REPORT TO THE INSTITUTE OF LAW RESEARCH AND REFORM

RE: SECTION 24 OF THE JUDICATURE ACT

Submitted by

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The Judicature Act, R.S.A. 1970, Ch. 193

24.(1) No action whereby relief of any kind is claimed on account of anything done or proposed to be done, or on account of anything omitted to be done by a member of the Executive Council of the Province in the execution of his office shall be brought or maintained against that member unless permission to bring or maintain the action has first been given by the Lieutenant Governor in Council.

(2) No action whereby the relief claimed or part of the relief claimed is an injunction, mandamus, prohibition or other process or proceeding affecting or interfering directly or indirectly with the doing by a person or the omission by a person of an act authorized or directed by a statute of the Legislature of the Province, or by an order in council of the Province, shall be brought or maintained unless permission to bring or maintain the action has first been given by the Lieutenant Governor in Council.

[R.S.A. 1955, c.164, s.24]

EXISTING LAW

I. Background.

a) History of the Section.

It is important to understand the law and the political atmosphere of 1936 in order to appreciate why this section was created.

At common law, once actions were possible against the Crown, judges and lawyers had to differentiate between situations where the estate of the Crown was directly or indirectly affected. Where directly affected, the proper proceedings were by petition of right against the Crown. Where the Crown was indirectly affected a Court could make declarations which affected the Crown indirectly. Dyson v. Attorney General [1911] 1 K.B. 410.[1]

The rule laid down in the Dyson case was applied in Great West Life Assurance Co. v. Baptiste [1924] 2 W.W.R. 920 (App.D. Alta.). In the

latter case Beck J.A. pointed out that under our system of government the proper party to represent the Crown where the Crown is indirectly affected is the Minister who has the relevant authorities and duties. He recognized that the English practice was to name the Attorney-General and that even in our jurisdiction the Attorney -General had a general authority where proceedings were by or against the Crown (a direct action) or by or against a Minister (an indirect action).

All of the aforementioned cases are discussed in the Royal Trust Company (Executor of Cochrane Estate) v. Attorney-General for Alberta (No. 3) [1936] 2 W.W.R. 337 (S.C. Alta.). This case is cited by Riley J. in[2] Poitras et al v. Attorney-General for Alberta (1969) 68 W.W.R. 2 24 (S.C. Alta.)[3] as the reason for the amendment to the Judicature Act.

In the Cochrane Estate case the executors were applying for the return of monies paid to the Provincial Government pursuant to the Succession Duties Act, R.S.A., 1922, ch. 28 which had been declared ultra vires. Ford J. held that the only way the subject could get monies back from the Crown was by petition of right. The Lieutenant Governor had refused the application for a fiat to sue the Crown then necessary under the Petition of Right Act R.S.A., 1922, ch. 94. He held, thus, the court had no jurisdiction and further was not concerned with the soundness of the reason for the refusal of the fiat.

The case is nicely summed up by Riley J. in the Poitras case at p. 229.

> "This 1936 decision served in part to clarify the law in Alberta at that time in that it dealt with two different types of proceedings. One was under The Petition of Right Act where it was necessary to obtain a fiat to sue Her Majesty. Proceedings were by way of petition in a form

> set out in a schedule to the Act. In that type of proceeding the petition was addressed to Her Majesty and not to the minister of the department involved. The other kind of proceedings were of the nature contemplated by Dyson v. Atty.-Gen., supra, where an action could be brought seeking declarations. In this latter type the minister of the department concerned was to be named as defendant and it was not necessary to obtain permission before commencing action."

Riley J. and others believe the legislature moved in the same year, 1936, to be sure a fiat would be necessary before any Cabinet Minister could be sued.

The combined effect then, of the Petition of Right Act and the amendment to the Judicature Act was that a fiat was necessary to sue the Crown (a direct action) or a member of the Executive Council (an indirect action) or a person acting under statutory authority.

Section 24 was added by Chapter 16 of the Statutes of Alberta, 1936 and became section 27 of the Judicature Act. It was made effective 1st September, 1935 though passed 1st September, 1936.[4]

As section 27 it had two subsections (a) and (b) which have remained as section 24(1) and (2) with some changes. Section 27(b) had the words "heretofore or hereafter passed or made" deleted and the words have been re-arranged for greater clarity in both subsections.

Another possible reason for the section being enacted is the Powlett and Powlett v. University of Alberta et al [1934] 2 W.W.R. 209 (App. D. Alta.) case. This was the case where the freshman became insane after initiation and the Provincial Government had to pay as a consequence of the Board of Governors being held liable. The case certainly resulted in an amendment to the University Act and may have given rise to concern for protecting in some way those persons covered by the second subsection of the Amendment ot the Judicature Act.

b) Reaction to the Section.

The Law Society passed a resolution on the 7th January A.D. 1937 urging the immediate repeal of sections 27(a) and (b) and suggesting a draft bill of the Committee on Comparative Law of the Canadian Bar Association (1936) be enacted. The strong feelings of the Society and notice of the resolution were communicated to the Attorney-General by a letter dated 12th January, A.D. 1937.

Some idea of the debate in the House upon the introduction of the amendment is indicated by a newspaper clipping of 1 September, A.D. 1936 [5] The Opposition had tried to introduce a bill which was very much like the Proceedings Against the Crown Act, R.S.A. 1970 Ch. 285 passed in 1959, allowing suits against the Crown without consent. Note also that the reporter had it on "high authority" that the Act would not be retroactive!

c) Summary.

In 1936 the Government of the Province of Alberta, upon realizing the gate along the subject's path to a legal attack against the Crown was only partially closed, took swift, strong steps to close it completely. The gate could only be opened by the Crown's consent.

II. The Proceedings against the Crown Act.

This statute was passed in Alberta in 1959[6] and abolished proceedings by way of petition of right against the Crown. Actions could be brought against the Crown without a fiat and the Crown became liable in tort as if a person of full age and capacity.

Section 3 made that Act subject to the amendment which by 1959 had become section 24 of the Judicature Act.[7]

Thus, a subject could sue the Crown without consent but not by

Section 24(1), a member of the Executive Council. Likewise he could not by section 24(2), sue a person acting by statutory authority or direction so as to attempt to affect or interfere with his power.

It is worth noting that no other province in Canada makes its statute equivalent to our Crown Proceedings Act subject to a qualification like that contained in Section 24 of the Judicature Act. Based perhaps on the 1950 recommendation of the Manitoba Commissioners to The Conference of Commissioners on Uniformity of Legislation in Canada,[8] Ontario and Nova Scotia have sections in their statutes stating that their Crown Proceedings Act shall prevail.

III. Judicial Interpretation of the Section

Section 24 (hereinafter referred to as the Section) has been considered in a number of cases.

In Rex ex rel Mikklesen and McGaughey v. Highway Traffic Board [1947] 1 W.W.R. 342 (S.C. Alta.) an application for mandamus was being made[9] to require the Alberta Highway Traffic Board to hold certain hearings as required by a section in the Public Vehicles Act, R.S.A., 1942 ch. 276. Section 24 (then 26) of the Judicature Act was raised because the facts seemed to fit into subsection(2). No fiat had been obtained. O'Connor J.A., held that the application before him was by a motion and the section applied only where a remedy such as mandamus was sought in an action. Thus, he held no fiat was needed and he granted the mandamus.

This distinction in the case has been ignored in subsequent decisions on the section and in the opinion of Mr. E. Hughson of the Attorney-General's Department, the decision is probably incorrect on that point.

It is submitted that it was a judicial attempt to circumvent the section.

The most helpful case discussing the section is Poitras et al v. Attorney-General for Alberta (1969) 68 W.W.R. 224 (S.C. Alta.).[3] The Attorney-General for Alberta as defendant brought a motion to strike out the statement of claim in which the plaintiffs were seeking a declaratory judgment that revenues from minerals under lands occupied by the Metis belonged to them. The motion was allowed and the statement of claim struck out.

The judgment allows the following conclusions about the section and practice relating thereto:

a) the Alberta practice is to sue the Minister of the department given the power or duty in issue, not the Attorney-General;

b) the distinction between a motion and action made in the Mikkleson and McGaughey case has been ignored.[9]

c) the combined effect of the Proceedings Against the Crown Act[6] and the section is that consent from the Lieutenant-Governor-in-Council is required before an action can be commenced against a Cabinet Minister in regard to "anything to be done by him in the execution of his office."

d) Riley J., feels the section defies the rule of law and all principles of equity and fairness. He says at pages 238 and 239:

> "The case at bar graphically illustrates rule by the executive branch of government, the administrative branch, and the bureaucrats; the defiance of those branches of "the rule of law", all principles of "equity and fairness", resulting in subjugation of the courts.
>
> It goes without saying that if the plaintiffs can find some method of properly bringing the matter before the courts this decision does not fetter them in any way and is without prejudice to their rights so to do.
>
> I quite agree that the procedure laid down by government, somewhat unilateral and almost prohibitory, denies the prophesy "that government should be of the people, for the people and by the people."
>
> I do not think that courts are mere interpreters of the law; I quite agree that the courts are in no sense legislators but I do think judicial pronouncements may be helpful in shaping the law."

Two other points made in the case are worth noting:

a) the action might have been brought under the Proceedings Against the Crown Act, i.e. against Her Majesty the Queen in the Right of Alberta, had the Minister of Public Welfare (now Health and Social Development) approved a proposal or by-law to sue pursuant to the relevant statute, namely, The Metis Betterment Act, R.S.A. 1955, ch. 202 (see p.235).

b) the Court has an inherent jurisdiction, apart from the Rules of Court, to strike out a statement of claim as being an abuse of the process of the court (see p. 227).

The cause of action received a set-back by this judgment but did not die. I have been advised by Mrs. M. Donnelly, the solicitor to the Attorney-General, who deals with applications for fiats under the section that a fiat has been granted to the plaintiffs in an action against the Minister of Health and Social Development. Mrs. Anne Russell, solicitor to that Department, has confirmed that the action so framed has been commenced. Mrs. Donnelly reports that the plaintiffs did not apply for a fiat prior to the case against the Attorney-General.

Aremex Minerals Ltd. v. Her Majesty The Queen in the Right of Alberta[10] is an unreported trial decision of Sinclair J. of 10th November, A.D. 1971. The plaintiff alleged it accepted the defendant's offer to grant a petroleum and natural gas lease pursuant to the Mines and Minerals Act and that the defendant then refused to grant the lease. The plaintiff was applying for an order declaring that the defendant as named was a proper party to the action. The direct, indirect distinction became important to the decision in the case because if the action affected the Crown directly by the Proceedings Against the Crown Act[6], no fiat would be needed.

If it indirectly affected the Crown the proper party would by Alberta practice be either the Minister of Mines and Minerals and a fiat would be required by section 24(1) or the proper party might be the person authorized by statute to act on the lease in which case a fiat would be required by section 24(2).

Sinclair J. held that the claim by the plaintiff that it be entitled to the lease raised section 24, either (1) or (2), and thus that Her Majesty the Queen was not the proper party to the action, the implication being that the Minister or the person authorized to grant the lease would be the proper defendant.

It would seem that Sinclair J. has said that the intention of section 24 is not restricted to actions indirectly affecting the Crown but that the section is broadly worded enough to include at least contractual matters directly affecting the estate of the Crown so long as a member of Executive Council is exercising his powers or that a person is doing an act authorized by statute.

Simply put, Sinclair J. held that section 3 overrides section 4 of The Proceedings Against the Crown Act[6] and if section 24 of the Judicature Act fits the facts a fiat is needed and Her Majesty is not the proper party to sue.

Sinclair J. feels section 24 is very broad. He says at p. 7:

> "When one considers closely the far-reaching provisions of section 24 of The Judicature Act it is possible to envisage their being invoked by the Crown in a wide range of proceedings, involving a broad spectrum of claims for relief, because, taken literally, there could scarcely be any kind of a claim against the Crown that could not be said to affect, at least indirectly, the doing by a person or the omission by a person of an act authorized or directed by a statute of the Legislature of the Province."

Mr. E. Hughson was counsel on the case and advises that a fiat to sue the Minister of Mines and Minerals was obtained and there were examinations for discovery after which the plaintiff discontinued the action.

The most recent reported case dealing with the section is Re Red Deer College Inquiry [1973] 2 W.W.R. 222 (S.C. Alta.)[11] Dr. T. C. Byrne was the Commissioner appointed under The Public Inquiries Act, R.S.A. 1970, ch. 296 to inquire into the operation of Red Deer College. The Order in Council appointing him was never filed as required by The Regulations Act, R.S.A. 1970, ch. 318. Before the Court was the application by the College President et al to quash by certiorari the proceedings and report of the Commissioner. Primrose J., agreed with the Crown that pursuant to section 24(2) of the Judicature Act no consent was obtained to bring the proceedings before him and that he therefore had no jurisdiction to proceed.

Non-compliance with the section had the effect of temporarily putting off the day on which a court had to face the appellant's claim.

Mr. G. Wright, counsel for the appellants, advised me that after this judgment he applied for and got a fiat but is awaiting a Supreme Court of Canada decision on another case before proceeding further.

The section was relevant again recently in another certiorari application before Primrose, J. in the case of Kritzenger v. The Stony Plain Hospital District No. 84, Supreme Court Action No. 84219, 22nd April, A.D. 1974. This was an application by Dr. Kritzenger alleging that certain proceedings of the Hospital pursuant to the Alberta Hospital Act, R.S.A. 1970, ch. 174 by which his hospital privileges were suspended were invalid. The Hospital objected that no fiat had been obtained and was required by section 24(2). Primrose, J. adjourned the application so that the applicant could obtain the fiat. The fiat was requested and granted and the application heard. The reasons for judgment do not deal with the section but allow the application thereby quashing the suspension.

The cases referred to support the following conclusions:

a) the section has the potential of broad application;

b) the absence of the consent of the Lieutenant-Governor-in-Council to the commencement of proceedings of the type covered by the section means a Court has no jurisdiction to proceed with an action;

c) varying degrees of concern about the justice and fairness of the procedure required by the section were expressed by all justices;

IV. Practice and Comments -

a) of the Government

Mrs. Donnelly advises that applications for fiats under the section are granted as a matter of routine. The Attorney-General's Department has never advised the refusal of an application during the tenure of the present government. She believes the previous government took the same approach and knows of no refusal then but acknowledges there may have been. The Cabinet apparently does not look into the merits of each case too closely. The Department has undertaken to provide a list of applications and the statutes relevant to them. Records to give this information have been kept only very recently.

No notice of an application is sent to opposing Counsel. Mrs. Donnelly advises that she sometimes receives representations against the granting of the fiat.

Mr. E. Hughson often acts as counsel on these cases and pointed out that he had had occasion to raise the objection of "no fiat" under the section where the plaintiff sued the wrong party. These were generally cases where the suit should have been brought pursuant to the

Proceedings Against the Crown Act and not against a Minister at all. He said he generally used the section to "get other lawyers to sue the right party."

b) of the Bar

Members of the profession whose opinions were canvassed were unanimous in their disapproval of the section.

Mr. A. O. Ackroyd recently applied for a fiat as he put it "out of an abundance of caution" where he was challenging the decision of an Arbitration Board consituted not pursuant to the Labour Act (as amended in 1967 when a code of arbitration was written into it) but by special order of the Minister. He believes a fiat is not now needed to challenge a decision of the Board of Industrial Relations where the approved procedure under the Act is being followed.

Mr. G. Wright, counsel on the Red Deer Case [11] said the section "makes a monkey of the Crown Procedings Act."

After speaking with over twenty lawyers concerned from time to time with the section it seems reasonable to conclude that there is some confusion about when the section will apply. More senior lawyers are more likely to apply for a fiat if at all concerned, knowing it would be granted. Mrs. Donnelly said her experience confirmed this practice.

V. Opinion.

I will attempt to summarize the case for and against retaining the section.

a) Justifications for retaining the section:

1. The Lieutenant-Governor-in-Council is put on notice of a proposed suit.

2. Ministers may be protected from vexatious proceedings and the bad publicity such suits may attract.

3. The Executive and persons acting by statutory authority should be responsible to the Legislature and not to the Courts.

b) Justifications for removing the section:

1. The requirement of a fiat is unjust.

2. The Proceedings Against the Crown Act has removed the requirement of a fiat in all cases other than those anticipated by the section.

3. The other Canadian provinces have moved or are moving to give an unfettered right to sue the Crown.

4. No other province has legislation exactly like section 24.

5. Denial of a fiat is unknown in recent times in this Province.

6. The Proceedings Against the Crown Act grants the Crown certain immunity (see section 17 re injunctions).

7. The number of statutes and administrative tribunals to which the section might apply has increased dramatically since 1936.

Reviewing the justifications for retaining the section, it can be said:

1. A notice of a proposed suit could be required by amendment to the Crown Proceedings Act. Ontario and Manitoba have such notice provisions.

2. A Vexatious Proceedings Act such as the Ontario Act might be an answer. The Court has by the Rules of Court an inherent jurisdiction to strike out pleadings if they are an abuse of process. There are tort actions available to a Minister.

3. The courts must not be so subjugated (see Riley J., in the Poitras case).

RECOMMENDATION:

THAT Section 24 be abolished.

VII. Appendix

1. Dyson v. Attorney-General [1911] 1 K.B. 410.

2. Royal Trust Co. v. Attorney-General (No. 3) [1936] 2 W.W.R. 337 (S.C. Alta.).

3. Poitras v. Attorney-General (1969) 68 W.W.R. 224 (S.C. Alta.)

4. Judicature Act Amendment Act, 1936, S.A. 1936 Ch.16.

5. "Officers of Crown Get Suit Immunity", (Newspaper clipping) 1 September, 1936.

6. The Proceedings Against the Crown Act, R.S.A. 1970, Ch.285.

7. The Judicature Act, R.S.A., 1970, Ch. 193, section 24.

8. Report of the Conference of Commissioners on Uniformity (1950) Appendix J, p. 67.

9. Rex ex Mikklesen and McGaughey v. Highway Traffic Board [1947] 1 W.W.R. 342 (S.C. Alta.).

10. Aremex Minerals Ltd. v. Her Majesty The Queen In The Right of Alberta, Supreme Court Action No. 70835, 10 November, 1971.

11. Re Red Deer College Inquiry [1973] 2 W.W.R. 222 (S.C. Alta.).

[IN THE COURT OF APPEAL.]

DYSON *v.* ATTORNEY-GENERAL.

Practice—Striking out Pleadings—Reasonable Cause of Action—Relief against the Crown—Declaratory Judgment—Attorney-General Defendant—Action or Petition of Right—Rules of Supreme Court, 1883, *Order* XXV., *rr.* 4, 5.—*Finance* (1909-1910) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *Form IV.*

Order XXV., r. 4,—which enables the Court or a judge to strike out any pleading on the ground that it discloses no reasonable cause of action—was never intended to apply to any pleading which raises a question of general importance, or serious question of law.

The Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and main object of the action is to affect the rights of the Crown in favour of the plaintiff.

Hodge v. *Attorney-General*, (1839) 3 Y. & C. Ex. 342, examined and approved.

A declaratory judgment can, under Order XXV., r. 5, be made against the Attorney-General, as defendant representing the Crown, and the plaintiff is not bound in such a case to proceed by petition of right.

APPEAL from a decision of Lush J. in chambers.

This action was brought against the Attorney-General to test the validity of the notices issued by the Commissioners of Inland Revenue under the Finance (1909-1910) Act, 1910, and commonly known as Form IV. The main question argued was whether the Attorney-General could properly be made a defendant to an action of this nature.

The plaintiff's statement of claim was (so far as material) as follows:—

The plaintiff is the owner and occupier of (*a*) a house and premises with gardens, orchards, and agricultural land of some thirty acres attached, and (*b*) also of some forty acres of agricultural land with a farmhouse and buildings on it, situate in the parish of Weeton, in the county of York.

On August 9 last Form IV., dated August 4, was left on the plaintiff's premises, requiring the occupier to deliver the return to "the appointed officer, Hugh Bateson, Kirby Overblow, Gannall, S.O.," within thirty days from the date of the notice.

exceeding 50*l*. On September 20 last the plaintiff commenced this action against the Attorney-General, and on October 5 delivered a statement of claim in which he made the following allegations:—

3. The said notice and forms purported to be issued by the said J. Atterbury by the directions of the Commissioners of Inland Revenue under the provisions of the Finance (1909-1910) Act, 1910 (10 Edw. 7, c. 8).

4. The said Hugh Bateson carries on the trade of a village blacksmith at Kirby Overblow aforesaid, a village adjacent to the said parish of Weeton, and is not in the employment of the said Commissioners.

5. The forms accompanying the said notice required the recipient to comply with the following requisition, viz.:—

	Annual value. £
(i.) If the person making the return is also the occupier, state the annual value—i.e., the sum for which the property is worth to be let to a yearly tenant, the owner keeping it in repair'	

6. The said notice and forms aforesaid are illegal, unauthorized, and ultra vires the said Act, as appears from the recitals thereof.

7. Amongst other matters so illegal, unauthorized, and ultra vires are the following:—

(a) By the terms of the said Act the said Commissioners have no power to require the plaintiff to deliver the said forms to the said Hugh Bateson. The said Act requires the return to be furnished to the said Commissioners.

(b) The plaintiff is required under requisition (i.) of the said forms aforesaid set out to supply matters which are not such matters as are set forth in section 26 (2.) of the said Act, and such, moreover, cannot properly be required under the said Act, and, further, the said matter is not such as it is in the plaintiff's power to give within the meaning of the said Act.

(c) The plaintiff was not given the lawful time for making the said returns provided in section 26 (2.) of the said Act.

said penalty for failure to make the said returns."

The plaintiff accordingly claimed a declaration:—

"(1.) That he is under no obligation to comply with the said notice dated the 4th August, 1910, or to furnish any of the said particulars to the said Hugh Bateson or at all.

"(2.) The plaintiff is entitled to furnish any returns which he may be lawfully required to make under the said Act to the Commissioners of Inland Revenue and not to make it to the said Hugh Bateson, if the plaintiff so desires.

"(3.) The plaintiff is not under any obligation to comply with the said requisition (i.) aforesaid."

The Attorney-General thereupon took out a summons under Rules of Supreme Court, Order xxv., r. 4, to strike out the statement of claim as disclosing no reasonable cause of action, and Lush J., affirming a previous decision of the Master, made an order in the terms of the summons.

The plaintiff appealed. The appeal was heard on November 28.

Danckwerts, K.C., Felix Cassel, K.C., and *Neilson,* for the appellant. This statement of claim raises an important question of law, and is not the kind of pleading which was intended to be dealt with under Order xxv., r. 4, which was to stop cases obviously frivolous or vexatious: *Attorney-General of the Duchy of Lancaster* v. *London and North Western Ry. Co.* (1), where the rule is clearly stated and explained.

[FLETCHER MOULTON L.J. The only question would seem to be whether an action of this kind can be brought against the Attorney-General. Order xxv., r. 4, cannot apply to this action.]

The Attorney-General can be sued as a defendant as representing the Crown, and in such a suit relief can be given against the Crown: *Hodge* v. *Attorney-General.* (2) That the Attorney-General can be sued as a defendant is clear from the following cases:—*Pawlett* v. *Attorney-General* (3); *Lara[illegible]*

(1) [1892] 3 Ch. 274.
(2) 3 Y. & C. Ex. 342.
(3) (1667) Hardres' Rep. 465.

[illegible] v. *Attorney-General* (2); *Casberd* v. *Attorney-General* (3); *Peto* v. *Attorney-General* (4); *Deare* v. *Attorney-General* (5); *Crauford* v. *Attorney-General* (6); *Ex parte Colebrooke, Bart.* (7); *Colebrooke* v. *Attorney-General.* (8)

It would seem from *Reg.* v. *Prosser* (9) that the Court has the same control over the Attorney-General as over any other suitor. Lush J. seems to have been misled by *Barraclough* v. *Brown* (10), but that case is not applicable.

There is now jurisdiction under Order xxv., r. 5, to make a declaratory order whether any consequential relief is or could be claimed or not. It is not necessary to proceed by petition of right. The Attorney-General is according to the above authorities a proper party to this action, and the pleading should be allowed to stand, leaving it to the Attorney-General to raise such defence as he may be advised by his statement of defence in the usual way.

Sir J. Simon, K.C., S.-G., and *Rowlatt,* for the respondent. The authorities relied on by the appellant have no application except in cases in which the rights of the Crown are only incidentally concerned; in all cases where the rights of the Crown are the immediate and sole object of the suit the application must be by petition of right: Mitford on Pleading, 32 ed. [30].

[FARWELL L.J. referred to *Kirk* v. *Reg.* (11)]

There is no justification or precedent for this form of action, and it is a very inconvenient way of obtaining a decision as to the plaintiff's liability to the penalty in default of compliance with the notice. If an action of this kind will lie against the Crown there will be innumerable other actions for declarations as to the meaning of numerous other Acts of Parliament which impose a penalty, thus adding greatly to the labours of the law officers.

The plaintiff has no right to ask for a declaration that he is not under any obligation to comply with this notice. The

(1) (1816), 2 Price, 172.
(2) (1741) 2 Atk. 223.
(3) (1819) 6 Price, 411, 477.
(4) (1827) 1 Y. & J. 509.
(5) (1835) 1 Y. & C. Ex. 197.
(6) (1819) 7 Price, 1.
(7) (1803) 7 Price, 87.
(8) (1807) 7 Price, 146.
(9) (1848) 11 Beav. 306, 314.
(10) [1897] A. C. 615.
(11) (1872) L. R. 14 Eq. 558, at p. 563.

plaintiff may have a good defence if the Attorney-General proceeds by information to recover the penalty, but he has a right to bring an action of this kind; it is turning the procedure upside down.

The equity jurisdiction of the Court of Exchequer as a Court of Revenue was not taken away by 5 Vict. c. 5: *Attorney-General* v. *Halling* (1); and in that Court a declaratory judgment could not have been obtained. [*Sir Thomas Cecil's Case* (2) was also referred to.]

Order xxv., r. 5, does not apply to proceedings on the Revenue side, and Order LXVIII., r. 1 (*c*), excludes declaratory judgments under the rules on the Revenue side of the King's Bench Division.

Danckwerts, K.C., in reply.

Cur. adv. vult.

Dec. 10. COZENS-HARDY M.R. This is an appeal from an order of Lush J. in chambers confirming an order of the Master dismissing the action with costs. The application in chambers was made under Order xxv., r. 4, and the action relates to what is known as "Form IV." under the Finance Act. The statement of claim alleges that a notice was served upon the plaintiff, signed by the secretary to the Commissioners of Inland Revenue, requiring him to deliver certain returns within thirty days under a penalty not exceeding 50*l*. It alleges that certain requisitions in the said form are illegal and unauthorized, and that the Commissioners have threatened to enforce the penalty for failure to make the return, and the plaintiff claims a declaration that he is not under any obligation to comply with the notice. It will be observed that the plaintiff does not seek to divest any property of the Crown or to enforce any pecuniary claim against the Crown.

It might be sufficient to say that Order xxv., r. 4, was not intended to take the place of a demurrer, and that it ought not to be applied to an action involving serious investigation of ancient law and questions of general importance, and on that ground alone I think the plaintiff is entitled to have the action proceed to trial in the usual way, leaving the Attorney-General to make any objection he may be advised to raise by his statement of defence. As, however, the case has been elaborately argued before us, I think it better that we should state our views upon the interesting question whether the Attorney-General can be sued in a case like this.

I start with this proposition, that the penalty which is threatened to be enforced against the plaintiff is one which the Attorney-General must sue for in this Court: Inland Revenue Regulations Act, 1890, ss. 21 and 22. This suggests that the Attorney-General ought to be liable to an action in so far as he threatens to enforce a penalty based upon non-compliance with an unauthorized notice.

It has been settled for centuries that in the Court of Chancery the Attorney-General might in some cases be sued as a defendant representing the Crown, and that in such a suit relief could be given against the Crown. *Pawlett* v. *Attorney-General* (1) is a very early authority on this point. *Lavagoity* v. *Attorney-General* (2) is a case where this matter was a good deal discussed. In *Deare* v. *Attorney-General* (3) the Attorney-General demurred to such a bill. Lord Abinger (4) said: "I apprehend that the Crown always appears by the Attorney-General in a Court of justice, especially in a Court of Equity, where the interest of the Crown is threatened. Therefore a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned," and the demurrer was overruled. But it is said that these authorities have no application except in cases in which the Crown rights are only incidentally concerned, and that where the rights of the Crown are the immediate and sole object of the suit the application must be by petition of right: see Mitford on Pleading, p. 30. I do not think the distinction thus suggested is supported by authority, nor do I think the distinction would avail the Attorney-General in the present case. The case of *Hodge* v. *Attorney-General* (5) is an important decision. I have examined the record, which fully bears out

(1) (1846) 15 M. & W. 687.
(2) (1598) 7 Rep. 89.
(1) Hardres' Rep. 465.
(2) 2 Price, 172.
(3) 1 Y. & C. Ex. 197.
(4) Ibid. at p. 208.
(5) 3 Y. & C. Ex. 342.

the report, with one exception. The plaintiffs were equitable mortgagees by deposit of the title deeds of certain leasehold premises. George Bailey, who had deposited the deeds, was convicted of felony, the result of which was that the legal title was vested in the Crown. The plaintiffs filed their bill in the Exchequer, making the Attorney-General sole defendant. It came on before Alderson B., "sitting in equity," as he himself stated. The Court declared the plaintiffs entitled to an equitable mortgage or lien, and referred it to the Master to take an account of what was due to the plaintiffs for principal, interest, and costs; and the decree proceeded to order, "by consent of Her Majesty's Attorney-General," that the plaintiffs should hold certain premises until they should be fully satisfied what the Master should find to be due to them, and the tenants were directed to attorn. This seems to me a distinct authority that the Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the suit is to affect the rights of the Crown in favour of the plaintiffs. The only doubt raised in argument was due to the circumstance that the Crown had the legal estate, and that the Crown could not be compelled to convey that legal estate. But Alderson B. in a considered judgment expressly held that he had jurisdiction to make a declaration and to direct an account, and also to decree that the plaintiffs should hold possession until they were repaid, although it is true that in the decree itself the last part of the relief, but not the earlier parts, was by the consent of the Attorney-General. So far as I can discover, the authority of *Hodge* v. *Attorney-General* (1) has never been challenged, and I think it ought to be followed. It was suggested that there was something peculiar in the jurisdiction of the old Court of Exchequer which might account for such a decision. I cannot adopt this view. No doubt the Court of Exchequer on the Revenue side had peculiar functions which are not transferred by the Judicature Act to all branches of the High Court, but its equity jurisdiction had nothing peculiar as distinguished from the Court of Chancery, to which by statute this jurisdiction was transferred. What the Court of Chancery could do can now be done by both Divisions of the High Court.

(1) 3 Y. & C. Ex. 342.

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But then it is urged that in the present action no relief is sought except by declaration, and that no such relief ought to be granted against the Crown, there being no precedent for any such action. The absence of any precedent does not trouble me. The power to make declaratory decrees was first granted to the Court of Chancery in 1852 by s. 50 of 15 & 16 Vict. c. 86, under which it was held that a declaratory decree could only be granted in cases in which there was some equitable relief which might be granted if the plaintiff chose to ask for it: see *Rooke* v. *Lord Kensington*. (1) The jurisdiction is, however, now enlarged, for by Order xxv., r. 5, "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment, or order, is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not." I can see no reason why this section should not apply to an action in which the Attorney-General, as representing the Crown, is a party. The Court is not bound to make a mere declaratory judgment, and in the exercise of its discretion will have regard to all the circumstances of the case. I can, however, conceive many cases in which a declaratory judgment may be highly convenient, and I am disposed to think, if all other objections are removed, this is a case to which r. 5 might with advantage be applied. But I desire to guard myself against the supposition that I hold that a person who expects to be made defendant, and who prefers to be plaintiff, can, as a matter of right, attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The Court may well say "Wait until you are attacked and then raise your defence," and may dismiss the action with costs. This may be the result in the present case. That, however, is not a matter to be dealt with on an interlocutory application. It is pre-eminently a matter for the trial. In my opinion the plaintiff may assert his rights in an action against the Attorney-General and is not bound to proceed by petition of right.

(1) "

It is needless to say that I have not expressed, nor have I formed, any opinion as to the substance of the case alleged by the plaintiff. I have dealt only with the question of form. In my opinion the appeal must be allowed and the order discharged. In fairness to the learned judge from whose order the appeal is brought, I would add that the authorities bearing on the case were not, and could not be, called to his attention in chambers.

FLETCHER MOULTON L.J. In this case the plaintiff has received a paper from the Commissioners of Inland Revenue (known ordinarily as Form No. IV.) making certain inquiries and threatening him with a penalty unless the inquiries are answered by a certain date, and he is desirous of testing the legality of the procedure, and for that purpose has brought an action against the Attorney-General for a declaration that he is under no obligation to comply.

The law advisers to the Crown, being of opinion that this course was not open to the plaintiff, took out a summons to dismiss the action on the ground that it was frivolous and vexatious and disclosed no reasonable cause of action. The Master and the judge approved of their contention, and it is from this decision of the judge in chambers that the present appeal is brought.

Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that the power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

The objection taken by the Crown in the present case was solely that there was no justification or precedent for the form of the action. Neither side has discussed the merits either here or at chambers. Mr. Rowlatt on behalf of the Crown frankly stated that in chambers he relied solely on a paragraph in Mitford on Pleading, which he considered to support his contention, and the Master and the judge took his view. In my opinion the passage does not bear the interpretation which he puts upon it. If it does bear that meaning it does not accurately state the law at the time, for it would be inconsistent with the case of *Hodge* v. *Attorney-General* (1), where an action was brought against the Attorney-General as sole defendant as representing the Crown in order to obtain a declaration affecting the rights of the Crown and consequent relief. Moreover, even if the statement of Mitford could have been supported in the then state of the law (which did not permit of actions for declarations unless the Court could also grant specific relief), I should not be prepared to hold that it is correct in the present state of the law which permits of an action whose sole object is a declaratory judgment.

The question in what branch of the jurisdiction of the old Court of Exchequer the case of *Hodge* v. *Attorney-General* (1)

(1) 3 Y. & C. Ex. 342.

was decided has been hotly contested before us in this case. I do not propose to enter into this question. The very fact that the parties agree that the answer we give in recondite a matter may have an important, and in one alternative decisive, effect on the right to bring the present action, shews conclusively to my mind that it is not a case for the exercise of these exceptional powers. For, as I have said, an order of this kind ought not to be made where there is any reasonable ground for argument as to the maintainability of the action. Moreover it is unfair on the judge at chambers himself to require him to decide a question involving such an investigation of old authorities none of which are or can be properly called to his notice.

The sole question for our decision on the present occasion is whether or not this order should have been made in this case, and therefore I have no hesitation in coming to the conclusion that this appeal ought to be allowed.

FARWELL L.J. Order xxv., r. 4, was never intended to apply to a case of this kind, and we might well have allowed the appeal on this ground alone, but the case raises a question of public importance, and as we have had it fully argued I think that we ought now to decide it.

The Attorney-General contends that he is not the proper defendant, that no such declaration as is asked could ever have been obtained in any Court against any defendant, and that, therefore, none such can now be obtained in the High Court, and that the subject has no remedy, but can only defend actions for penalties when he is sued.

Now the action is for no declaration in respect of any penalty, the complaint is that the Legislature has entrusted to a Government department (the Commissioners of Inland Revenue) the performance of the duty of making certain specific inquiries in a specific manner from landowners and of requiring answers to be sent to themselves, and has imposed a 50*l.* penalty for disobedience. The plaintiff alleges that the Commissioners have exceeded their powers by making inquiries not authorized to be made, by not giving proper time to answer, and by requiring answers to be sent to a person not authorized to receive them. This appeal has been heard as if it were on demurrer under the old practice, and the allegations must therefore be taken as true for the present purpose. It is obviously a question of the greatest importance; more than eight millions of Form IV. have been sent out in England, and the questions asked entail much trouble and in many cases considerable expense in answering; it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty. I am, however, of opinion that the Attorney-General's contention is not well founded.

1. In a case like the present the Attorney-General is properly made defendant. It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only method of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the Courts of Equity, whether the Court of Chancery or the Exchequer on its equity side (see *Deare* v. *Attorney-General* (1)), could and did make declarations and orders which did affect the rights of the Crown. The two cases of *Pawlett* v. *Attorney-General* (2) and *Hodge* v. *Attorney-General* (3) on the one hand and *Reeve* v. *Attorney-General* (4) on the other are good illustrations of the distinction. It has not, since the Commonwealth at any rate, been the practice of the Crown to attempt to defeat the rights of its subjects by virtue of the prerogative; in 1667 Baron Atkyns in *Pawlett* v. *Attorney-General* (5) says: "The party ought in this case to be relieved against the King; because the King is the fountain and head of justice and equity, and it shall not be presumed that he will be defective in either; it would derogate from the King's honour to imagine that what is equity against a common

(1) 1 Y. & C. Ex. 197, at p. 208.
(2) Hardres' Rep. 465.
(3) 3 Y. & C. Ex. 342.
(4) 2 Atk. 223.
(5) Hardres' Rep. at p. 469.

person should not be equity against ... where a petition of right is required, that proceeding "... only for the purpose of reconciling the dignity of the Crown ... the rights of the subject and to protect the latter against ... injury arising from the acts of the former; but it is no part of its object to enlarge or alter those rights": per Lord Cottenham in *Monckton* v. *Attorney-General*. (1) It is very unusual for the responsible minister to refuse to authorize the indorsement "... right be done," and it would be unjustifiable to refuse in any case where a plausible claim is made out. As Lord Langdale says in *Ryves* v. *Duke of Wellington* (2), "I am far from thinking that it is competent to the King, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right." The present is not a case for a petition of right at all; the Crown is not directly affected, but the plaintiff seeks a declaration from the Court of the true construction of an Act which imposes burdens some and expensive inquiries upon him, and for non-compliance with which he is threatened with fines. The argument on behalf of the Attorney-General admits for this purpose the illegality of the inquiries, but claims for a Government department a superiority to the law which was denied by the Court to the King himself in Stuart times.

2. Then it was argued that there is no precedent for such an order as is asked in this action. That may very well be, because before the Judicature Act the Court of Chancery would not make declarations of right where the plaintiff did not, or at any rate could not, ask for consequential relief. Order xxv., r. 5, has altered this, and declarations of right can now be obtained in cases where the Court of Chancery would have refused to grant them. Then it was objected that the penalty made the refusal to answer the questions a criminal or quasi-criminal offence, and that the Court of Chancery would not interfere in such a case, and this may very well have been true before the Judicature Acts: *Prudential Assurance Co.* v. *Knott* (3); but it is otherwise since those Acts: *Bonnard* v. *Perryman*. (4)

(1) (1850) 2 Mac. & G. 402, at p. 412.
(2) (1846) 9 Beav. 579, at p. 600.
(3) (1875) L. R. 10 Ch. 142.
(4) [1891] 2 Ch. 269.

3. The next argument on the Attorney-General's behalf was *ab inconvenienti*"; it was said that if an action of this sort would lie there would be innumerable actions for declarations as to the meaning of numerous Acts, adding greatly to the labours of the law officers. But the Court is not bound to make declaratory orders and would refuse to do so unless in proper cases, and would punish with costs persons who might bring unnecessary actions: there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the inconvenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court. Within the present year in this Court alone there have been no less than three such cases. In *Rex* v. *Board of Education* (1) the Board, while abandoning by their counsel all argument that the Education Act, 1902, gave them power to pursue the course adopted by them, insisted that the Court could not interfere with them, but that they could act as they pleased. In *In re Weir Hospital* (2) the Charity Commissioners were unable to find any excuse or justification for the misapplication of 5000*l.* of the trust funds committed to their care. In *In re Hardy's Crown Brewery* (3) the Commissioners of Inland Revenue, who are entrusted by s. 2, sub-s. 1, of the Licensing Act, 1904, with the judicial duty of fixing the amount of compensation under the Act, fixed the sum mero motu without any inquiry or evidence and without giving the parties any opportunity of meeting objections, and claimed the right so to act without interference by any Court. Bray J. and the Court of Appeal held that they had acted unreasonably and ordered them to pay costs. In all these cases the defendants were represented by the law officers of the Crown at the public expense, and in the present case we find the law officers taking a preliminary objection in order to prevent the trial of a case

(1) [1910] 2 K. B. 165.
(2) [1910] 2 Ch. 124.
(3) [1910] 2 K. B. 257.

which, treating the allegations as true (as we must on such an application), is of the greatest importance to hundreds of thousands of His Majesty's subjects. I will quote the Lord Chief Baron in *Deare* v. *Attorney-General* (1): "It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a Court of justice when any real point of difficulty that requires judicial decision has occurred." I venture to hope that the former salutary practice may be resumed. If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.

I agree that this appeal should be allowed, but it is only fair to the learned judge to add that this is not a case which could be properly argued in chambers, and that his attention was not called to all the cases cited to us, but reliance was really placed on the passage in Mitford on Pleading, which is not quite accurate.

Appeal allowed.

Solicitors: *Simpson, Thomas & Clark, for Simpson, Thomas & Curtis, Leeds; Solicitor for Inland Revenue.*

(1) 1 Y. & C. Ex. at p. 208.

W. C. D.

[IN THE COURT OF APPEAL.]

PRESTED MINERS COMPANY, LIMITED *v.* GARDNER, LIMITED.

Sale of Goods—Contract not to be performed within a Year—Writing signed by Party to be charged—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.

Sect. 4 of the Statute of Frauds (so far as relates to agreements not to be performed within a year) applies to agreements for the sale of goods and is not repealed by the Sale of Goods Act, 1893. Therefore an agreement for the sale of goods is not taken out of the operation of the above provision of the Statute of Frauds by reason of there having been an acceptance and actual receipt by the buyer of part of the goods so sold.

Decision of Walton J., [1910] 2 K. B. 776, affirmed.

APPEAL by the plaintiffs from a decision of Walton J. (1)

Holman Gregory, K.C. (*Valetta* with him), for the appellants, gave up the point of law which was decided in the Court below, namely, that s. 4 of the Statute of Frauds did not apply to an agreement for the sale of goods which complies with the requirements of s. 4 of the Sale of Goods Act, 1893, but contended upon the construction of the agreement that it was not an agreement which was not to be performed within a year within the meaning of s. 4 of the Statute of Frauds.

Bailhache, K.C., and *J. B. Matthews*, for the respondents, were not called upon.

COZENS-HARDY M.R. I think there is nothing in this appeal. The decision of Walton J. upon the only point raised before him was clearly right even by the admission of the appellants' counsel, and it is quite plain that this was a contract which was not to be performed within a year within the meaning of s. 4 of the Statute of Frauds. The appeal must be dismissed with costs.

FLETCHER MOULTON and FARWELL L.JJ. concurred.

Appeal dismissed.

Solicitors for appellants: *Coleman & Coleman.*

Solicitors for respondents: *Dennison, Horne & Co., for E. S. Taylor, Birmingham.*

(1) [1910] 2 K. B. 776.

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ment. Further, I am clearly of the opinion that, if it had been the intention of the Legislature to confine the operation of the section to the current year in which the error is discovered, as suggested by counsel for the Epp school district, other words would have been used. In its present form it refers to "any year." Further, sec. 302 of *The Rural Municipality Act* empowers the council at any time to correct any gross or palpable errors in the assessment roll even after its adoption, so I do not think that it can be held that sec. 70 of *The School Assessment Act* as amended could be held to apply to the current year only. Further, errors such as the one in question may not be discovered for years, or if discovered within the then current year, the council would correct the assessment without reference to the Minister.

If it had been the intention of the Legislature to confine the power of the Minister to the rectification of only such errors which had been discovered after the amendment came into force, I think it should have done so in explicit words. The words of the amendment as it now stands are such as to convince me that it was the clear intention of the Legislature to empower the Minister with authority to make the order in question.

Again, subsec. (2) of sec. 70 provides that the Minister may order the municipality to pay for the "school taxes levied or to be levied," which clearly shows that the section was not to be confined to any one year. Then necessarily it must apply to all.

The Minister having dealt with the matter, it follows that this appeal should be allowed with costs and the judgment entered set aside and the action dismissed. The plaintiff will be entitled to its costs up to the date of the order of the Minister, i.e., July 31, 1935. The defendant will be entitled to costs thereafter. There will be a set-off.

Royal Trust Company (Executor of Cochrane Estate) v. Attorney-General for Alberta

(No. 3)*

Petition of Right—When Only Remedy—Recovery Back of Succession Duties Paid Under Invalid Statute—Payment Under Invalid Statutes Act, R.S.A., 1922, Ch. 28.

Where money in the possession of the Government is claimed by it as its own, the questions whether it was paid to the Government under circumstances which would give rise to a right to recover it back, whether *The Payments under Invalid Statutes Act*, 1934, ch. 16 (Alta.) is or is not valid legislation, and whether that Act is couched in apt terms to prevent such recovery back, can be determined only in proceedings by way of petition of right or in some other proceeding at the instance of the Crown.

Except in cases specially provided for by statute, e.g., the provision of the *Finance Act* of 1894 (Imp.) sec. 10, for the recovery back of estate duty, the only way by which a subject is enabled to obtain back out of the hands of the Crown either land, money or goods, upon which the Crown has, rightfully or wrongfully, laid its hands, is by a petition of right; and where, as in the present instance, declarations are sought as foundations upon which to base a claim that the Crown is wrongfully holding money which of right belongs to the plaintiff the Court has no jurisdiction to make such declarations except as incidental to a claim which can only be the subject of a petition of right (*Lovibond v. G.T.R. Co., ante*, p. 298 [P.C.] followed; *Dyson v. Atty.-Gen.* [1911] 1 K.B. 410, 80 L.J.K.B. 531; [1912] 1 Ch. 158, 81 L.J. Ch. 217; *G. W. Life Assur. Co. v. Baptiste* [1924] 2 W.W.R. 920 [Alta.], and other cases, distinguished).

The Court is not concerned with the soundness or unsoundness of the reason given for the refusal of a fiat for a petition of right. The fact that without a fiat the plaintiff will be left without a remedy does not confer jurisdiction to make a declaration.

[Note up with 2 C.E.D., *Crown*, sec. 20; 6 C.E.D., *Mistake*, sec. 1; *Petition of Right*, secs. 1, 6 and sec. 4A (1934 and 1935 Supps); 7 C.E.D., *Succession Duties*, sec. 7.]

H. G. Nolan, K.C., and *J. J. Saucier*, for plaintiff.

W. S. Gray, K.C., for defendant.

June 10, 1936.

Ford, J. — William Edward Cochrane died on March 6, 1929, in the city of Calgary, Alberta, leaving a will whereby the Royal Trust Company was appointed sole executor. The testator was at the time of his death domiciled in the province

Ford, J.

*For Nos. 1 and 2, see [1934] 1 W.W.R. 824 and 831.

The value of the personal property of the testator locally situated outside of Alberta, was $875,538.85. The value of the whole estate was $1,255,496.90. All the beneficiaries resided and were domiciled outside of Alberta.

On June 5, 1929, the executor, in lieu of giving a bond as security for the payment of succession duty, paid to the collector of succession duties the sum of $100,000. This payment was accompanied by the delivery of a letter of undertaking reading as follows:

> "With this letter a deposit of One Hundred Thousand Dollars ($100,000.00) to apply on account of Succession Duty payable in the Province of Alberta, in the above estate will be made. In consideration of your consenting to the issue immediately of Probate of the Will of the above named deceased, The Royal Trust Company hereby binds itself, its successors and assigns to pay to you any and all duty for which the estate of the above named William E. Cochrane, deceased, may be found properly liable under the provisions of *The Succession Duty Act* of the Province of Alberta over and above the foregoing amount of One Hundred Thousand Dollars ($100,000.00). The personal undertaking of this Company hereby given, being hereby limited to the sum of One Hundred and Thirty Thousand Dollars ($130,000.00)."

From time to time thereafter further payments were made bringing the total amount paid up to the sum of $197,958.12 from which certain rebates were made, and on the discovery of a further asset there appeared to be outstanding a balance of $86.22 payable by the estate.

By a judgment delivered on July 27, 1933, *The Succession Duties Act*, R.S.A., 1922, ch. 28, as amended in 1923 and 1927 was declared *ultra vires: Kerr v. Prov. Treas. of Alta. and Atty.-Gen. for Alta.* [1933] 3 W.W.R. 38, [1933] A.C. 710, 102 L.J.P.C. 137.

On October 21, 1933, the plaintiff presented to the clerk of the executive council a petition of right addressed to His Majesty and requested a fiat to proceed. In this petition the plaintiff, as petitioner, claimed judgment for the whole amount of succession duty paid or alternatively for the amount paid in respect of the property situate outside of the province.

1934, ch. 19 (Alta.), which became law on April 16, 1934, it was provided by secs. 2 and 3 thereof as follows:

> "2. Every payment heretofore made to the Government of the Province on account of any tax imposed by virtue of any statute of the Province which is or has been subsequently to the payment declared to be invalid by any court of competent jurisdiction shall be deemed to be a payment made in mistake of law notwithstanding that the payment has been made under protest and no action shall lie for the recovery thereof except only in cases where the payment has been made in pursuance of an agreement in writing which has been approved by the Lieutenant Governor in Council, providing for repayment in a specified event.
>
> "3. Every payment heretofore made to the Government of the Province by any person whomsoever on account of any tax imposed by any statute of the Province which subsequently to the time of payment is or has been declared to be invalid shall be deemed to have been lawfully made, and no action of any kind whatsoever shall lie against any person in respect of any payment so made."

On April 16, 1934, an amended petition of right was presented to which the plaintiff's solicitors received a reply to the effect that in view of sec. 2 of *The Payments under Invalid Statutes Act* a fiat cannot be granted. In this petition also the plaintiff, as petitioner, sought judgment for the whole amount paid for succession duty or alternatively for the amount paid in respect of the property situate outside of Alberta.

Between the dates of the two requests for fiats to proceed by way of petition of right the plaintiff obtained, in proceedings taken under the provisions of sec. 35 of *The Succession Duties Act, 1932*, ch. 16, a declaration that the personal property situate outside of the province was not liable to succession duty.

On June 6, 1934, the present action was commenced. The prayer in the statement of claim, as amended, claims as follows:

> "(*a*) A Declaration of this Honourable Court that *The Payments under Invalid Statutes Act* of the Statutes of Alberta, 1934, is *ultra vires* of the Provincial Legislature.

of Alberta, 1934, has no application to the estate of William Edward Cochrane, Deceased.

"(*c*) A Declaration of this Honourable Court that the provisions of *The Payments under Invalid Statutes Act*, of the Statutes of Alberta, 1934, insofar as they purport to apply to the estate of William Edward Cochrane, Deceased, are *ultra vires* of the Provincial Legislature.

"(*d*) A Declaration that the moneys paid to the Collector of Succession Duties in respect of personal property of the estate of William Edward Cochrane situate outside the Province of Alberta, and devolving upon beneficiaries resident outside of said Province are the moneys of the plaintiff, and that *The Payments under Invalid Statutes Act* vests no title thereto in the Government of Alberta."

In the view I take of the law and of the Court's duty in such a case as the present, it is unnecessary, and indeed inadvisable, to state the facts more fully, to express any view as to the effect of the facts given in evidence, or to express any opinion upon the grounds upon which the declarations in the plaintiff's prayer are asked, for the reason that, as the defendant pleads in par. 11 of the statement of defence, the Court "has no jurisdiction on the facts alleged in the statement of claim or at all to grant the relief claimed or any part of said relief." It is sufficient to say that the money is in the possession of the Government which claims it as its own. The questions whether it was paid under circumstances which would give rise to a right to recover it back, whether *The Payments under Invalid Statutes Act* is or is not valid legislation, and whether that statute is couched in apt terms to prevent such recovery back, can be determined only in proceedings by way of petition of right or in some other proceeding at the instance of the Crown.

Whatever jurisdiction the Court might have to make the declarations asked if there was non-existent in this province any provision for a proceeding by way of petition of right, I am clearly of the opinion that there is no remedy available to the plaintiff herein except by petition of right which cannot be tried by the Court unless and until the Lieutenant-Governor in Council grants a fiat that right be done: *The Alberta Petition of Right Act*, R.S.A., 1922, ch. 94, sec. 4 (1). Except in cases specially provided for by statute, as for instance

for the recovery back of estate duty (see *In re Sassoon; Inland Revenue Commrs. v. Raphael* [1935] A.C. 96, 104 L.J. K.B. 24) the only way by which subjects of His Majesty are enabled to obtain back out of the hands of the Crown either land, money or goods, upon which the Crown has, rightfully or wrongfully, laid its hands, is by the proceeding known as a petition of right, and where, as in the present instance, the declarations are sought as foundations upon which to base a claim that the Crown is wrongfully holding money which of right belongs to the plaintiff the Court has no jurisdiction to make the declarations asked or any of them. Such declarations cannot be made except as incidental to a claim which can only be the subject of a petition of right.

Even if I thought that the power exists in the Court in the present action to make the declarations sought, or any of them, I would exercise the discretion given by *The Judicature Act*, R.S.A., 1922, ch. 72, with respect to declaratory judgments against the making of a declaration. The only use to which any of the declarations asked for, if made, could be put would be in an endeavour to influence the Attorney-General to advise, and the Lieutenant-Governor in Council to grant, a fiat that right be done or without a proceeding by way of petition of right to return the money said to be wrongfully withheld, or to serve as a basis of criticism of the advisers of the Crown for refusing to permit that right be done.

The constitutional duty of the officers of the Crown in respect of making easy the determination of difficult questions of law which may affect the interests or rights of the Crown, and what has been called "the constitutional duty of the Attorney-General not to refuse a fiat unless the claim is frivolous" or indeed where there is a "shadow of claim," have been more than once stated by very learned Judges. For my part I prefer to refrain from giving unsolicited advice either to the legislative or executive branches of government. It may well be that what in 1884 Bowen, L.J. conceived to be the "constitutional duty" of the Attorney-General, as stated by him in *Reg. v. Inland Revenue Commrs.; In re Nathan* (1884) 12 Q.B.D. 461, at 479, 53 L.J.Q.B. 229, may not now be so considered. I have known a number of instances of the refusal of a fiat in cases where the claims asserted could not be said to be "frivolous" or without a "shadow of claim." As stated by Middleton, J.A. in *Lovibond v. G.T.R. Co.* [1933] O.R. 727, at 757:

the plaintiff cannot maintain this action and must proceed by petition of right. If this is his only remedy, we are not concerned with the difficulties in his path."

Nor is the Court concerned with the soundness or unsoundness of the reason given for the refusal of a fiat. The fact that without a fiat the plaintiff will be left without a remedy does not confer jurisdiction to make a declaration. In the absence of a fiat for a petition of right or of some proceeding at the instance of the Crown, such as suggested by Sir George Farwell in *Eastern Trust Co. v. Mackenzie, Mann & Co. Ltd., infra,* the plaintiff must continue to be "without a remedy." Doubtless the advisers of the Crown have read the remarks of Sir George Farwell in *Eastern Trust Co. v. Mackenzie, Mann & Co. Ltd.* [1915] A.C. 750, at 759, 84 L.J.P.C. 153, 31 W.L.R. 248; of Lord Abinger in *Deare v. Atty.-Gen.* (1835) 1 Y. & C. Ex. 197, at 208, 160 E.R. 80, at 85; and of Farwell, L.J. in *Dyson v. Atty.-Gen.* [1911] K.B. 410, at 421-2, 80 L.J.K.B. 531, as well as of Bowen, L.J. in *In re Nathan, supra.*

The present case comes clearly within the authority of the very recent decision of the Judicial Committee of the Privy Council in *Lovibond v. G.T.R. Co.,* of which the only report at present available here is in the *"Times"* newspaper of May 15, 1936 [now reported *ante* p. 298]. So far as concerns the question now before me the Judicial Committee affirmed the judgment of Kerwin, J. and of the Court of Appeal of Ontario.

The facts in the *Lovibond* case, *supra,* are set out in the judgment of Rose, C.J.H.C. on one of the motions made therein, which is reported along with the judgments of Kerwin, J., and of the Court of Appeal in [1933] O.R. 727, at 728, as follows:

> "The plaintiff presented a petition of right in which he set forth certain of the claims which he now makes in this action. The petition was left with the Secretary of State for Canada in accordance with sec. 4 of the *Petition of Right Act* (R.S.C., 1927, ch. 158) but a fiat was refused. The plaintiff then petitioned His Majesty in Council for leave to appeal from the refusal of His Excellency the Governor-General to grant a fiat, but leave to appeal was refused: *Lovibond v. The Governor-General of Canada* [1930] A.C. 717, 99 L.J.P.C. 178. Then this action was commenced. In it the plaintiff on behalf of himself and all others the registered holders on January 18th, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada, their personal representatives or assignees, sues the Grand Trunk Railway Company of Canada, The Canadian National Railway Company and the Attorney-General of Canada, asking on behalf of himself and all those whom he professes to represent in the action (*a*) a declaration that certain transfers to the Minister of Finance of certain shares of stock of the Grand Trunk Railway Company of Canada are illegal and void, and an order directing the defendant railways to rectify the stock register of the Grand Trunk, (*b*) a declaration that *The Grand Trunk Railway Acquisition Act, 1919,* 10 Geo. V., ch. 17, is *ultra vires* the Parliament of Canada, (*c*) a declaration that a certain meeting of shareholders of the Grand Trunk Railway Company was not duly constituted, and that a resolution passed at that meeting was *ultra vires* and void, (*d*) a declaration that an agreement of the 8th March, 1920, between the Government of Canada and the Grand Trunk is *ultra vires* and void, (*e*) a declaration that an Act of 1920 (10-11 Geo. V., ch. 13) confirming the last mentioned agreement is *ultra vires,* and (*f*) a declaration that an order-in-council of the 19th January, 1923, is not within the authority conferred by the Act of 1919, and is otherwise *ultra vires* and void. On his own behalf, he claims an order for the rectification of the stock register of the Grand Trunk Company by restoring his name as the holder of certain specified shares of stock or an order directing the defendant railways to appropriate or acquire shares and to transfer and register the same in the books of the Grand Trunk in the name of the plaintiff as holder, or, alternatively, damages."

The Privy Council, the Court of Appeal, and Kerwin, J., all held that the case was governed by the earlier decision of the Board in *Atty.-Gen. for Ont. v. McLean Gold Mines Ltd.* [1926] 3 W.W.R. 193, [1927] A.C. 185, 95 L.J.P.C. 217.

Referring to the *McLean* case, *supra,* Middleton, J.A., in the *Lovibond* case ([1933] O.R. at p. 757) said:

> "The decision of the Privy Council in *Attorney-General for Ontario v. McLean Gold Mines, Ltd.,* [1927] A.C. 185, is directly in point. I adapt the language of the late lamented Chief Justice of Canada in that case. It is

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particular declaration and order set forth in the prayer to his statement of claim. It is essential to the plaintiff's status that he should establish his interest and the interest of those whom he represents in the shares of the Railway Company. Until that has been done he cannot succeed. The real matter in issue is the Crown's right and title to the stock in the Railway Company and what is being alleged is the invalidity of the proceedings upon which the Crown's title depends. The one essential thing that is in controversy is the title of the Crown. That being so, on the authority of that decision, this action will not lie."

In the report in the *"Times"* of the judgment delivered by Lord Russell of Killowen the following appears:

> "There remained for consideration that part of the relief claimed which sought to obtain declarations. Those were sought as foundations on which to base the claims to have the names of the old holders of the junior stocks restored as such to the register of the Grand Trunk. In other words they were ancillary to the claims which could only be the subject of a petition of right. The action could not be allowed to proceed with regard to them * * *."

In the *McLean* case, *supra*, certain mining claims in Ontario granted by the Crown were forfeited under *The Mining Tax Act*, R.S.O., 1914, ch. 26, and were granted to another person. Defects were alleged in the forfeiture proceedings and a declaration was claimed that the plaintiffs were the true owners of the claims, and that the forfeiture certificates were void, and an order was asked that the plaintiffs be substituted as owners in the register of titles. If the forfeiture proceedings were invalid the Crown had acquired no title after the first grant. It was held that as the plaintiffs' claim impugned the title accruing to the Crown on the forfeiture, it could not be made by action but only by petition of right. At p. 195, [1926] 3 W.W.R., and p. 190, [1927] A.C., Anglin, C.J., delivering the judgment of the Judicial Committee, said:

> "However the plaintiffs' claim may be viewed, it seeks in substance and reality to avoid the title acquired by and vested in the Crown as the result of the impugned forfeiture."

See also *Keewatin Power Co. v. Keewatin Flour Mills Co. Ltd.*, 59 O.L.R. 406, [1926] 4 D.L.R. 531.

Atty.-Gen. [1911] 1 K.B. 410, 80 L.J.K.B. 531; [1912] 1 Ch. 158, 81 L.J. Ch. 217; *R. & N. Ry. Co. v. Wilson* [1919] 3 W.W.R. 961, [1919] A.C. 358, 89 L.J.P.C. 27; *Wigg v. Atty.-Gen. of Irish Free State* [1927] A.C. 674, 96 L.J.P.C. 88; or *Spooner Oils Ltd. and Spooner v. Turner Valley Gas Conservation Board* [1932] 3 W.W.R. 477. See also *Smith v. Atty.-Gen. for Ont.* [1924] S.C.R. 331. These cases are all clearly distinguishable from the present one. Indeed in some of them the grounds of distinction are clearly stated.

In *Dyson v. Atty.-Gen.*, Farwell, L.J. himself clearly pointed out the distinction at p. 421, [1911] 1 K.B., as follows:

> "It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the Courts of Equity * * * could and did make declarations and orders which did affect the rights of the Crown."

Rowlatt, J., who was one of the counsel in *Dyson v. Atty.-Gen.*, in an interesting judgment in *Bombay and Persia Steam Navigation Co. v. MacLay* [1920] 3 K.B. 402, 90 L.J.K.B. 152, explains the *Dyson* judgment and makes it quite clear that no action will lie against the Attorney-General or any other official of the Crown, unless under some statutory authority, for a declaration of any liability to pay money, which, if it exists at all, rests upon the Government, except in a proceeding by petition of right. At p. 408 Rowlatt, J. said:

> "The machinery of *Dyson v. Attorney-General* cannot be used to prejudge the issue of what may have to be adjudicated upon in a petition of right as to a money claim against the Treasury. There is a difference in substance and constitutionally between a petition of right and an action against the Attorney-General. A petition of right making a monetary demand against the Treasury is dealt with by the Sovereign under the advice of the Secretary of State. I have known petitions of right disallowed. But if an action is brought against the Attorney-General he has practically no choice but to appear, and in that manner the procedure marked out for a petition of right would be got rid of."

at 908, [1920] A.C. 358, at 368, clearly points out the vital distinction between the present case and those cases in which the Attorney-General may properly be made a party:

> "Turning back once more to the present case, the claim sought is a declaration not against the Crown, but against grantees from the Crown. If the relief be granted and if the injunction sought be made, there will be nothing directing the Crown to do any act whatever. It is true that in these circumstances certain rights which the Crown possesses, if the grant be good, will be interfered with. But in order to see whether this involves a direct claim against the Crown, it is necessary to see how those rights arose. The petition is certainly strange. The original grant by the Crown to the appellants is perfectly good and remains unassailed except to the extent to which it may be defeated by application made by the settlers. If such application be made and granted, there is then reserved to the Crown out of the grant certain powers and rights against the grantee which they would not otherwise possess. In the event of the grant being good, these rights arise; if the grant be bad, they fall with it. But the chief substance of the action is the declaration that the grant is void, and the other result is consequential upon that decree."

The case of *G.W. Life Assur. Co. v. Baptiste* [1924] 2 W.W.R. 920, 20 Alta. L.R. 513, is another interesting example of the application of the rule laid down in *Dyson v. Atty.-Gen., supra,* to the effect that where the interests of the Crown are only indirectly concerned the Crown's rights may be affected in favour of a plaintiff in an action against the Attorney-General or in this province against a specified minister of the Crown. In that case it was held that the Court may in a mortgage foreclosure action make an order dealing with the Crown's interest under a statutory lien for seed grain advances to the same extent as with the interest of a subject.

There will be judgment dismissing the action. The question of costs may be spoken to later.

COURT OF APPEAL

Before Prendergast, C.J.M., Trueman, Robson and Richards, JJ.A.

In re Templeton Estate

Templeton et al (Plaintiffs) Appellants
v. Royal Trust Company (Defendant) Respondent

Wills—Interpretation—Life Interest with Power of Appointment — Whether Exercisable by Donees in Their Own Favour.

A will devised and bequeathed all the testator's property to his executor and trustee on trusts to pay certain legacies, the first of which was a gift to his niece Jenny Templeton of his residence at his death and $5,000, then followed legacies of $5,000 to his nephew, and of $500 each to two nieces, and of $1,000 to a church (by a codicil the $500 legacies were revoked and by a second codicil the $5,000 legacies were reduced to $1,000). The will next directed the trustees: "To divide the residue of my Estate into two equal shares each of which shares shall be held in trust by my said Executor and Trustee and net income therefrom paid to my nephew, the aforesaid Percy Templeton, and my niece, the aforesaid Jenny Templeton, during their respective lives. On the death of either the said Percy Templeton or the said Jenny Templeton, the share of my Estate from which they receive the net income shall be distributed as they shall by deed or will appoint and in default of such appointment or insofar as such appointment shall not extend, to their respective next-of-kin."

Held, Trueman, J.A. dissenting, that the donees of the power could separately exercise the power in his or her own favour so as to entitle them to have the half of the residue transferred to him or her immediately (*Barford v. Street,* 16 Ves. Jr. 135, 33 E.R. 935, applied; *In re McNeill Estate* [1920] 1 W.W.R. 523 [Alta.] distinguished).

[Note up with 7 C.E.D., *Wills,* sec. 40.]

Appeal from a judgment by Adamson, J. Appeal allowed, Trueman, J.A. dissenting. Costs out of the estate.

H. A. Bergman, K.C., and *R. W. Campbell,* for plaintiffs, appellants.

H. E. Swift, K.C., for defendant, respondent.

May 12, 1936.

PRENDERGAST, C.J.M.—The appeal is from the construction by Adamson, J. of clause 5 (*c*) of the last will and testament of the late William Templeton, whose estate, both at the time of making the said will and at his death, was approximately of the net value of $90,000. Prendergast, C.J.M.

Poitras et al v. Attorney-General for Alberta

Crown — Proceedings for Declaratory Judgment — Misjoinder of Attorney-General as Defendant — Necessity of Consent before Action — Proceedings Against the Crown Act — Judicature Act.

Motion to strike out a statement of claim in a representative action against the attorney-general for a judgment declaratory of the plaintiffs' rights in respect of the revenues from minerals under lands occupied by them and other Metis associations; the revenues in question, amounting to date to something in excess of $6,000,000, had been paid into the general revenue fund of the province and plaintiffs claimed that they ought properly to have been paid into the Metis' population betterment trust account. Although unsuccessful representations had been made to the provincial cabinet no representations had been made to the minister whose department was responsible for supervision of the affairs of the Metis population.

It was *held* that defendant's motion must be allowed and the statement of claim struck out; it was the practice in Alberta in actions such as the plaintiffs' in the case at bar, to name as defendant not the attorney-general but the responsible minister, in this case the minister of public welfare; the combined effect of *The Proceedings Against the Crown Act*, 1959, ch. 63, and of sec. 24 of *The Judicature Act*, RSA, 1955, ch. 164, to which the former Act was made subject, was that where it was sought to obtain a declaratory judgment against the responsible minister in respect of "anything done or proposed to be done or omitted to be done by him in the execution of his office" consent to commence proceedings must first have been given by the lieutenant-governor in council. This consent had not, in the case at bar, been given. It was clear from the legislation dealing with the Metis population that the minister of public welfare alone had power to administer their affairs and ought to have been named as defendant in any proceedings commenced, subject to the necessary consent having been given; the attorney-general had no jurisdiction to grant such consent: *Dyson v. Atty.-Gen.* [1911] 1 KB 410, 81 LJKB 217; *G.W. Life Assur. Co. v. Baptiste; Canada Life Assur. Co. v. Mills and Atty.-Gen. for Alta.* [1924] 2 WWR 920, at 924, 20 Alta LR 513, affirming [1924] 1 WWR 1103, 12 Can Abr (2nd) 3124 (App. Div.); *Royal Trust Co. (Executor of Cochrane Estate) v. Atty.-Gen. for Alta.* (No. 3) [1936] 2 WWR 337, at 340, 346, 12 Can Abr (2nd) 3145 (Alta.) considered.

[Note up with 8 CED (2nd ed.) *Crown*, secs. 2, 38, 39, 40.]

T. R. Maccagno, for plaintiffs.

W. F. McLean, for defendant.

March 24, 1969.

RILEY, J. — The plaintiffs, who seek the authoritative guidance of the court, have commenced a representative action against the attorney-general, as defendant representing the crown, for a declaratory judgment that upon a true construction of *The Metis Population Betterment Act*, RSA, 1942, ch. 329 (now *The Metis Betterment Act*, RSA, 1955, ch. 202) and the pertinent regulations thereunder, the revenues received by the crown from any disposal of the mines and minerals located on the lands set aside and withdrawn for the settlement of members of the Metis settlement associations should be paid into the Metis population betterment trust account, on behalf of and for the benefit of the said associations and their members only, instead of into the general revenue fund.

Representations in this regard to the provincial cabinet have been unsuccessful. A request for a reference to the courts to determine the true intent of the legislation and regulations in question was rejected.

The present application by the defendant is to strike out the plaintiffs' statement of claim on the following main grounds:

(a) That the attorney-general of Alberta is improperly named therein as defendant.

(b) That the plaintiffs named therein have no capacity at law to bring this action and if any right to bring action exists in respect to the matters alleged in the statement of claim, then such right to bring action lies with the Metis settlement associations and not with the individual members thereof.

(c) That the Metis settlement associations have not at any time indicated to the minister of public welfare or to any of his predecessors or to anyone in his department or to anyone in the Metis rehabilitation branch any desire to bring action in respect to the matters referred to in the statement of claim, and the minister of public welfare has therefore never been called upon to exercise his discretion as to whether or not he should permit or forbid the commencement and carrying on of such poceedings.

The statement of claim asks for no direct relief against the crown but merely for a declaration to resolve a question of statutory interpretation where the revenues of the crown as well as the rights of a large number of people are involved and it is plain that the draftsman was relying on the form of the action in the case of *Dyson v. Atty.-Gen.* [1911] 1 KB 410, 81 LJKB 217, and cases following it such as: *Tuxedo Holding Co. v. University of Man. and Atty.-Gen. for Man.* [1930] 1 WWR 464, 38 Man R 506, [1930] 3 DLR 250, affirming [1930] 1 DLR 435 (C.A.); *Smith v. Atty.-Gen. for Ont.* (1923) 53

Atty.-Gen. [1911] 2 Ch 139, 80 LJ Ch 506; *Wigg v. Atty.-Gen. of Irish Free State* [1927] AC 674, 96 LJPC 88, and particularly Viscount Cave, L.C., wherein it was stated at p. 102:

> "Upon the first point, therefore, their Lordships are of opinion that the appellants have a legal right which may be asserted in the Courts of the Irish Free State; and they see no objection to the form of the action, which is brought against the Attorney-General for a declaration of rights and is in accordance with the well-known decisions in *Dyson v. Atty.-Gen.* [*supra*] and other cases."

Spooner Oils Ltd. and Spooner v. Turner Valley Gas Conservation Board and Atty.-Gen. for Alta. [1932] 3 WWR 477, affirming in part [1932] 2 WWR 454 (App. Div.); *Majestic Mines Ltd. v. Atty.-Gen. for Alta.* [1942] SCR 402, affirming [1942] 1 WWR 321; *Huggard Assets Ltd. v. Atty.-Gen. for Alta., Minister of Lands and Mines for Alta. and Atty.-Gen. of Can.* (1953) 8 WWR (NS) 561, [1953] AC 420, reversing [1951] SCR 427.

A brief examination of the statement of claim issued on July 29, 1968, contains allegations as follows:

(a) That there are five of these associations formed pursuant to the provisions of *The Metis Population Betterment Act,* 1938 (2nd sess.), ch. 6 (now *The Metis Betterment Act*), and that unoccupied provincial lands were, by certain orders in council, set aside for these associations.

(b) That by various orders in council made under the said Act the minister charged with administering the Act was empowered to make regulations or orders covering the administration and constitution of the associations.

(c) That the Metis population betterment trust account was first established on November 20, 1943, by order in council 1785-43 and is presently provided for by Alberta reg. 112/60.

(d) That by virtue of the provisions of the said Act and the pertinent regulations thereunder, all moneys received from the sale or lease of petroleum and natural gas rights and fees and royalties therefrom on all of the said lands are required to be credited to the said trust account.

(e) That to date, the government of the province of Alberta has received in excess of $6,000,000 from dealing with the petroleum and natural gas rights in the said lands, and these province and not into the said Metis population betterment trust account.

(f) That the Metis settlement associations have presented a submission to the government in support of the contention that they are entitled to the said moneys and the benefits thereof, but this submission was wholly rejected.

(g) That the department of the attorney-general has since indicated it is not prepared to consent to any legal proceedings of any nature or kind being commenced in this matter.

In the statement of claim the plaintiffs seek declarations that mines and minerals were included in the provincial lands set aside for the associations, and that all moneys accrued or hereafter accruing from the sale, lease or rental of the petroleum and natural gas rights in the said lands should be held on behalf and for the benefit of the respective associations.

In his said affidavit, Tilley Maurice Johnston deposes to the effect that he is the director of the Metis rehabilitation branch of the department of public welfare and as such is responsible for the supervision of the said Metis settlement associations. He states that Alberta reg. 56/66 provides that the affairs and business of each association shall be transacted by a board consisting of three members of the association and that it shall be the duty of the board to submit to the minister of public welfare proposals for the purpose of the betterment of the members of the association. He states further that no representations have been made by any of the associations or by any member or members thereof to the said minister or to himself or to any member of the Metis rehabilitation branch respecting the bringing of this action or respecting the claims therein contained.

Aside entirely from the Rules of Court there is, I think, inherent jurisdiction vested in the court to strike out a statement of claim as being plainly an abuse of the process of the court: *Hollinger Bus Lines Ltd. v. Ont. Labour Relations Board* [1951] OR 562, [1951] OWN 551, affirmed [1952] OR 366, [1952] OWN 237, where Spence, J. states at p. 568:

> "I am of the opinion that Riddell, J. (as he was then) when he stated in *Orpen v. Atty.-Gen. for Ont.* (1925) 56 OLR 327, at 332: 'The power left in the Court by the Ontario Judicature Act * * * and asserted by Rule 124, of staying or dismissing any action which is plainly frivolous or vexatious or which discloses no reasonable cause

of action, is simply that inherently possessed by the Court to prevent abuse of its process,' cannot be taken as having decided that Rule 124 had the effect of excluding any part of the inherent jurisdiction exercised by the Court up to the time of the enactment of the Rules and not included in the wording of the said Rule 124."

It does appear that the attorney-general is improperly named as the defendant—that the Alberta practice is to name as defendant the minister of the department concerned and before such proceedings can be launched, permission of the lieutenant-governor in council must be obtained.

Reference is made to *G.W. Life Assur. Co. v. Baptiste; Canada Life Assur. Co. v. Mills and Atty.-Gen. for Alta.* [1924] 2 WWR 920, 20 Alta LR 513, affirming [1924] 1 WWR 1103 (App. Div.) which was an appeal from the judgment of Ives, J., wherein he had directed that certain seed-grain liens filed under *The Seed Grain Act,* 1921, ch. 44, be foreclosed out in favour of the mortgages held by the plaintiffs. Relevant to this application are the following remarks of Beck, J.A. at p. 924:

> "Then comes the question of the 'foreclosure' of the liens on the land. Counsel for the Crown contends that the claims under the seed-grain liens are debts owing to the Crown * * * and that sale or foreclosure cannot be taken against the Crown.
>
> "The older cases apparently held that where the legal estate was in the Crown this was so. That is not at all events the case here. And the recent cases of *Dyson v. Atty.-Gen.* [*supra*] and *Burghes v. Atty.-Gen.* [*supra*], make it quite clear that the Court has power to make a declaration of right with consequent relief in an action against the Attorney-General although the immediate and sole object of the action is to effect the rights of the Crown in favour of the plaintiff.
>
> "In England the Attorney-General always represents the Crown, *but under our system of Government,* where by statute, both Dominion and provincial, the several Departments of Government are constituted under different Ministers of the Crown and the authority and duties of the designated Ministers are defined, *the Crown is represented by such designated Minister,* although the Attorney-General has a general authority over proceedings by or against the Crown or by or against a Minister as representing the Crown.
>
> Crown in the right of the province was notified in accordance with the practice of the Court of the jeopardy in which the lien of the Crown would be placed, unless the Provincial Treasurer should see fit to redeem the plaintiff and the Provincial Treasurer appears by the Attorney General."

The above case was referred to in *Royal Trust Co. (Executor of Cochrane Estate) v. Atty.-Gen. for Alta.* (No. 3) [1936] 2 WWR 337, where Ford, J. stated at p. 346:

> "The case of *G.W. Life Assur. Co. v. Baptiste* [*supra*] is another interesting example of the application of the rule laid down in *Dyson v. Atty.-Gen.* [*supra*], to the effect that where the interests of the Crown are only indirectly concerned the Crown's rights may be affected in favour of a plaintiff in an action against the Attorney-General *or in this province against a specified minister of the crown.*"

Previously, Ford, J. had dealt with the situation where the crown's interest was directly concerned. He observed at p. 340:

> "Whatever jurisdiction the Court might have to make the declarations asked if there was non-existent in this province any provision for a proceeding by way of petition of right, I am clearly of the opinion that there is no remedy available to the plaintiff herein except by petition of right which cannot be tried by the Court unless and until the Lieutenant-Governor in Council grants a fiat that right be done: *The Alberta Petition of Right Act,* RSA, 1922, ch. 94, sec. 4 (1). Except in cases specially provided for by statute, as for instance is provided in Engand under the *Finance Act* of 1894, sec. 10, for the recovery back of estate duty * * * the only way by which subjects of His Majesty are enabled to obtain back out of the hands of the Crown either land, money or goods, upon which the Crown has, rightfully or wrongfully, laid its hands, is by the proceeding known as a petition of right, and where, as in the present instance, the declarations are sought as foundations upon which to base a claim that the Crown is wrongfully holding money which of right belongs to the plaintiff the Court has no jurisdiction to make the declarations asked or any of them."

This 1936 decision served in part to clarify the law in Alberta at that time in that it dealt with two different types

where it was necessary to obtain a fiat to sue Her Majesty. Proceedings were by way of petition in a form set out in a schedule to the Act. In that type of proceeding the petition was addressed to Her Majesty and not to the minister of the department involved. The other kind of proceedings were of the nature contemplated by *Dyson v. Atty.-Gen., supra,* where an action could be brought seeking declarations. In this latter type the minister of the department concerned was to be named as defendant and it was not necessary to obtain permission before commencing action.

With great haste and indeed later in the same year, the legislature acted. In an amendment to *The Judicature Act* it provided that in certain circumstances permission of the lieutenant-governor in council would be necessary before any action could be commenced against a minister. It seems obvious that, since *The Petition of Right Act* was still in effect with its protection of the crown, the legislature was, at least in part, aiming at the aforesaid second type of proceedings. By 1936 (2nd sess.), ch. 16, the following new section was added:

> "27*a*. No action shall be brought or maintained against any member of the Executive Council of the Province whereby relief of any kind is claimed on account of anything done or proposed to be done or omitted to be done by him in the execution of his office unless permission to bring or maintain such action has first been given by the Lieutenant-Governor in Council."

Proceedings by way of petition of right have of course been abolished by *The Proceedings Against the Crown Act,* 1959, ch. 63. Nevertheless, the Act provides as follows:

> "3. (1) This Act is subject to *The Workmen's Compensation Act,* * * * section 24 of *The Judicature Act* and such other enactments as may be designated by the Lieutenant Governor in Council."

Sec. 24 of *The Judicature Act,* RSA, 1955, ch. 164, is in substantially the same form and has the same meaning as sec. 27*a* of the 1936 amendment.

The Proceedings Against the Crown Act has been made subject to sec. 24 of *The Judicature Act* to prevent proceedings of the nature of the present action being brought. In the statement of claim the plaintiffs really are attacking the minister of public welfare.

[illegible] the plaintiffs are alleging that the government of Alberta has paid money into the general revenue fund instead of the Metis population betterment trust fund. The declaration asked for in par. (b) of the prayer really is the means by which these and subsequently acquired moneys are to be placed in the said trust account.

Although the plaintiffs make reference to the government of the province of Alberta in these paragraphs the minister of public welfare is responsible for the administration of the Metis population betterment trust account. This is clearly provided in Alberta reg. 112/60 which reads in part as follows:

> "The Lieutenant Governor in Council, upon the recommendation of the Minister of Public Welfare, pursuant to section 8 of The Metis Betterment Act, is pleased to approve regulations relating to the Administration of the Funds of the Metis Settlement Associations in accordance with the Schedule hereto.
>
> * * *
>
> "3. The Minister shall provide for the general management and administration of such trust funds and may direct and authorize expenditure therefrom for any purpose which has for its objective the advancement and betterment of the members of Settlement Associations."

Since the minister of public welfare is responsible for the administration of the said trust fund it is his obligation to see that moneys are properly allocated thereto. Any failure on his part to properly allocate the moneys would come within the meaning of the words *"on account of anything * * * omitted to be done by him"* in sec. 24 of *The Judicature Act.* The plaintiffs in seeking the declarations asked for should first have obtained the consent referred to in sec. 24 and, provided that this consent was given, should have named the minister of public welfare and not the attorney-general as defendant.

The plaintiffs might well, subject to them first obtaining the permission of the minister of public welfare, have brought action under *The Proceedings Against the Crown Act* and in that event the defendant would, I think, have been Her Majesty the Queen in the right of Alberta.

(Note: All italics in this judgment are mine.)

Grounds (b) and (c) of the defendant's notice of motion can, I think, be conveniently, judgment-wise, treated together and

Betterment Act and certain of the regulations, ministerial orders, etc. passed thereunder and it is noted in passing that the plaintiffs are relying on it and in no sense attacking it.

The earliest predecessor of *The Metis Betterment Act* was *The Metis Population Betterment Act,* 1938. The preamble to this Act reads as follows:

> "Whereas by the report, dated the 15th day of February, 1936, of a commission appointed pursuant to *The Public Inquiries Act,* on the 27th day of February, 1933, certain recommendations were made for the betterment of the general welfare of the metis population of the Province;
>
> "And whereas it is convenient and in the public interest that the ways and means of giving effect to such recommendations should be arrived at by means of conferences and negotiations between the Government of the Province and representatives of the metis population of the Province."

In *The Metis Population Betterment Act,* 1940, ch. 6, provision was first made under sec. 4 for the formation of what were to be known as the Metis settlement associations. This section is very similar in wording to sec. 4 of *The Metis Betterment Act,* which provides in part as follows:

> "4. (2) The constitution and by-laws of a settlement association shall prescribe
>
> "(*a*) the qualifications for membership in the settlement association, and
>
> "(*b*) the conditions of membership in the settlement association.
>
> "(3) A settlement association shall have a local board consisting of a chairman who shall be the local supervisor of the area appointed by the Metis Rehabilitation Branch of the Department of Public Welfare * * *.
>
> "(4) The Minister shall appoint two members of the local board * * *.
>
> "(5) The aims and objects of a settlement association are to co-operate with the Minister in preparing and formulating schemes
>
> "(*a*) for the betterment of the members of the settlement association, and
>
> association on lands of the Province set aside for that purpose.
>
> "(6) The constitution of a settlement association is subject to the approval of the Minister, and when the constitution is approved it is binding on all the members of the settlement association.
>
> "(7) A board of a settlement association may alter or amend the constitution of the settlement association only with the approval of the Minister * * *."

To be noted is subsec. (6), which is very similar to sec. 28 of *The Companies Act,* RSA, 1955, ch. 53.

The constitution of these settlement associations was approved of by ministerial order upon the advice of the lieutenant-governor in council. This order appears under order in council 285-40 (*Alberta Gazette,* vol. 36, p. 186). Of importance are the following excerpts of this order at pp. 187, 189, 190:

> "The affairs and business of the Association shall be transacted by a Board consisting of not more than five members, who shall be elected in the manner hereinafter mentioned, and it shall be the duty of the Board to submit to the Minister the proposals for the purpose of the betterment of the members of the Settlement Association and for their settlement on any lands in the Province set aside for occupation by the Settlement Association under The Metis Population Betterment Act, and to co-operate with the Minister in the formation of schemes for such purpose.
>
> * * *
>
> "The Board may make rules and regulations for calling meetings, governing its proceedings for the conduct of its meetings, and generally for the transaction of its business. Any question dealt with by the Board upon which there is an equality of votes shall be deemed to be in the negative, but may be submitted to the Minister and his decision thereon shall be final.
>
> * * *
>
> "*Duties of the Chairman of the Board* — He shall be the chief executive officer of the Settlement Association and shall
>
> "(*a*) cause the laws, rules and regulations governing the Settlement Association to be duly executed;

Board;

* * *

"(*e*) report and certify all by-laws and other acts and proceedings of the Board to the Minister;

"(*f*) to communicate from time to time to the Board all such information and recommend such measures as may tend to better the welfare of the Settlement Association;

* * *

"The Board of a Settlement Association may pass by-laws and regulations, not inconsistent with the provisions of the constitution of the Settlement Association, pertaining to the management and governing of the Settlement Association and the reserved area occupied by their Settlemen Association. Any such by-law and regulation passed by the Board shall become effective when approved by the Minister.

"The constitution and by-laws of Settlement Associations and the qualifications for membership in such Settlement Association and the conditions of membership therein and the regulations as set forth in the foregoing having been adopted as the constitution of the following Metis Settlement Associations at the organization meetings * * *."

Various regulations since this ministerial order have been passed respecting the constitution of the associations and the number of directors in each board has been reduced to three, all being elected by the association members. The present regulation appears as existing Alberta reg. 56/66. Worthy of note is the first paragraph of sec. 3 reading in part as follows at p. 106:

"3. The affairs and business of an association shall be transacted by a Board consisting of 3 members which shall be formulated in the matter hereinafter mentioned. It shall be the duty of the Board to submit to the Minister proposals for the purpose of the betterment of the members of the Settlement Association * * *."

Also worthy of note is the following, at p. 108:

"Such payments shall be made on the receipt of the signed, original copy of the minutes of the meeting by the

Minister of Public Welfare.

* * *."

Turning specifically to the second ground of this application, the Metis settlement associations have existed since order in council 285-40. They are creatures of statute and their constitution and bylaws are provided for by sec. 4 of the present Act. From their beginning, the regulations have provided that the board of each association should submit proposals or bylaws for the betterment of the respective association to the minister. In the case of a bylaw, the bylaw upon being approved by the minister becomes part of that particular association's constitution (order in council 285-40, at p. 190).

By sec. 4 (6) of the present Act, the members of each association are bound by its constitution. Surely this must mean that they, through their board of directors, should submit a proposal or bylaw to the minister respecting the feasibility of bringing action respecting the matters referred to in the statement of claim. Should the minister approve of the proposal or bylaw, the association would have the capacity to sue Her Majesty in its own name.

It is abundantly plain that final control of the Metis association was designed to rest with the department of public welfare and final discretion in all important matters lies with the minister of public welfare.

There is no allegation or evidence to indicate that the associations or any one of them or any member thereof have sought or been refused to bring the present or any other form of action respecting the matters referred to in the statement of claim. Had they, through their respective boards, made proper and adequate presentation to the minister of public welfare, they might well have received permission to sue or obtained satisfaction in other ways.

In the statement of claim it is alleged that the department of the attorney-general has indicated that it is not prepared to consent to any legal proceedings of any nature or kind being commenced in this matter. If I be correct then it is apparent that the attorney-general has absolutely no jurisdiction to grant the necessary consent.

I am not unmindful of the plaintiffs' further arguments that:

(i) The section of *The Judicature Act* is inapplicable where the attorney-general is named as representative of the crown—

performance of his official duties but seeks the court's interpretation of *The Metis Population Betterment Act* (now *The Metis Betterment Act*) and certain regulations thereunder and that the crown always acts through its representatives: See *G.W. Life Assur. Co. v. Baptiste; Canada Life Assur. Co. v. Mills and Atty.-Gen. for Alta., supra.*

(ii) The members of the Metis settlement associations have a real and common interest in the subject matter of the declaration sought in this action—and that the rights of the plaintiffs, who are all members of the various Metis settlement associations, are in issue and that the plaintiffs are merely applying for the determination of the true construction of the pertinent statute and regulations, and for a declaration of their rights thereunder: See *Interlake Tissue Mills Co. v. Geo. Everall Co.* (1921) 50 OLR 165, at p. 166:

> "The case of *Ellis v. Bedford (Duke)* [1899] 1 Ch 494, 68 LJ Ch 289; *Bedford (Duke) v. Ellis* [1901] AC 1, 70 LJ Ch 102, is authority for the general proposition that where a statute confers certain rights upon a class an action will lie by any member of the class on behalf of all for a declaratory judgment in assertion of these rights."

In the *Ellis* case, *supra,* a number of market gardeners who were claiming certain preferential rights, sued on behalf of themselves and all other such gardeners within the meaning of a certain Act for a declaration as to the true construction of the Act in question.

(iii) The permission of the minister of public welfare is not required to commence and carry on this action—it being *not a proposal by a board "for the purpose of the betterment of the members of the settlement associations* and for their settlement on any lands in the province set aside for occupation by a settlement association * * * ;" that plainer words would be required if it were necessary for the members of the settlement associations to obtain ministerial approval prior to proceeding with this action. *This action is not concerned with the internal management of the settlement associations, the subject matter of the aforesaid regulation relied upon by the defendant.*

(iv) The matters of status which are raised in (b) and (c) of the defendant's notice of motion are questions of substance to be raised in the defendant's pleadings and cannot be the subject of the summary application: See *Sykes v. One Big Union* (No. 2) [1936] 1 WWR 237, 43 Man R 542 (C.A.).

treme caution and only in obvious cases and where a question of general importance or a serious question of law arises on the pleadings; the court will not strike out the pleadings unless it is clear and obvious that the action will not lie. The court must be satisfied beyond a reasonable doubt that no cause of action is disclosed: *Security Trust Co. v. Nat. Trust Co.* [1928] 1 WWR 687, 24 Alta LR 11, reversing *ibid,* p. 145 (App. Div.); *Racine v. C.N.R.* [1923] 1 WWR 1439, 19 Alta LR 529, affirming [1923] 1 WWR 961 (App. Div.); *Minnes (otherwise Rees-Davies) v. Minnes and Rees-Davies* (1962) 39 WWR 112, at pp. 120 *et seq.; Elec. Dev. Co. of Ont. v. Atty.-Gen. for Ont.* [1919] AC 687, 88 LJPC 127, 47 DLR 10, at 15, reversing 38 OLR 383; *Smith v. Atty.-Gen. for Ont.* (1922) 52 OLR 469, at 473; *Demers v. Desrosier* [1928] 2 WWR 60 (Alta.).

(vi) Generally speaking, the courts have taken a very liberal attitude in considering whether a declaratory judgment or order will be granted in a particular case. In *Kloepfer Wholesale Hardware & Automotive Co. v. Roy* [1952] 2 SCR 465, affirming [1951] OWN 774, Locke, J. stated as follows at p. 475:

> "To make such a declaration of right is expressly authorized by subsection (*b*) of s. 15 of the Judicature Act (c. 190, R.S.O. 1950), [sec. 32 (*p*) of our *Judicature Act*] whether any consequential relief is or could be claimed or not. The section of the Ontario Act reproduces verbatim r. 5 of Order XXV of the Rules of the Supreme Court 1883, under which it has been held that the making of such a declaration is not confined to cases where the plaintiff has a cause of action against the defendant (*Guarantee Trust Co. of New York v. Hannay & Co.* [1915] 2 KB 536, 84 LJKB 1465; *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438, 90 LJKB 1089, Lord Sumner at 452). In *Hanson v. Radcliffe Urban Dist. Council* [1922] 2 Ch 490, at 507, 91 LJ Ch 829, Lord Sterndale expressed the opinion that the power of the court to make a declaration under this rule where it is a question of defining the rights of two parties is only limited by its own discretion."

Reluctantly I grant the motion applied for by the defendant. I say reluctantly because I am reminded of the words of Sir George Farwell who delivered the judgment of the judicial committee of the Privy Council in the case of *East. Trust Co. v. MacKenzie, Mann & Co.* [1915] AC 750, 84 LJPC 152, 31 WLR 248, at p. 759:

Court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorize the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney General, and a declaratory order obtained, as has been recently explained by the Court of Appeal in England in *Dyson v. Atty.-Gen.* [*supra*], and in *Burghes v. Atty.-Gen.*, [*supra*]. It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it. The proper course in the present case would have been either to apply to the Court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver and to obtain from the Court an order on the receiver to pay the sums properly payable for labour and supplies, as to the construction of which their Lordships agree with the Supreme Court of Nova Scotia.

"The duty of the Crown in such a case is well stated by Lord Abinger in *Deare v. Atty.-Gen.* (1835) 1 Y & C Ex 197, at 208, 160 ER 80. After pointing out that the Crown always appears (in England) by the Attorney General in a Court of justice, especially in a Court of Equity, where the interest of the Crown is concerned, even perhaps in a bill for discovery, he goes on to say: 'It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice where any real point of difficulty that requires judicial decision has occurred.' "

The case at bar graphically illustrates rule by the executive branch of government, the administrative branch, and the bureaucrats; the defiance of those branches of "the rule of law," all principles of "equity" and fairness," resulting in subjugation of the courts.

It goes without saying that if the plaintiffs can find some method of properly bringing the matter before the courts this

thee to their rights so to do.

I quite agree that the procedure laid down by government, somewhat unilateral and almost prohibitory, denies the prophesy "that government should be of the people, for the people and by the people."

I do not think that courts are mere interpreters of the law; I quite agree that the courts are in no sense legislators but I do think judicial pronouncements may be helpful in shaping the law.

I express my appreciation of the counsel concerned for very thorough and able arguments.

Costs if demanded may be spoken to.

ALBERTA

SUPREME COURT — KIRBY, J.

Board of Trustees, Brooks School District No. 2092 v. Town of Brooks

Schools and School Districts — Requisition by School Board to Municipality — Duty of Municipality to Raise Amount Requisitioned by Taxes — No Discretion.

A school board and a municipal corporation are distinct and separate corporate bodies, each within its own field supreme, and a school board has the sole right of determining the amount of money which it requires for the discharge of its duties under *The School Act*, RSA, 1955, ch. 297, and of authoritatively requisitioning that amount from the municipality; the latter is under an inescapable obligation, subject to an appeal to the local authorities board, to impose the necessary taxes to meet that requisition; if it fails to pay what is requisitioned the school board may sue for it as for a debt. Sec. 86 (1) (*d*) of *The Municipal Taxation Act*, 1967, ch. 54, does not confer on the municipality a discretion to levy such taxes as it deems sufficient to satisfy the needs of the school board, and the word "or" in the subsection is to be construed conjunctively: *Vacher & Sons Ltd. v. London Soc. of Compositors* [1913] AC 107, at 117, 82 LJKB 232; *Reg. v. Spooner* (1954) 13 WWR (NS) 215, at 219, 19 CR 344, 109 CCC 57, 6 Abr Con (2nd) 642 (B.C. C.A.); *Morris v. Structural Steel Co.* [1917] 2 WWR 749, 24 BCR 59, 33 Can Abr 520 (C.A.); *Re West Nissouri Continuation School* (1912) 1 DLR 252, at 254, varied 25 OLR 550, 3 DLR 195, 32 Can Abr 1100 applied.

[Note: Sec. 86 (1) (*d*) reads in part: "The council shall in each year * * * authorize the municipal secretary to levy * * * tax at such * * * rate * * * as the council considers sufficient * * * or as are annually requisitioned * * * to meet the requisition by the board * * * ."]

[Note up with 16 CED (2nd ed.) *Municipal Corporations*, sec. 50; 20 CED (2nd ed.) *Schools and School Districts*, secs. 4, 25.]

1936

(SECOND SESSION)

CHAPTER 16.

An Act to amend The Judicature Act.

(Assented to September 1, 1936.)

MAJESTY, by and with the advice and consent of
Legislative Assembly of the Province of Alberta,
as follows:

his Act may be cited as *"The Judicature Act Amend-* Short title
ct, 1936."

he Judicature Act, being chapter 72 of the Revised New sections 27a and 27b
s of Alberta, 1922, is hereby amended by inserting
immediately after section 27 thereof, the following
tions:

. No action shall be brought or maintained against
mber of the Executive Council of the Province
relief of any kind is claimed on account of any-
me or proposed to be done or omitted to be done by
he execution of his office unless permission to bring
tain such action has first been given by the Lieuten-
ernor in Council.

. No action shall be brought or maintained whereby
f claimed or part of the relief claimed is an injunc-
ndamus, prohibition or other process or proceeding
g or interfering directly or indirectly with the doing
person or the omission by any person to do any act
ed or directed by a statute of the Legislature of the
e or by an Order in Council of the Province hereto-
hereafter passed or made, unless permission to bring
tain such action has first been given by the Lieuten-
ernor in Council.

his Act shall be retroactive to the first day of Retroactive force of Act
ber, 1935.

his Act shall come into force on the day upon which Coming into force of Act
ented to.

(c) questions submitted for the opinion of the Court in the form of special cases on the part of such persons as by themselves, their committees or guardians, or otherwise, concur therein.

[R.S.A. 1955, c. 164, s. 21]

Vesting order

22. (1) Where the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may by order vest such real or personal estate in such person or persons, and in such manner and for such estates as would be done by any such deed, conveyance, transfer or assignment if executed.

(2) An order made under subsection (1) has the same effect as if the legal or other estate or interest in the property had been actually conveyed by deed, conveyance, transfer, assignment or otherwise for the same estate or interest to the person in whom the same is so ordered to be vested, or in the case of a *chose in action*, as if the *chose in action* had been actually assigned to such person.

[R.S.A. 1955, c. 164, s. 22]

Procedure and practice

23. The jurisdiction of the Court with regard to procedure and practice shall be exercised in the manner provided by this Act or by the rules and orders of the Court made pursuant to this Act. [R.S.A. 1955, c. 164, s. 23]

Action against Executive Council

24. (1) No action whereby relief of any kind is claimed on account of anything done or proposed to be done, or on account of anything omitted to be done by a member of the Executive Council of the Province in the execution of his office shall be brought or maintained against that member unless permission to bring or maintain the action has first been given by the Lieutenant Governor in Council.

(2) No action whereby the relief claimed or part of the relief claimed is an injunction, mandamus, prohibition or other process or proceeding affecting or interfering directly or indirectly with the doing by a person or the omission by a person of an act authorized or directed by a statute of the Legislature of the Province, or by an order in council of the Province, shall be brought or maintained unless permission to bring or maintain the action has first been given by the Lieutenant Governor in Council.

[R.S.A. 1955, c. 164, s. 24]

APPENDIX J

(*See page 21*)

PROCEEDINGS AGAINST THE CROWN

REPORT OF THE MANITOBA COMMISSIONERS

At the 1949 meeting of the Conference the Manitoba Commissioners presented a report on this subject accompanied by a draft Act. The draft was not considered, but the Conference passed four resolutions laying down principles to be embodied in the draft Act.

In the light of these statements of principle the Manitoba Commissioners have revised the former draft, and have also made other changes that they deemed advisable. The new draft accompanies this report.

The Manitoba Commissioners draw the attention of the Conference to subsection 4 of section 4 of the draft submitted, which preserves certain statutory immunities of officers of the Crown in actions of tort and gives the benefit of those immunities to the Crown. It is suggested that the Conference should consider whether this subsection should stand as drafted, or should be eliminated, and a recommendation made that each province enacting the uniform Act repeal all such special immunities contained in specific Acts.

A related problem may arise in connection with statutory exemptions in favour of the Crown or Crown officers in actions other than for tort. An example is to be found in subsection 3 of section 17 of The Securities Act (Manitoba). This Act authorizes the taking of certain court proceedings by the Attorney-General, and the above mentioned subsection provides, among other matters, that "costs may be awarded to but not against the Attorney-General". This would seem to be in conflict with the provisions of the draft now submitted. This provision in The Securities Act could be repealed, but there may be a number of similar provisions in other statutes, and it would require a careful check of all the provincial statute law to find them.

The Conference might, therefore, consider the advisability of including in the draft Act an additional section to the following effect:

> Except as otherwise provided herein, where this Act conflicts with any other Act this Act shall prevail.

Another kind of difficulty may arise in connection with provincial statutes that include a provision similar to subsection 1 of Section 44 of The Manitoba Power Commission Act. This reads as follows:

> (1) Without the consent of the Attorney-General no action shall be brought against the commission or any of its members for anything done or omitted in the exercise of its office.

Although the consent required by this subsection might be termed a "fiat", it is submitted that it is not just the same thing as the Lieutenant-Governor's fiat abolished by section 3 of the draft submitted, but is a special statutory permit. Provinces that have similar provisions in their legislation relating to Crown-owned corporations may desire to consider whether it would be advisable to add to section 3 of the draft submitted a subsection 3 which might be worded somewhat as follows:

> Subject to this Act, where a person has a claim against an officer of the Crown or a corporation owned or controlled by the Crown that, if this Act had not been passed, might be enforced subject to the consent of an officer of the Crown, then the claim may be enforced as of right without such consent.

Dated at Winnipeg this 29th day of June, 1950.

R. M. FISHER,
I. J. R. DEACON,
G. S. RUTHERFORD,
Manitoba Commissioners.

B.C.
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BROWN
v.
BROWN

Farris,
C.J.S.C.

parties, the facts as to what occurred on the night in question warranted me in drawing the conclusion that the respondent was guilty of adultery as alleged in the petition.

I have already pointed out that had Mr. Monteith on the trial given me the explanation as to how he came to direct the detective and the petitioner to go to these particular premises, the suspicion as to collusion or connivance would have at once been removed.

As the explanation has now been given to me, which I am satisfied with and accept, I am now in the same position as I would have been on the trial, and am justified in finding that there was no collusion or connivance between the parties.

Accordingly there will be a decree for the dissolution of the marriage and for costs against the respondent.

ALBERTA

SUPREME COURT

O'CONNOR, J.A.

Rex ex rel Mikklesen and McGaughey v. Highway Traffic Board

Mandamus — Motion for — Compelling Performance of Statutory Duty — Right to—When Demand and Refusal Not Required — When Leave Under S. 26 Judicature Act Not Required — Proceedings by Motion Distinguished from Action — RR. 874-880, 511-514.

Automobiles — Public Service Vehicles Act, SS. 19, 20, 26 — Operators' Certificates — Necessity of Public Hearings.

The relators, holders of public service vehicle certificates under *The Public Vehicles Act*, R.S.A., 1942, ch. 276, *held* entitled to a *mandamus* requiring the Alberta Highway Traffic Board to comply with sec. 19 of the Act by holding public hearings of all applications for such certificates except applications for renewals (which were excepted by sec. 26 [2]). The provision to the contrary in the order-in-council of April 13, 1937, held *ultra vires*.

Although orders for *mandamus* deal as a rule with specific acts yet if breaches of a statute are so indiscriminate that such a specific order cannot be made (as under the present circumstances where permits were being issued "over the counter") the order can be made sufficiently general to ensure the carrying out of the expressed will of the Legislature.

A *mandamus* will be granted although a demand and refusal by the relator is not proved if the Court is satisfied that the party complained of is determined (as it was found to be in this case) not to perform its statutory duty: *In re West Nissouri Continuation School* (1916) 38 O.L.R. 207, 28 Can. Abr. 443; *In re Stratford Local Option By-Law* (1915) 35 O.L.R. 26, 28 Can. Abr. 483.

There are two kinds of *mandamus* proceedings, one by motion under Rules 874-880, the other by an action under Rules 511-514.

Sec. 26 of *The Judicature Act*, R.S.A., 1942, ch. 129, which requires leave from the Lieutenant-Governor in Council to bring an action for a *mandamus* in certain cases, does not apply to a motion under Rules 874-880.

[Note up with 1 C.E.D. (C.S.) *Automobiles*, secs. 33, 34; 2 C.E.D. (C.S.) *Mandamus*, secs. 1, 2, 4.]

S. Wood, K.C., for relators.

C. M. Macleod, K.C., for the Board.

January 11, 1947.

O'CONNOR, J.A. — This is an application for a *mandamus* to compel the Alberta Highway Traffic Board to conduct public hearings of all applications for public service freight vehicle certificates except applications for renewals. The relevant sections of *The Public Service Vehicles Act*, R.S.A., 1942, ch. 276, are as follows: O'Connor, J.A.

"19. The Board shall conduct public hearings of all applications for public service vehicle certificates and shall give such notice of any hearing as the Board deems proper and reasonable, and may appoint or direct any person to make an inquiry and report on any application, complaint or dispute, before the Board or upon any matter or thing over which the Board has jurisdiction.

"20. If the Board finds that the existing facilities for transportation are insufficient or that public business or public convenience will be promoted by the establishment or continuance from year to year of the proposed transportation service, or a part thereof, the Board may upon payment of the prescribed fee grant a certificate to the applicant allowing the operation of public service vehicles on the route or routes determined by it and set out in the certificate.

* * *

"26. (1) Prior to the first day of February in each year or such later date as the Board may allow, every person who holds a public service vehicle certificate shall

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make application to the Board for renewal thereof, which application shall be accompanied by the prescribed fee.

"(2) The Board may, if satisfied with the service rendered by the applicant, issue a renewal certificate, and the renewal certificate may be granted without the necessity of a public hearing as required under section 19; if renewal is refused the applicant shall not operate a public service vehicle after the expiration of the certificate which he then holds."

The relator, Samuel Alexander McGaughey, has been engaged in hauling freight in Alberta since 1933. The relator, Chris Mikklesen, engaged in freight hauling in 1935 under the name of Chris' Transport. In 1938 this business was carried on as Canadian Freightways, a partnership, and in 1946 a company was incorporated under the name of Canadian Freightways Limited in which company Mikklesen is a substantial shareholder. Canadian Freightways Limited hauls general freight between Coutts and Edmonton, Alberta. McGaughey hauls freight throughout Alberta and has no regular run.

Both relators held public service vehicle permits issued under *The Public Vehicles Act, 1927*, ch. 63, which was repealed by *The Public Service Vehicles Act, 1936*, ch. 91. The provisions now contained in secs. 19, 20 and 26 of the 1942 Act first appear in the 1936 Act and were subsequently re-enacted in the 1938 and 1942 Acts. The relator's permits were renewed in the form of certificates under the 1936, 1938 and 1942 Acts and they obtained additional certificates from time to time.

On April 13, 1937, the Lieutenant-Governor of Alberta by and with the advice of the Executive Council by order-in-council purported to authorize the "issue of interim certificates for operation to public service and commercial vehicles as from the date of the order until further notice excepting that the said order shall not apply to the control and operation of passenger carrying vehicles."

Public hearings of applications for public service passenger vehicle certificates have been held but no such hearings have been held of applications for public service freight vehicle certificates—the latter certificates being issued "over the counter" contrary to secs. 19 and 20 aforesaid. The portion of the order-in-council of April 13, 1937, above quoted, was

not, in my opinion, authorized by the 1936, 1938 or 1942 Acts. It purports to be of temporary duration. During the war the number of freight vehicles permitted to operate was limited by the rationing of gasoline and tires under the *War Measures Act*, R.S.C., 1927, ch. 206, but with the end of rationing the situation created by unlimited competition became acute.

For almost six months from May 1 to October 21, 1946, the solicitors for the Alberta Motor Transport Association of which the relators are members corresponded with the Highway Traffic Board, the Attorney-General and the Premier of Alberta, demanding that the board comply with sec. 19 aforesaid and threatened *mandamus* proceedings. They were informed that in the opinion of the chairman of the board "it is entirely unnecessary for the Board to hold such hearings before issuing P.S.V. licenses for the operation of trucks doing casual work or operating on regular routes hauling freight."

The present situation requires clarification. The Legislature is summoned to meet on February 20, 1947, and can either amend sec. 19 of *The Public Service Vehicles Act* so as to dispense with the necessity of holding of public hearings of applications for public service freight vehicle certificates (in which event the present practice will continue) or refuse to do so (in which event the practice must conform to the legislation).

But it is said that the Court should not issue a mandatory order for a number of reasons, viz.:

(1) Counsel for the board contends that the application is not made in good faith or from a proper motive because Mikklesen swears that Canadian Freightways Limited has suffered substantial loss through excessive competition but admits that the company now owns 22 trucks while he started with one; that he has brought this motion at the request of the Alberta Motor Transport Association of which he is a member; that he desires to have public hearings so he can show cause against the granting of further certificates pursuant to secs. 19 and 20 aforesaid. Counsel for the board suggests that Canadian Freightways Limited should first surrender all certificates and ask for public hearings with respect to new applications; that they are seeking to retain their certificates but also to make it more difficult for others to obtain new certificates.

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I can find no evidence of bad faith or improper motive in these facts. The relators held permits before secs. 19 and 20 were enacted and sec. 26 provides that public hearings need not be held on applications for renewals. The relators are trying to carry on their business according to the statute as best they can notwithstanding the divergence between the Legislature and the Executive.

(2) It is contended that the relators are seeking to undo what has been done, but, if so, they cannot succeed. All they can hope to do is to regularize the practice in future.

(3) Then it is contended that the relators must establish a specific legal right in themselves (not shared with members of a class) to the relief sought and a passage in 9 *Halsbury* at p. 770 is cited in support. The authorities cited in *Halsbury* in support of this statement are: *Reg. v. Lewisham Union Guardians* [1897] 1 Q.B. 498, 66 L.J.Q.B. 403, in which the Court held that the district board of works was not concerned with the failure of the Guardians to prosecute offenders under the vaccination Acts; *Ex parte Napier* (1852) 18 Q.B. 692, 21 L.J.Q.B. 332, 118 E.R. 261, which went off on the ground that the East India Company was not legally liable to Lord Napier for his salary; *Reg. v. Bishop of Chichester* (1859) 2 El. & Bl. 209, 29 L.J.Q.B. 23, 121 E.R. 80, in which it was held that a clerk in orders who was a stranger to the parish could not *mandamus* the bishop to investigate alleged improper practices of a rector in the parish; and *Rex v. London City Assessment Committee* [1907] 2 K.B. 764, 76 L.J.K.B. 1087, in which Buckley, L.J. said (p. 797):

> "Assuming the rating authority had no right of appeal, still, looking at the Act of Parliament as a whole, I think that it provides an elaborate system of procedure under which the assessment committee is to prepare and arrive at a valuation list which, under s. 45, is to be conclusive * * * in other words, that, providing the requirements of the Act of Parliament are complied with, the rating authority shall no longer have it in its power to say that the assessment committee has gone wrong, even though it may have made mistakes; it must be taken to have been right, for the statute has made those mistakes impossible of correction. The result being that the thing is right, the rating authority cannot have a *mandamus* to compel the assessment committee to put that right which, upon that footing, already is right."

On the other hand in *Reg. v. Cotham* [1898] 1 Q.B. 802, 67 L.J.Q.B. 632, Mattinson, Q.C. contended (p. 804):

> "The applicant [a clergyman who objected to the renewel of a liquor licence] has no legal specific interest in the matter determined by the justices and therefore is not entitled to apply for a *mandamus* (*Reg. v. Lewisham Union Guardians, supra*). His only interest is that he resides in the place * * * [*Per curiam.* He clearly has sufficient interest.]"

I hold that the relators having held certificates issued before secs. 19 and 20 were enacted and being entitled to renewals without the holding of public hearings are aggrieved by the unlawful issue of certificates by the highway board to their competitors without a public hearing and are entitled to maintain this motion for a *mandamus*.

(4) Counsel for the board objects that the relators do not ask for an order with respect to any specific certificate or any specific application before the board. Clearly this is impossible as long as licences are issued "over the counter." Undoubtedly, orders for *mandamus* generally deal with specific acts but if breaches of the statute are so indiscriminate that such an order cannot be made I see no reason why it should not be sufficiently general to ensure the carrying out of the expressed will of the Legislature.

(5) It is contended that the relators have not proved a demand and a refusal to hold public hearings of applications for public service freight vehicle certificates.

In *In re West Nissouri Continuation School* (1917) 38 O.L.R. 207, 33 D.L.R. 209, Meredith, C.J.C.P. said (p. 210):

> " * * * the course of conduct of these appellants shews a settled purpose not to perform this statute-imposed duty * * * in such a case a demand and refusal would be useless, and need not be proved."

In *In re Stratford Local Option By-Law* (1915) 35 O.L.R. 26, 25 D.L.R. 774, it was held that a *mandamus* will be granted if the Court is satisfied that the party complained of has determined not to do what is required. I am satisfied that the board is determined to disregard secs. 19 and 20 of the Act of 1942 as to applications for public service freight vehicle certificates.

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(6) Counsel for the board does not refer to sec. 26 of *The Judicature Act*, R.S.A., 1942, ch. 129, but counsel for the relators raises it. It prohibits an action for a *mandamus* effecting or interfering directly or indirectly with the doing by any person or the omission by any person to do any act authorized or directed by a statute of the Legislature of the province or by an order-in-council of the province unless permission to bring or maintain the action has first been given by the Lieutenant-Governor in Council.

There are two kinds of *mandamus* proceedings, one by motion under Rules 874 to 880 and one in an action under Rules 511 to 514. Sec. 26 of *The Judicature Act* applies only to an action while the proceedings here are by motion.

An order of *mandamus* will issue requiring the board after April 15, 1947, to conduct public hearings of all applications for public service freight vehicle certificates except applications for renewals of existing certificates. If, as suggested by counsel for the board, a bill is introduced at the coming session of the Legislature providing for the amendment of sec. 19 in a manner which will permit the board to dispense with public hearings when it deems this advisable and if the bill passes its third reading on or before April 15, 1947, the order of *mandamus* will be suspended until the session ends and thereafter the board may apply to vary or rescind the order.

The defendant will pay the costs of the relators.

The time for serving notice of appeal from the order will be extended until April 30, 1947.

IN THE TRIAL DIV

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

[illegible] MINERALS LTD.,

Plaintiff,

-and-

HER MAJESTY THE QUEEN IN THE RIGHT OF ALBERTA,

Defendant.

REASONS FOR JUDGMENT

of

THE HONOURABLE MR. JUSTICE W.R. SINCLAIR

The plaintiff applies for an order declaring that Her Majesty the Queen in right of Alberta is a proper party to the action, and that the action and alleged claim ought to be maintained in this fashion.

The position of the Crown is that the action and alleged claim ought not to be maintained in this

The plaintiff's action is framed in contract. In its statement of claim it says that the defendant, by one of its servants, offered to grant the plaintiff a petroleum and natural gas lease under Part 5 of The Mines and Minerals Act of Alberta. The minerals involved belong to the Province of Alberta.

The plaintiff says it accepted the offer and tendered the consideration but that the defendant refused to grant the lease.

The statement of defence alleges that the Minister of Mines and Minerals withdrew the minerals involved from disposition, and that his authority for so doing is section 12 of the Mines and Minerals Act which reads:

> "12.(1) The Minister may restrict the disposition of or withdraw from disposition any mineral in any specified area in any manner he may consider warranted."

The resolution of the application involves the interpretation of The Judicature Act and of the Proceedings Against the Crown Act.

The relevant sections are as follows:

> The Proceedings Against the Crown Act
>
> "3.(1) This Act is subject to... section 24 of The Judicature Act..."
>
> "4. A claim against the Crown that, if this Act had not been passed, might be enforced by petition of right, subject to

"the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceedings against the Crown in accordance with this Act, without the grant of a fiat by the Lieutenant Governor."

"12. In proceedings under this Act the Crown shall be designated 'Her Majesty the Queen in right of Alberta.' "

"17.(1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of...specific performance the court shall not, as against the Crown,...make an order for specific performance but may, in lieu thereof, make an order declaratory of the rights of the parties."

The Judicature Act

"24.(1) No action whereby relief of any kind is claimed on account of anything done or proposed to be done, or on account of anything omitted to be done by a member of the Executive Council of the Province in the execution of his office shall be brought or maintained against that member unless permission to bring or maintain the action has first been given by the Lieutenant Governor in Council.

(2) No action whereby the relief claimed or part of the relief claimed is an injunction, mandamus, prohibition or other process or proceeding affecting or interfering directly or indirectly with the doing by a person or the omission by a person of an act authorized or directed by a state of the Legislature of the Province, or by an order in council of the Province, shall be brought or maintained unless permission to bring or maintain the action has first been given by the Lieutenant Governor in Council."

It will be seen that the plaintiff has framed his action in accordance with section 12 of The Proceedings Against the Crown Act, and pursuant to section 17 of the

Act the relief sought is a declaration that the plaintiff is entitled to be granted a lease, rather than an order for a specific performance.

The position of the plaintiff is this:

At common law a distinction was made between a case where the estate of the Crown was directly affected, and one in which theinterests of the Crown were only indirectly affected.

In the first type of case, of which Royal Trust Company v. Attorney-General For Alberta (No.3) (1936) 2 W.W.R. 337 is an example, proceedings by way of petition of right were said to be required.

In the second type of case, of which the classic example is Dyson v. Attorney-General (1911) 1 K.B. 410, a court could make declarations and orders which did affect the rights of the Crown indirectly.

The plaintiff says that the refusal of the Department of Mines and Minerals to grant him the lease, involving, as it does, minerals owned by the Crown, gives rise to an action whereby the estate of the Crown is directly affected. That being so, it is urged, the case is one that, before the passage of The Proceedings Against the Crown Act in 1959, would have taken the form of a petition of right. Consequently, if the view of the plaintiff is accepted, his claim against the Crown may now be enforced

as of right by proceedings against the Crown without the grant of a fiat by the Lieutenant Governor, pursuant to section 4 of The Proceedings Against the Crown Act, and with the Crown being designated in the manner provided by section 12 of The Proceedings Against the Crown Act.

The plaintiff's position would be unassailable but for section 24 of The Judicature Act. As Riley, J. pointed out in Poitras et al v Attorney-General for Alberta (1969) 68 W.W.R. 224 the precursor to that section was added to The Judicature Act in 1936 - and in a retroactive manner - after the decision of Royal Trust v. Attorney-General for Alberta (supra).

The present application clearly depends on the effect to be given to section 24 of The Judicature Act. If that section is intended to require the permission of the Lieutenant Governor in Council only where the nature of the relief sought against the Crown indirectly affects the interest of the Crown - the second type of situation to which I have already referred - then the plaintiff's action is properly framed in its present form.

But is that the intention of section 24? The wording of the section must be analysed.

Subsection (1), so far as is relevant, says that the permission of the Lieutenant Governor in Council is required when relief of any kind is claimed on account of anything done or omitted to be done by a member of the

Executive Council in the exercise of his office. The words of the subsection are broad enough to include contractual matters that could directly affect the estate of the Crown.

As regards the present case, section 12 of The Mines and Minerals Act says that the Minister may withdraw from disposition any mineral in any specified area in any manner he may consider warranted.

Indeed, it is alleged in the Statement of Defence that this is what was done by the Minister in this case. If that were so, it can be said that the relief sought by the plaintiff is claimed on account of something done by a member of the Executive Council in the exercise of his office - the withdrawing from disposition of the minerals the plaintiff says he is entitled to lease.

In his statement of claim, however, the plaintiff does not refer to an action of the Minister, but to an offer of the Crown, made by its servant, M. J. Day, to grant the plaintiff a lease under The Mines and Minerals Act. This position calls for a consideration of subsection (2) of section 24 of The Judicature Act. So far as is relevant, the subsection says that no action whereby the relief claimed is an injunction, mandamus, prohibition or other process or proceeding affecting or interfering directly or indirectly with the doing by a person of an act authorized by a statute of the Legislature may be brought without the permission of the Lieutenant Governor in Council.

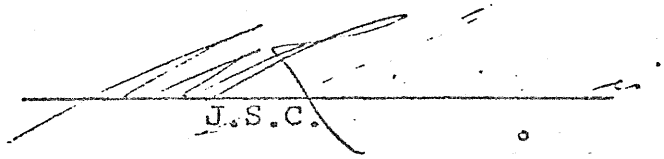
The present action can be said to be a process or proceeding affecting the doing by a person of an act authorized by a statute of the Legislature, because it is clear from the pleadings that the relief claimed arises out of the doing by the Minister or by Mr. Day or by someone else in the Department of an act authorized by a statute - in this case, by section 12 of The Mines and Minerals Act.

When one considers closely the far-reaching provisions of section 24 of The Judicature Act it is possible to envisage their being invoked by the Crown in a wide range of proceedings, involving a broad spectrum of claims for relief, because, taken literally, there could scarcely be any kind of a claim against the Crown that could not be said to affect, at least indirectly, the doing by a person or the omission by a person of an act authorized or directed by a statute of the Legislature of the Province.

Be that as it may, I have come to the conclusion that the relief claimed by the plaintiff in this case is of the kind contemplated by subsections (1) or (2), or both, of section 24 of The Judicature Act. In my opinion, in the circumstances of this case, the provisions of that section over-ride those of section 4 of The Proceedings Against the Crown Act.

It follows that Her Majesty the Queen in right of Alberta is not a proper party to the action, and that the action and alleged claim of the plaintiff ought not to be maintained against Her Majesty the Queen in right of Alberta.

The defendant is entitled to costs.



DATED this 16 day of
November, A.D., 1971.
at EDMONTON, Alberta.

COUNSEL:

For the plaintiff:
Pratt, G.N.,Esq.,
Milner & Steer.

For the defendant:
Hughson, E.G.,Esq.,
(Department of the
Attorney General).

union was successor to former unions which had been certified, whose certification had not been cancelled, and that it was therefore entitled to such notice.

The Board ruled that the company was unlawfully pleading on another's behalf an objection in which it had no legal interest. This position was sustained in this Court, which held that the company was not entitled to invoke the rights of another party before the Board.

I would dismiss this appeal, with costs.

SPENCE J. (dissenting):—I have had the opportunity of perusing the reasons circulated by Martland J. and, with regret, I cannot agree therewith. On the other hand, I am in complete accord with the dissenting reasons delivered in the Court of Appeal for British Columbia by Robertson J.A., [1971] 5 W.W.R. 251, 21 D.L.R. (3d) 735, and I would allow the appeal with costs.

ALBERTA SUPREME COURT

Primrose J.

Re Red Deer College Inquiry

Certiorari — Application to quash proceedings under The Public Inquiries Act, R.S.A. 1970, c. 296 — Failure to obtain permission of Lieutenant-Governor in Council — Effect of — Originating notice of motion — Subject matter not within R. 410 (Alta.).

Applications to quash the proceedings and report of a Commissioner appointed under The Public Inquiries Act. The appellants contended that since the Order in Council appointing the Commissioner and ordering the inquiry was not filed the entire proceeding was a nullity; the Crown took the preliminary objection that the present applications were not maintainable since permission to institute the proceedings had not been obtained from the Lieutenant-Governor in Council as required by s. 24(2) of The Judicature Act, R.S.A. 1970, c. 193.

Held that the application to quash by way of certiorari was not maintainable since there had been non-compliance with s. 24(2) of The Judicature Act; the second application by originating notice of motion must be dismissed since the subject matter did not fall squarely within the provisions of R. 410.

[Note up with 3 C.E.D. (2nd ed.) *Certiorari*, s. 8; 18 C.E.D. (2nd ed.) *Practice*, ss. 96, 104.]

G. S. D. Wright, for appellants.

D. W. Axler, for respondents.

29th December 1972. PRIMROSE J.:—These are two motions in effect to quash proceedings instituted into the affairs of

the Red Deer College and the report issued by Dr. T. C. Byrne, the Commissioner appointed under The Public Inquiries Act, R.S.A. 1970, c. 296, the first being a motion by way of certiorari No. 76756 and the second being an originating notice of motion.

Dr. Byrne was appointed by Order in Council No. OC-327/72 dated 21st March 1972 pursuant to s. 2 of The Public Inquiries Act as a Commissioner for the purpose of inquiring into and concerning the Red Deer College at Red Deer and, in particular, to inquire into:

(a) The administration, organization and operation of the College.

(b) The relationships between the Colleges Commission, the College Board, staff, faculty, students and the community.

(c) The range of programmes offered or planned by the College.

(d) Such other matters as in the opinion of the Commissioner may affect the efficiency and effectiveness of the operation of the College.

Dr. Byrne held an inquiry in April 1972 and subsequently filed a report.

The certiorari proceedings and the notice of motion were filed by the College president and a student and a publisher for the purpose of quashing the report, and in effect say it was a nullity because the Order in Council appointing Dr. Byrne was never filed pursuant to the provisions of The Regulations Act, R.S.A. 1970, c. 318, and it is conceded that the Order in Council was never filed. It is the argument of the appellants that this order must be filed pursuant to s. 2(*f*) of the Act which reads as follows:

"(*f*) 'regulation' means any regulation, rule, order or by-law, of a legislative nature made or approved unler the authority of an Act of the Legislature, including those made by any board, commission, association, or similar body whether incorporated or unincorporated all the members of which, or all the members of the board of management or board of directors of which, are appointed by an Act of the Legislature or by the Lieutenant Governor in Council, but does not include any regulation, rule, order, by-law or resolution made by a local authority or, except as hereinbefore otherwise provided, by a corporation incorporated under the laws of the Province."

The Crown takes a preliminary objection that, pursuant to s. 24(2) of The Judicature Act, R.S.A. 1970, c. 193, no permit of the Lieutenant-Governor in Council was obtained to bring or maintain the proceedings. Section 24(2) of The Judicature Act reads as follows:

"(2) No action whereby the relief claimed or part of the relief claimed is an injunction, mandamus, prohibition or other process or proceeding affecting or interfering directly or indirectly with the doing by a person or the omission by a person of an act authorized or directed by a statute of the Legislature of the Province, or by an order in council of the Province, shall be brought or maintained unless permission to bring or maintain the action has first been given by the Lieutenant Governor in Council."

The appellants argue that since the Order in Council was not filed the whole proceedings are a nullity and that the Court has jurisdiction to decide the question.

In the case of *Nireaha Tamaki v. Baker*, [1901] A.C. 561, it was an action by a native of a Maories tribe against the Commissioner of Crown Lands in New Zealand and the subject matter of the action was the title to certain land which the appellant claimed to be owned by the natives under their customs or belonging to the tribe under an order of a Native Land Court, but which the respondent contended was vested in Her Majesty the Queen. It was suggested that the Court did not have jurisdiction to appeal with the action but it was held that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority, and the Court enunciates the principle that litigants should be able to protect their rights "whatever they are" and that the Court has jurisdiction to inquire, in the case in question, whether as a matter of fact the land in dispute had been ceded by the native owners to the Crown in accordance with law.

In *Rattenbury v. Land Settlement Board*, [1929] S.C.R. 52 at 63, [1929] 1 D.L.R. 242, it was held that:

"it is common practice, founded upon general principle, that the court will interfere to restrain *ultra vires* or illegal acts by a statutory body, and, when it is charged, as in this case, that the proceedings in question, though authorized by the letter of the statute, are nevertheless incompetent, by reason of defect in the enacting authority of the legislature, the court must, I should think, have jurisdiction so to declare,

and to restrain the *ultra vires* proceedings, although directed by the statute and in strict conformity with the legislative text."

Also in *Poitras v. Attorney General for Alberta* (1969), 68 W.W.R. 224 at 238, 7 D.L.R. (3d) 161 (Alta.), Riley J. held citing *Eastern Trust Co. v. MacKenzie, Mann & Co.*, [1915] A.C. 750 at 759, 31 W.L.R. 248, 22 D.L.R. 410]:

"The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorize the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney General and a declaratory order obtained, as has been recently explained by the Court of Appeal in England in *Dyson v. Attorney General*, [1911] 1 K.B. 410, and in *Burghes v. Attorney General*, [1911] 2 Ch. 139. It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it. The proper course in the present case would have been either to apply to the Court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver and to obtain from the Court an order on the receiver to pay the sums properly payable for labour and supplies, as to the construction of which their Lordships agree with the Supreme Court of Nova Scotia.

"The duty of the Crown in such a case is well stated by Lord Abinger in *Deare v. Attorney General* (1835), 1 Y. & C. Ex. 197 at 208, 160 E.R. 80. After pointing out that the Crown always appears (in England) by the Attorney General in a Court of justice, especially in a Court of Equity, where the interest of the Crown is concerned, even perhaps in a bill for discovery, he goes on to say: 'It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice where any real point of difficulty that requires judicial decision has occurred.'"

Counsel for the appellants argues that the Crown does not have immunity and that in this case an attempt has been

made to prevent the appellants from inquiring into the real issue, i.e., if the report was or was not a nullity.

I agree that the Crown should not throw obstacles in the way of litigants succeeding in a proceeding where the Crown indirectly is involved but one cannot overlook the provision of s. 24(2) of The Judicature Act, which have a specific purpose, and until permission has been granted under that section I am satisfied that there is no jurisdiction to proceed with the motions.

The Crown also took objection to the form of the proceedings in that the parties or who is to be bound by the appeal are not named. So far as the certiorari motion is concerned the Rules are laid down in the Rules of Court, RR. 742 to 744. Pursuant to R. 743, upon the notice of motion for an order in the nature of certiorari, a notice shall be endorsed:

"You are hereby required forthwith after service hereof to return to the clerk of the Supreme Court at . . . together with the process commencing the proceedings, the evidence and all exhibits filed, if any, and all things touching the matter as fully and entirely as they remain in your custody, together with this notice."

Such a notice was endorsed on the back of the notice of motion and unless that notice had been included I would find that the proceedings were improper. It is true that certain irregularities in such matters can be overlooked. In *Re Hudson's Bay Co. and Peters* (No. 2), [1933] 2 W.W.R. 412, 19 C.B.R. 258, [1933] 3 D.L.R. 791 (Alta.), Ewing J. held that certain non-compliances with the Rule went to irregularities only. We have R. 561 that provides:

"561. No pleading or other proceedings shall be defeated on the ground of an alleged defect of form."

This does not dispose of the matter of the failure to name the parties to the proceedings but with some doubt I am inclined to overlook the failure to set out the parties.

In *Hruden v. Pawlyk* (1958), 25 W.W.R. 47, 28 C.R. 260 (Man.), it was held by Monnin J. that if an applicant for certiorari does not comply with the requirements of The Queen's Bench Act, R.S.M. 1954, c. 52, similar to our Rules, the motion must be dismissed.

In *Re Fanini*, [1949] 2 W.W.R. 16, 93 C.C.C. 244 (B.C.), Whittaker J. held that non-compliance with some of the provisions of a similar Rule was a ground for discharging the

le nisi. However, as indicated, I am not inclined to find y defect in the form of the notice of motion dealing with e certiorari.

As to the other originating notice of motion, under the berta Rules of Court provision is made for proceedings by y of originating notice, and R. 405(1) says that such "An iginating notice shall be in Form G modified in such man- r as may be necessary having regard to the nature of the plication."

However, under R. 410:

"410. Proceedings may be commenced by originating notice the following cases:

"(*a*) proceedings to recover possession of land;

"(*b*) applications for the appointment of a new trustee ith or without a vesting or other consequential order, or for vesting or other consequential order on the appointment a new trustee whether the appointment has been made in ourt or out of court;

"(*c*) proceedings relating to land

"(i) for the declaration of a beneficial interest in or a harge upon land and of the character and extent thereof, or

"(ii) for a declaration settling the priority as between in- erests or charges, notwithstanding any entry in the register r the registration or filing of any instrument, or

"(iii) for an order cancelling any certificate of title or making any title subject to an interest or charge;

"(*d*) proceedings where, under any statute or these Rules, provision is made that the proceedings be taken by originating notice;

"(*e*) proceedings for the determination of any question where there are no material facts in dispute and the rights of the parties depend upon the construction of

"(i) a written instrument, or

"(ii) a statute or order-in-council or a regulation,

and for a declaration of the rights of the persons interested;

"(*f*) proceedings for the opinion, advice or direction of the court pursuant to *The Trustee Act*;

"(*g*) proceedings to fix the compensation of a trustee;

"(*h*) the approval of an arrangement for the variation o a trust;

"(*i*) proceedings to compel partition of land;

"(*j*) proceedings under Part 34."

I cannot find that the proceedings herein entitle the appel lants to proceed by way of originating notice of motion be cause it does not fall squarely within the provisions of any of the matters where proceedings may be commenced by orig inating notices.

In the result the proceedings by way of certiorari will be dismissed for failure to comply with the provisions of s. 24(2) of The Judicature Act aforesaid and the other notice by way of originating notice is dismissed for the reasons given.

In the circumstances there will be no costs to either party.

BRITISH COLUMBIA COURT OF APPEAL

Bull, McFarlane and Taggart JJ.A.

Thomas v. Attorney General of British Columbia, Milliken and Power

Milliken v. Attorney General of British Columbia

Trials — Automobile accident — Action for damages tried by jury — Judge's charge to jury — Whether misdirection.

A car owned by M. was being driven south by P. when it went out of control and overturned in the ditch to its right, causing injury to the driver P. as well as to M. and two other occupants, namely, T. and one H. The accident was allegedly caused by the actions of an unidentified driver, and the Attorney General was joined under the provisions of The Motor-vehicle Act, R.S.B.C. 1960, c. 253, s. 108, as amended by 1961, c. 42, s. 10. The jury found the unidentified driver wholly to blame and exonerated P., who did not give evidence. The accident occurred during the hours of darkness on a north-south highway which ran downhill to the south; it contained at the point of upset three lanes, one for south-bound downhill traffic and two for uphill north-bound vehicles. Shortly after the accident a police officer was at the scene and found all four occupants lying injured and in some degree of shock, as well as showing signs of impairment by alcohol. He had a conversation with the driver P. (which he recounted in his evidence) who stated that he was forced out of control and off the road by a car approaching from the south which was occupying the single south-bound lane in an attempt to overtake two vehicles coming north and occupying respectively the first and second north-bound lanes. At trial M., T. and H. swore that P. was forced off the road by a south-bound driver who overtook P. and then cut sharply in front of him forcing him to swerve and brake vio-

INTER-DEPARTMENTAL CORRESPONDENCE

TO Mr. Wm. Hurlburt DATE June 18th, 1974.

FROM Mrs. Ellen Jacobs

Re: Section 24 of the Judicature Act

There are a few further comments I wish to make supplementary to the memo which I provided to you on the Judicature Act.

1. Re Kish et al v. The Director of Vital Statistics [1973] 2 W.W.R. 678.

A passing reference was made by Chief Justice Milvain to s.24(2) of the Act in his judgment. I enclose a photocopy of that paragraph for your information. I have discussed the case at some length with Mr. Hughson, who you will note, appeared for the Director of Vital Statistics. He tells me that he did not raise s.24(2) at all in this case and that it is not the practice of the Department to do so in cases where a decision one way or the other would establish the practice required by, for example, in this case the Registrar of Marriage Licenses. Mr. Hughson tells me that there are at least 3 other cases he knows of where s.24(2) has not been raised in an application on similar facts to this case.

The Chief Justice has mixed his statements regarding the proper form to initiate the application and reference to s.24(2). Mr. Hughson tells me that the proper method to commence such an application is by notice of motion and that all he was agreeing to was that the originating notice by which counsel for the applicant had commenced the application could be considered to be a notice of motion for purposes of getting on with the hearing of the application. He feels that the difference in form had nothing whatsoever to do with the Judicature Act and that the technical difficulties referred to have entirely to do with the notice of motion-originating notice problem just discussed.

Thus, it is probably reasonable to say that the Attorney-General

..../2

believes s.24(2) might be applicable in this kind of fact situation, but that their practice is not to raise it to preclude the hearing of the application.

Mr. Hughson felt, as I do, that by this judgment, as well as his decision in the recent Calgary case (that a fiat was not necessary where the applicant sought to affect the decision of the Calgary City Council, since it was found that the Council was acting under By-law and not under Provincial statute), indicates that the Chief Justice will not allow s.24(2) to prevent him from hearing and deciding a case before him.

2. I trust the Institute will find of some assistance the listing by Mrs. Donnelly of the fact situations that have been presented to her in the applications for fiat. As well, and supplementary to this, I attach to this memo a photocopy of a letter from Mr. Stevenson, in which he lists some of the cases he knows of. I can only state again in answer to Mr. Stevenson's mention of fiats being denied that Mrs. Donnelly has advised that within her experience in the Department and after perusing such other documents as were left by the previous Government, ~~there~~ she knows of no fiats being denied.

3. Mr. Hughson and Mr. Axler of the Attorney-General's Department advised that the Mikkleson et al v. The Highway Traffic Board (1947) 1 W.W.R. 342 case did not result in an amendment to a statute to cover the problem of the definition of "action".

4. Regarding the recent application by Mr. Gordon Wright for a Writ of Mandamus to force the Lieutenant Governor to hold a hearing as a "visitor" under s.5 of The Universities Act, I wish to advise that the application has been set over to be heard at the end of July. Mr. David Axler of the Attorney-General's Department, who has done considerable briefing on the problem, feels that no fiat under s.24 will be necessary.

I trust that this information will be of some assistance to the Institute when considering this matter.

Ellen Jacobs.

EJ:ms

Encl.

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YOUR FILE

OUR FILE 16,417-S

May 7, 1973

Dr. W. F. Bowker,
Director,
The Institute of Law Research and Reform,
University of Alberta,
Edmonton, Alberta.

Dear Dr. Bowker:

Re: Sec. 24 - Judicature Act

Another example of the application of that Section appears in the recent reported case of Kish et al v. Director of Vital Statistics, [1973] 2 W.W.R. 678. In that case, there was an application for an Order for the Respondent to issue a licence permitting the marriage of the applicants. It was noted that no leave was obtained pursuant to Sec. 24(2). Peculiarly enough, the Court then said that the Section wouldn't apply if it were treated as a notice of motion, and apparently it was treated as a notice of motion rather than an originating notice by consent. The difference escapes me, but it provides another example of a kind of case where the Section is potentially applicable.

Yours faithfully,

W. A. Stevenson

WAS/ns

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YOUR FILE

OUR FILE 16,417-S

May 4, 1973.

Dr. W. F. Bowker,
Director,
Institute of Law Research and Reform,
University of Alberta,
Edmonton 7, Alberta.

Dear Dr. Bowker:

Re: Section 24, Alberta Judicature Act

I thank you for your letter of May 1st. I have heard the Section raised, sometimes successfully and sometimes unsuccessfully, in a number of cases. The following is a catalogue of some examples. Some of them are meritorious, some are unmeritorious; in some fiats were given and in some fiats were denied.

1. Proceedings against the University of Alberta to challenge decisions made by it in respect of staff and students.

2. Proceedings against the Energy Resources Conservation Board: the most recent was one for an application of prohibition, and another was an injunction to restrain them from hearing an application.

3. Proceedings by way of prerogative writs against The Workmen's Compensation Board.

4. Proceedings to quash the decision of a Commission sitting under The Public Inquiries Act.

5. Proceedings to prohibit a hearing by a Coroner, or the Chief Provincial Fire Commissioner.

6. Proceedings for a declaration against the Registrar of Companies.

7. Declaratory proceedings against the Minister of Health.

These are examples of the kind of cases where the Section has been raised. I hope this will be sufficient for your purposes, but would be pleased to discuss the matter with you.

Yours faithfully,

W. A. Stevenson

WAS/ns

INTER-DEPARTMENTAL CORRESPONDENCE

TO ALL MEMBERS OF THE BOARD DATE June 18th, 1974.

FROM W. H. HURLBURT.

Re: The Judicature Act, Section 24

1. Here is Mrs. Jacobs' research paper which recommends the abolition of Section 24 which is quoted at page 1.

2. It will be noted that Section 24(1) prohibits any action against a member of the Executive Council in the execution of his office, unless permission is obtained. Section 24(2) prohibits an action for injunction, mandamus, prohibition or other process or proceeding interfering with anyone acting under statute or order in council, without permission.

3. Note that although the Mikklesen case referred to at page 5 of the research paper might indicate a restrictive interpretation of Section 24(2), the passage from the Aremex case at page 8 would indicate a danger that Section 24(2) would come close to wiping out the proceedings against the Crown Act.

4. I should mention that Eric Hughson of the Attorney General's Department does not suggest that Section 24(2) is of any particular value or that anyone feels strongly in favour of retaining it. With regard to Section 24(1) he seems to regard it primarily as a means of ensuring that actions are brought against Her Majesty the Queen rather than against a minister.

5. The Attorney General himself, however, appears to have a feeling that there can be circumstances under which the court might interfere by way of injunction, particularly interim injunction, with some transaction or operation which is an important matter of government policy, and I am not able to say that his fear is unreasonable. When we spoke to him on June 14th, he made this point. In reply to him, Section 17 of the Proceedings against the Crown Act was referred to; that section prohibits injunctions and orders for specific performance against the Crown, while permitting, in lieu thereof, an order declaratory of the rights of the parties. His rejoinder was that although an injunction might not be obtainable against the Crown, it would be possible to obtain one against all the individuals involved, thereby effectively obtaining an injunction against the Crown which, of course, cannot act except through individuals. We did not pursue that point any further, but I now note that Section 17(2) of the Proceedings against the Crown Act also prohibits injunctions against "an officer of the Crown" if it would

"give any relief against the Crown that could not have been obtained in proceedings against the Crown." It seems to me that this goes a long way towards meeting his point, even assuming that we agree that his point is valid, but it may be that we should consider a strengthening of that subsection, though no doubt the fact that it is a uniform act may militate against that suggestion.

6. There may be objections to ruling out the injunction, particularly since without an interim injunction irreparable harm might be suffered. My own thought is that upon occasion the Executive must be able to act and that the interests of the individual must give way, though such cases should be ones of very substantial importance. If that is so, then the Executive should be able to proceed in the knowledge that it can be called to account only by the Legislature or the electorate. Bearing in mind the power of the Court to make a declaration, the pressures upon the Executive not to do anything they should not are likely to be fairly strong.

7. I attach copies of pages 47 to 51 of B.C. Law Reform Commission Working Paper No. 7, Legal Position of the Crown, which I think was prepared by Jim Matkin. This will serve two purposes. Firstly, it gives arguments against the proposition that the injunction is necessary. Secondly, it suggests that if the interim injunction is to be abolished, it might be possible to substitute an "interim declaration" corresponding to the interim injunction, in addition to the existing power to make a final declaration. I find some attraction in the notion of an interim declaration, but I have some trouble in seeing just what it would do. An interim injunction is not based upon an established legal right as is a permanent injunction, so that there is no existing right to declare (I ignore the suggestion that a final declaration should be made on an interlocutory application which seems to me to be wrong). What would the interim declaration declare? That the balance of convenience is in favour of the Crown or Crown officials not proceeding, and that if they do proceed there will be irreparable injury?

8. There is one point that may not be within the scope of this project. Section 24 of the Judicature Act at least permits any form of action so long as permission can be obtained, and that is some advantage particularly since permission is given as a matter of practice and since there is some moral pressure on the Cabinet not to appear to be keeping a citizen away from the courts. Section 17 of the Proceedings against the Crown Act does not allow an injunction to be made if permission is granted, and may be it should be possible to obtain such permission. I think on the whole the point is without substance since if the Crown is going to behave it is more likely to behave under duress

of a declaration than upon an application for permission to sue, and if it would grant the permission it would probably conform to the declaration.

In summary, I think that the Board should address its mind to the following questions:

1. Subject to what has been said about injunctions, should the Institute recommend the abolition of:

   (1) Section 24(1)

   (2) Section 24(2).

2. Should injunctions still be prohibited:

   (1) against anyone acting under statutory or order in council authority?

   (2) against any officer or employee of the Crown acting under authority of statute or order in council?

   (3) against an employee certified by a minister to be acting under the instructions of that minister?

   (4) against anything being done under a certificate from the Lieutenant Governor in Council that a transaction or operation is necessary in the public interest?

Also please find attached a further memorandum from Mrs. Jacobs and enclosures. This is supplementary information and I do not think that it changes anything.

W. H. HURLBURT.

WHH:sr

D. Justification for Restricting Injunctions

The restriction on proceeding by injunction in the English Act was apparently justified on grounds of expediency. The Lord Advocate spoke in favour of the provision in the House of Commons because he said "one must keep in mind the fact that the Crown may have to take certain steps at the shortest possible notice which infringe the rights of subjects...."[1] Sir Thomas Barnes stated:

> No doubt the principle underlying this provision is that in times of national emergency the Crown may be compelled to take, at the shortest possible notice and with the certainty that its operations will not be interrupted by the courts, measures which may be thought to infringe the rights or alleged rights of the subject. In such a case the appropriate course is for the Government of the day to ask Parliament to validate what it has done and no doubt Parliament will in those cases decide how far the acts of the Crown were justified in the circumstances. If Parliament approves of what has been done and ratifies it by retrospective legislation it will also no doubt provide compensation for the persons aggrieved. The freedom of the Executive to meet a crisis by action of this kind would be fettered if it were open to the subject to obtain an interim injunction restraining the Crown from doing what it thought necessary in the public interest. (2)

The fallacy of this justification is that it assumes the courts will not be sympathetic to the urgency of the situation and that it is desirable to allow the executive to exceed its authority. There is little or no evidence in Canada that judicial review has ever prevented the executive from taking immediate action. Indeed during

the Second World War the Canadian courts' attitude to the emergency has been ably criticized as too compliant.[3] It is also questionable whether the words of section 21 are apt to support the justification. Injunctions granted against Crown servants in their personal capacities would not be prohibited.[4] Further, if the no injunction clause is treated as a privative clause it will clearly not protect from judicial review the unauthorized actions of government servants to meet a crisis situation.[5]

Professor Strayer has considered this remedy in an article entitled "Injunctions Against Crown Officers."[6] He suggests that the restrictions in the English Crown Proceedings Act do not necessarily point the way for Canada because "the legislative and administrative hazards of federalism do not beset the government of that country."[7] Because of Canada's federal division of powers a closer parallel may be found in the laws of the United States and Australia. The injunction is available in the United States as a device for controlling unauthorized government activity.[8] The injunction is also permitted as a sanction against breaches of public law in Australia.[9] The injunction appears to have served a useful function in the enforcement of public duties by private plaintiffs where the injury causes special damage peculiar to the plaintiff.

In his study of Governmental Liability, Professor Street recommends the use of injunctions against the government. He states:

> It is submitted that the ends of justice would be served by making injunctions available against government servants. To withhold them against a servant even where his act is plainly illegal, if he merely purports to be acting on behalf of the Crown, is particularly objectionable. The Treasury Solicitor says that this immunity is essential because the Crown might in an emergency want to override the law, leaving it to Parliament to decide whether or not to ratify ex post facto, and that it would be prevented from so doing by interlocutory injunction. This ignores the prerogative rights of the Crown in an emergency which are untouched by the Act. Moreover, it takes no account of the fact that injunction is a discretionary remedy. It is yet another example of the unwillingness of the Executive to trust the Judiciary. English law compares unfavourably both with Australia and the United States in this regard. (10)

The method of proceeding against the Crown where the injunction is prohibited is by a declaratory judgment.[11] Because declaratory judgments are almost never disregarded by governments this procedure would seem to provide the same relief against the Crown as if an injunction were used. However, there is an important distinction between the two procedures that does make the declaratory action a less attractive remedy. There is no interim relief available to preserve the matter in dispute until the question can be litigated in a declaratory action. It does not seem possible to get an interlocutory injunction against the Crown. In Underhill v. Ministry of Food[12] an interim declaration was sought to prevent the Ministry of Food from implementing a war time rationing scheme that may have had the effect of putting the plaintiffs out of business. It was alleged

that the Ministry exceeded its authority under the relevant legislation. It was also argued that the Ministry was estopped from implementing the rationing scheme. The case was dismissed on the grounds that the court had no jurisdiction to make an interim declaration in substitution for an interlocutory injunction. Mr. Justice Romer said:

> [Counsel for the Ministry] says that when the Crown Proceedings Act, 1947, s. 21 refers to the court making a declaration, it refers to a final declaration, and it is an unheard of suggestion that an interlocutory declaration should be made which might be in precisely the opposite sense of the final declaration made at the trial. He says, and I think rightly says, that what is usually done on the hearing of an interlocutory application is to grant some form of temporary remedy which will keep matters in status quo until the rights of the parties are ultimately found and declared, and that, accordingly, the reference to making a declaration of rights means a declaration at the trial as distinct from a declaration on some interlocutory application. (13)

This statement of the rule was quoted with approval by the English Court of Appeal in Int. General Electric Co. v. Commissioners of Customs and Excise.[14] This case raised the same issue and the court added to the reasons of Romer, J. the proposition that in proceedings between subjects it was "perfectly plain" that an interim declaration could not be granted, therefore because under section 21 of the Crown Proceedings Act the court only has "... power to make all such orders as it has power to make in proceedings between subjects...." No interim

order can be granted against the Crown. The weakness of this logic is that as between subjects there is no need for an interim declaration because an interim injunction can be obtained. But an injunction, interim or final, cannot be granted against the Crown. There is then a need for an interim declaration against the Crown.

Lord Justice Upjohn in the Court of Appeal did suggest that in special circumstances a declaration could be granted on an interlocutory proceeding. Such a declaration would have to determine finally the rights of the parties and would not be open to further review except on appeal. This kind of declaration would be rare and would not perform the function of an interim injunction to preserve the status quo until the rights of the parties can be finally determined. The learned judge concluded: "It seems to me quite clear that, in proceedings against the Crown, it is impossible to get anything which corresponds to an interim injunction."[15]

The above cases are both English decisions which are not binding in Canada. It seems unlikely, however, that any different ruling would be given by a Canadian court.

CHAPTER 285

Short title

1. This Act may be cited as *The Proceedings Against the Crown Act*. [1959, c. 63, s. 1]

Definitions

2. In this Act,

(*a*) "agent" when used in relation to the Crown includes an independent contractor employed by the Crown;

(*b*) "Crown" means Her Majesty the Queen in right of the Province of Alberta;

(*c*) "officer", in relation to the Crown, includes a Minister of the Crown and any servant of the Crown;

(*d*) "order" includes a judgment, decree, rule, award and declaration;

(*e*) "person" does not include the Crown;

(*f*) "proceedings against the Crown" includes a claim by way of set-off or counterclaim raised in proceedings by the Crown and interpleader proceedings to which the Crown is a party.

[1959, c. 63, s. 2]

Other Acts

3. (1) This Act is subject to *The Workmen's Compensation Act*, *The Land Titles Act*, as to claims against the assurance fund, *The Alberta Income Tax Act*, section 24 of *The Judicature Act* and such other enactments as may be designated by the Lieutenant Governor in Council.

(2) Except as otherwise provided in this Act, nothing in this Act

(*a*) subjects the Crown to greater liability in respect of the acts or omissions of an independent contractor employed by the Crown than that to which the Crown would be subject in respect of such acts or omissions if it were a private person,

(*b*) affects any right of the Crown to intervene in proceedings affecting its rights, property or profits,

(*c*) subjects the Crown to proceedings under this Act in respect of a cause of action that is enforceable

against a corporation or other agency owned or controlled by the Crown, or

(*d*) subjects the Crown to proceedings under this Act in respect of any thing done in the due enforcement of the criminal law or the penal provisions of any Act of the Legislature.

[1959, c. 63, s. 3; 1966, c. 79, s. 11 (2)]

Right to sue Crown

4. A claim against the Crown that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceedings against the Crown in accordance with this Act, without the grant of a fiat by the Lieutenant Governor. [1959, c. 63, s. 4]

Liability of Crown in tort

5. (1) Except as otherwise provided in this Act and notwithstanding section 13 of *The Interpretation Act*, the Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

(*a*) in respect of a tort committed by any of its officers or agents,

(*b*) in respect of any breach of those duties that a person owes to his servants or agents by reason of being their employer,

(*c*) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property, and

(*d*) under any statute or under any regulation or by-law made or passed under the authority of any statute.

(2) No proceedings lie against the Crown under subsection (1), clause (*a*) in respect of any act or omission of an officer or agent of the Crown unless the act or omission would, apart from this Act, have given rise to a cause of action in tort against that officer or agent or his personal representative.

(3) Where a function is conferred or imposed upon an officer of the Crown as such, either by any rule of the common law or by statute and that officer commits a tort in the course of performing or purporting to perform the function, the liability of the Crown in respect of the tort is such as it would have been if the function had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.

(4) An enactment that negatives or limits the amount of the liability of an officer of the Crown in respect of any tort committed by that officer, in the case of proceedings

tion for discovery apply in the same manner as if the Crown were a corporation, except that the Crown may refuse to produce a document or to make answer to a question on discovery on the ground that the production thereof or the answer would be injurious to the public interest. [1959, c. 68, s. 11]

Designation of Crown

12. In proceedings under this Act the Crown shall be designated "Her Majesty the Queen in right of Alberta". [1959, c. 68, s. 12]

Service on Crown

13. A document to be served on the Crown shall be served by leaving a copy with the Attorney General or the Deputy Attorney General or any barrister or solicitor employed in the Department of the Attorney General. [1959, c. 68, s. 13]

Trials

14. In proceedings against the Crown the trial shall be without a jury. [1959, c. 68, s. 14]

Interpleader

15. The Crown may obtain relief by way of interpleader proceedings and may be made a party to such proceedings in the same manner as a person may obtain relief by way of such proceedings or be made a party thereto, notwithstanding that the application for relief is made by a sheriff or bailiff or other like officer, and subject to this Act, the provisions relating to interpleader proceedings under *The Judicature Act* and *The District Courts Act* shall have effect accordingly. [1959, c. 68, s. 15]

Rights of parties

16. Except as otherwise provided in this Act, in proceedings against the Crown the rights of the parties are as nearly as possible the same as in a suit between person and person and the court may make any order, including an order as to costs, that it may make in proceedings between persons and may otherwise give such appropriate relief as the case may require. [1959, c. 68, s. 16]

Injunctions

17. (1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance the court shall not, as against the Crown, grant an injunction or make an order for specific performance but may, in lieu thereof, make an order declaratory of the rights of the parties.

(2) The court shall not in any proceedings grant an injunction or make an order against an officer of the Crown where the effect of granting the injunction or making the order would be to give any relief against the Crown that

could not have been obtained in proceedings against the Crown but may, in lieu thereof, make an order declaratory of the rights of the parties. [1959, c. 63, s. 17]

Recovery of property

18. In proceedings against the Crown in which the recovery of real or personal property is claimed the court shall not make an order for its recovery or delivery but in lieu thereof may make an order declaring that the claimant is entitled as against the Crown to the property claimed or to the possession thereof. [1959, c. 63, s. 18]

Set-off and counterclaim

19. (1) No person may avail himself of any set-off or counterclaim in proceedings by the Crown for the recovery of taxes, duties or penalties or avail himself, in proceedings of any other nature by the Crown, of any set-off or counterclaim arising out of a right or claim to repayment in respect of any taxes, duties or penalties.

(2) Subject to subsection (1) a person may avail himself of any set-off or counterclaim in proceedings by the Crown if the subject matter of the set-off or the counterclaim relates to a matter under the administration of the particular government department with respect to which proceedings are brought by the Crown. [1959, c. 63, s. 19]

Advance information

20. Before taking any step in proceedings against the Crown, the Crown may require the claimant to provide the Crown with such information as the Crown may reasonably require as to the circumstances in which it is alleged that the liability of the Crown has arisen and as to the departments and officers of the Crown concerned. [1959, c. 63, s. 20]

Crown defence

21. (1) In proceedings against the Crown, any defence that, if the proceedings were between persons, could be relied upon by the defendant as a defence to the proceedings or otherwise may be relied upon by the Crown.

(2) In proceedings against the Crown judgment shall not be entered against the Crown in default of appearance or pleading without the leave of the court to be obtained on an application of which notice has been given to the Crown. [1959, c. 63, s. 21]

Proceedings in rem

22. Nothing in this Act authorizes proceedings *in rem* in respect of any claim against the Crown or the seizure, attachment, arrest, detention or sale of any property of the Crown. [1959, c. 63, s. 22]

Interest

23. A judgment debt due to or from the Crown bears interest in the same way as a judgment debt due from one person to another. [1959, c. 63, s. 23]