

THE QUEEN ON THE INFORMATION }
 OF THE ATTORNEY-GENERAL FOR THE } PLANTIFF;
 DOMINION OF CANADA..... }

1897
 Mar. 22.

AND

JOHN A. FINLAYSON, ALEXAN- }
 DER GRANT AND JOHN ESDON } DEFENDANTS.

Third party procedure—Crown suit—Jurisdiction—Costs.

In an action by the Crown upon two Customs export bonds the defendants applied for an order to bring in a third party, and it appeared that such bonds were given by the defendants personally and did not indicate that the person against whom the third party order was sought was in any way liable to the Crown in respect of said bonds. The defendants, however, claimed that in giving the bonds they were only acting as agents for such person, and that he had agreed to indemnify them against the payment thereof.

Held, that the court had no jurisdiction to try the issue of indemnity between the defendants and such proposed third party, and that the application should be dismissed with costs to the Crown in any event.

THIS was a summons to show cause why, in an action instituted by the Crown by information, the defendants should not be allowed to bring in a third party.

The information in this case was exhibited to recover the total amount of two bonds given by the above named defendants to the Customs authorities in respect of the export to St. Pierre, Miquelon, of certain spirits which, at the time of giving said bonds, were warehoused at the port of Montreal. It was alleged in the information that the spirits were never exported to St. Pierre, but that they were illegally, and with intent to defraud the Government of Canada, landed, from the vessel on which they had been shipped, at a

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certain place on the shores of the Lower St. Lawrence, and so entered into consumption in Canada. By their statement in defence the defendants, amongst other things, alleged that they had entered into the said bonds only in the capacity of warehousemen and agents for one Henry Corby, of Belleville, Ontario, who was the owner of the said spirits; and that they were entitled to be indemnified by him in respect of any damage or loss they might be put to by reason of a breach of any of the conditions of the said bonds. They also alleged that they had nothing to do with the spirits after they delivered them from their warehouse to persons designated by the said Henry Corby, and upon his express order therefor.

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

If it is conceded for the purpose of argument that this application is governed by the provisions of the Code of Procedure of the Province of Quebec, and if it is further conceded that it is in the nature of a dilatory exception, and as such, under Article 120, ought to have been filed within four days after the return of the writ, I submit that the Judge of the Exchequer Court has power under rule 255 of the Exchequer Court Rules to enlarge the time for taking the exception. However, I contend that this is not in the nature of a dilatory exception, and that there is no provision in the Code of Procedure affecting the question of bringing a third party into an action, and that therefore the English Judicature practice must prevail. The defendants do not seek to delay the action; on the contrary, their object is to expedite it by bringing all the parties who will be affected by the adjudication in the case before the court, and so enable the court to dispose of the matter once for all.

J. M. Ferguson, contra : If the defendants have any rights in respect of the ground upon which this

motion is based, they are in the nature of a right to exercise a recourse in warranty against a third party. [Cites C.C.P., L.C., Art. 120; *Pigeau*, vol. 1, 167; *Belle v. Dolan* (1)]. That being so, it is in the nature of a dilatory plea, and must be filed within four days after the service of the writ. The information was served on the 2nd of January, 1897, and the defence was filed before we were aware that they intended to make this application. There being no writs in the Exchequer Court procedure, by analogy, I contend that the dilatory exception should have been filed and served within four days after the service of the information. [Cites *Durocher v. Lapalme*, (2); *Block v. Lawrence*, (3)]. Further, this action is in the nature of a penal action and there is no recourse in warranty in the case of a penal action. [Cites *Normandin v. Berthiaume*, (4); *Couvrette v. Fahey* (5).]

The court has no jurisdiction to grant this order. It has no jurisdiction to try out the issue of indemnity between the defendants and Corby, the person whom they desire to make a third party. The action is based upon two Customs bonds which do not disclose Corby's liability to the Crown in any way. The Crown could not sue Corby on the bonds, and therefore this court has no jurisdiction between the defendants and the proposed third party.

Mr. Hogg replied, citing *Carshore v. North Eastern Ry. Co.* (6).

THE JUDGE OF THE EXCHEQUER COURT now (March 22nd, 1897) delivered judgment:

The question raised on this application is an important one, and I have given the matter very careful

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Argument
of Counsel.

(1) 20 L. C. J. 302.

(2) M.L.R. 1 S. C. 494.

(3) M.L.R. 2 S. C. 279.

(4) M.L.R. 1 S. C. 393.

(5) M.L.R. 2 S. C. 423.

(6) 29 Ch. D. 344.

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 Judgment.

consideration. Apart altogether from the question as to procedure, and the time within which the application should have been made, which, in the view I take of the matter, I need not deal with, the application fails, I think, on the ground of want of jurisdiction. The action is brought on two bonds, and the allegation of the defendants is that they are entitled to be indemnified by one Henry Corby against any sum that may be recovered against them. But that is an issue over which the court has no jurisdiction. It has concurrent jurisdiction with the provincial courts in any case in which the Crown is plaintiff or petitioner. In the only case in which I have made a third party order the Crown was defendant and came in as a petitioner asking that the other party be made a third party to the action, and in that case all the parties consented to the order. See *Magee v. The Queen* (1). It does not appear from the bonds relied on in this action that Corby is in any way liable to the Crown. The statement of defence says that he is bound to indemnify the defendants, but that, as I have said, is a matter over which I have no jurisdiction. That being so, I think I should dismiss the application with costs to the Crown in any event.

Judgment accordingly.

Solicitor for the plaintiff: *J. M. Ferguson.*

Solicitors for the defendants: *O'Connor & Hogg.*

(1) *Post.*