in question herein. The question of costs is reserved to be adjudicated upon at the trial.

Judgment accordingly.

Solicitor for the plaintiff: *E. L. Newcombe.*

Solicitor for the defendant: *A. Marchand.*