

CANADA / JUDGMENT

R. v. J.B. & Sons Co. Ltd.

[1970] SCR 220

COURT

Supreme Court of Canada

DECIDED

17 November 1969

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R. v. J.B. & Sons Co. Ltd.

Collection

Supreme Court Judgments

Date

1969-11-17

Report

[1970] SCR 220

Judges

Cartwright, John Robert; Fauteux, Joseph Honoré Gérald; Abbott, Douglas Charles; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Hall, Emmett Matthew; Spence, Wishart Flett; Pigeon, Louis-Philippe

On appeal from

Canada

Subjects

Courts

Taxation

Decision Content

Supreme Court of Canada

R. v. J.B. & Sons Co. Ltd., [1970] S.C.R. 220

Date: 1969-11-17

Her Majesty the Queen Appellant;

and

The J.B. & Sons Co. Ltd. (by suggestion) formerly The John Bertram and Sons Co. Ltd.
Respondent.

1969: April 22, 23; 1969: November 17.

Present: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales tax—Production machinery—Removal of exemption—Application for refund—Whether sale contract permitted to add tax to amount of contract—Interpretation of contract by provincial Court in proceeding in which Crown not a party—Weight to be given to that interpretation in action before Exchequer Court for refund—Act to amend the Excise Tax Act, 1963 (Can.), c. 12, ss. 7, 9, 10—Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(d)—Excise Tax Act, R.S.C. 1952, c. 100, s. 30(1)(a).

Courts—Judgments—Equal or co-ordinate jurisdiction—Judicial comity.

On April 15, 1963, the respondent sold a hot mill which was exempt from sales tax under Schedule III of the Excise Tax Act, R.S.C. 1952, c. 100. The contract stipulated that the price was subject to certain adjustments including “the amount of any federal or provincial sales tax imposed by law”. On June 14, 1963, the exemption was repealed. The repealing legislation provided, in the case of certain fixed price contracts, for the refund of the tax which became payable by a vendor who was not permitted by his contract to add the tax to the purchase price. The respondent paid the tax under protest out of funds provided by the purchaser in accordance with the terms of a letter-agreement stating that the purchaser did not recognize any liability to pay the tax and that the respondent was to apply for a refund and remit it to the purchaser. A motion, without notice to the Department of National Revenue, was made in the Supreme Court of Ontario for an order determining the rights of the respondent and the purchaser under the contract. The judgment of that Court declared that the liability to pay the tax rested upon the respondent who then sought its recovery by petition of right. The Exchequer Court allowed the petition of right solely because it considered itself obliged to take the view “that judgments of Courts of equal or co-ordinate jurisdiction should be followed in the absence of strong reason to the contrary”. The Court stated, however, that if the matter had come before it initially, it would have come to a contrary conclusion. The Crown appealed to this Court.

Held: The appeal should be allowed.

Per Cartwright C.J.: As between the purchaser and the respondent the Supreme Court of Ontario had jurisdiction to construe the agreement and to give a judgment binding on the parties thereto. That judgment was not a judgment in rem and was binding only upon the parties to the proceeding. If it is sought to recover money from the Crown in reliance on the refund section and a question arises as to the existence of the prescribed condition it would seem obvious that the

Crown is a necessary party to the proceeding. On the true construction of the contract the respondent can recover the tax from the purchaser because the language employed contemplates a possible future tax being borne by the purchaser by way of an increased price. This Court is in no way fettered by the judgment of the Ontario Court. It follows that the respondent cannot recover the amount of the tax from the Crown.

Per Fauteux, Abbott, Martland, Judson and Ritchie J.: The Supreme Court of Ontario had no jurisdiction to bind the Crown in this matter. The contract provided, in plain terms, for the passing on of the tax to the purchaser. By the terms of the repealing legislation, the tax had to be paid by the respondent. Liability for this tax was a matter entirely between the taxpayer and the Minister. The tax paid under protest could only be recovered by petition of right in the Exchequer Court under s. 18(1) (d) of the Exchequer Court Act. The problem which troubled the judge of the Exchequer Court in reality did not arise. The Exchequer Court alone had jurisdiction to make the decision untrammelled by the declaratory order made in the Ontario Court.

Per Hall, Spence and Pigeon JJ.: The judgment of the Ontario Court was pronounced without jurisdiction. The proper Court to adjudicate upon the rights of private parties under a contract is the superior Court of their province. When considering the question submitted to the Ontario Court in the light of all the relevant facts including the letter-agreement under which the respondent's right to recover the tax from the purchaser was put beyond doubt and by virtue of which the respondent was really claiming the refund not for its own use but for the purchaser's benefit, the real question was not whether one of the parties was entitled to recover the tax from the other but whether one of them was entitled to recover it from the government of Canada for the benefit of the other. That matter was within the exclusive jurisdiction of the Exchequer Court. The purchaser cannot be considered as a stranger to this litigation. It is in the same situation as any other person for whose benefit an action is instituted. It follows that this case should be decided without reference to the judgment of the Ontario Court. The Exchequer Court was correct in its opinion as to what the proper conclusion should be on that view of the matter.

APPEAL from a judgment of Cattnach J. of the Exchequer Court of Canada[1], allowing a petition of right. Appeal allowed.

C.R.O. Munro, Q.C., and Derek Aylen, for the appellant.

G.F. Henderson, Q.C., and B.A. Crane, for the respondent.

THE CHIEF JUSTICE—The relevant facts and the applicable statutory provisions are set out in the reasons of my brother Pigeon and do not require repetition but I wish to stress the circumstance mentioned by him that during the course of the hearing in this Court, counsel for the appellant in answer to a question from the Bench stated that it was not alleged that the proceedings before Landreville J. were taken or conducted in bad faith. There is no suggestion that any step has been taken seeking to reverse or set aside the judgement of Landreville J. and the time for appealing from it has long since expired although that time could, I suppose, even at this date, be extended by the Court of Appeal for Ontario.

When the question was raised between Atlas Steels Company, hereinafter referred to as Atlas, and the predecessor of the present respondent as to the true construction of clause 18(a) of the Agreement of April 15, 1963, it was obvious that, by reason of the terms of s. 10 of c. 12 of the Statutes of Canada, 1963, 12 Eliz. II, quoted in the reasons of my brother Pigeon, the only persons having a substantial pecuniary interest in the answer to that question were the present appellant and Atlas. If it should be held that the respondent could add the amount of the tax to the sale price it would be paid to it by Atlas; if it were held that it could not it would be entitled to recover the amount of the tax from the appellant. Under these circumstances it is difficult to understand why that question was submitted in a proceeding to which the appellant was not a party. However we must deal with the circumstances as they exist.

I think it clear that as between Atlas and the respondent the Supreme Court of Ontario had jurisdiction in the proceeding brought before it to construe the Agreement of April 15, 1963, and to give a judgment binding on the parties thereto. I think it equally clear that the judgment which was pronounced by Landreville J. was not a judgment in rem and was binding only upon the parties to the proceeding before him.

In the action in appeal the Exchequer Court[2] was faced with the same question as that which had come before Landreville J., that is whether on its true construction the contract in writing of April 15, 1963, did or did not permit the respondent to add the tax to the amount payable to it by Atlas. The question was not whether in the event that had happened the respondent could actually recover the tax from Atlas; it was solely a question of the true construction of the terms of the written contract.

In the action in appeal the circumstances, if they exist, (i) that the judgment of Landreville J. will prevent the respondent from recovering the tax from Atlas or (ii) that as a result of the correspondence between Atlas and the respondent recited in the reasons of my brother Pigeon the respondent can retain the moneys advanced to it by Atlas for payment of the tax, both appear to me to be irrelevant and I express no opinion as to whether or not they do exist; it would be idle to do so in a proceeding to which Atlas is not a party.

It was suggested in the course of the argument that if we should hold that the judgment of Landreville J. is not to be treated as decisive of the question of the true construction of the contract it would follow that an executor or administrator could not safely distribute a dutiable estate in reliance on a final judgment of a provincial court construing a testator's will or deciding on conflicting evidence who were entitled as next-of-kin of an intestate unless the provincial treasurer and the Minister of National Revenue were parties to the proceeding in which the judgment was pronounced. The question whether this submission is sound is not before us but the argument requires consideration.

I have reached the conclusion that it should be rejected. Generally speaking, the incidence of estate tax and similar duties depends on the gross amount of the estate, the amounts passing to individual beneficiaries and their relationship to the deceased. These are questions which normally fall to be determined by the provincial courts according to the law of the province and,

except in the possible case of a judgment obtained by fraud or collusion, it is difficult to suppose that the Minister charged with the responsibility of collecting the revenue would seek to do otherwise than impose the taxes applicable to the estate on its distribution according to the judgment of the Court.

In the case at bar, on the other hand, s. 10 of c. 12 of the Statutes of Canada, 1963, 12 Eliz. II, creates an extraordinary right in favour of a taxpayer to recover money from the Crown if a certain explicitly defined condition exists. If it is sought to recover money from the Crown in reliance on this section and a question arises as to the existence of the prescribed condition it would seem obvious that the Crown is a necessary party to the proceeding in which the question is to be determined.

Turning to the question of the construction of the contract I agree with the reasons given by Cattanach J. for the conclusion to which he would have come had he felt himself untrammelled by the judgment of Landreville J. and particularly with the concluding sentence of the passage from his reasons quoted by my brother Pigeon:

It accordingly seems clear to me that the language employed contemplates a possible future tax being borne by the purchaser by way of an increased price.

While Cattanach J. decided that as a matter of judicial comity he should follow the decision of Landreville J. in preference to his own opinion, it is clear that we are in no way fettered by the judgment of Landreville J. and I have already indicated my view as to the true construction of the contract of April 15, 1963.

It is obvious that the combined result of all the proceedings in this matter up to the present time is gravely unsatisfactory. The Supreme Court of Ontario, in a judgment that would appear to bind the respondent but does not bind Her Majesty, has construed the contract as meaning that the respondent cannot recover the tax from Atlas. This Court on appeal from the Exchequer Court, in a judgment that will bind the respondent but would appear not to bind Atlas, is construing the contract as meaning that the respondent can recover the tax from Atlas and consequently cannot obtain a refund of the tax from Her Majesty. However, these circumstances do not permit us to do otherwise than pronounce a judgment construing the contract according to its terms.

Doubts were expressed during the argument as to whether there exists any procedure whereby the rights of all three parties concerned, the appellant, the respondent and Atlas, could have been determined in a single proceeding to which all were parties. If such a procedure is available in either the Exchequer Court or the Supreme Court of the Province it should of course have been resorted to; if no such procedure is available I venture to suggest that it should be provided by appropriate legislation.

Before parting with the matter I wish to make it plain that all I am actually deciding is that the respondent cannot recover the amount of the tax from the appellant; in arriving at this result it has been necessary to decide as between the appellant and the respondent that on the true construction of the contract between Atlas and the respondent the latter can recover the tax from Atlas; but Atlas is not a party to these proceedings and consequently this judgment will determine nothing as between Atlas and the respondent.

I would dispose of the appeal as proposed by my brother Pigeon.

The judgment of Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.—I agree with the conclusion of Pigeon J. that the Supreme Court of Ontario had no jurisdiction to bind the Crown in right of Canada in this matter.

The Excise Tax Act imposes the consumption or sales tax on the producer or manufacturer. When this contract was made between John Bertram and Atlas Steels the subject-matter of the contract—machinery or apparatus to be used in the manufacture or production of goods—was exempt from sales tax. But the contract provided, in plain terms, for the passing on of the sales tax to the purchaser. Consequently, when the exemption was repealed in 1963 this tax, by the terms of the repealing legislation, had to be paid by the manufacturer. Liability for this tax was a matter entirely between the taxpayer and the Minister of National Revenue.

In this case the Minister demanded payment of these taxes and they were paid under protest. They could only be recovered by petition of right in the Exchequer Court. This Court has original exclusive jurisdiction in such a matter by s. 18(1) (d) of the Exchequer Court Act, which reads:

18. (1) The Exchequer Court also has exclusive original jurisdiction to hear and determine the following matters:

* * *

- (d) every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

Nothing, therefore, turns on the failure of the manufacturer and the purchaser of the machinery to give notice to the Minister of National Revenue of their motion in the Supreme Court of Ontario to interpret the contract and determine their rights. Even if such notice had been given, the Minister could have disregarded it. If the money had not been paid, he could have taken collection proceedings under s. 50 of the Excise Tax Act, which reads:

50. (1) All taxes or sums payable under this Act shall be recoverable at any time after the same ought to have been accounted for and paid, and all such taxes and sums shall be recoverable, and all rights of Her Majesty hereunder enforced, with full costs of suit, as a debt due to or as a right enforceable by Her Majesty, in the Exchequer Court or in any other court of competent jurisdiction.

The choice of the forum in these proceedings rests with the Minister. Whatever Court he happens to choose has jurisdiction, subject to appeal, to determine the whole matter, namely, whether the contract permits the adding of the tax to the amount payable to the manufacturer.

Penalties under the Act are provided for by s. 50, subs. (2):

50. (2) Every penalty incurred for any violation of the provisions of this Act may be sued for and recovered
- (a) in the Exchequer Court of Canada or any court of competent jurisdiction; or
 - (b) by summary conviction under the provisions of the Criminal Code relating thereto.

Again, the choice of the forum rests with the Minister. Whatever court is chosen for the recovery of these penalties has exclusive jurisdiction, subject to appeal, to determine the whole matter.

Therefore, the problem which troubled the judge at the Exchequer Court before whom this matter came, in reality did not arise. The Exchequer Court alone had jurisdiction to make the decision untrammelled by the declaratory order made in the Supreme Court of Ontario. I would allow the appeal and dismiss the petition of right with costs here and in the Exchequer Court.

The judgment of Hall, Spence and Pigeon JJ. was delivered by

PIGEON J.—Respondent by its petition of right seeks to recover the sum of \$451,735.48 paid by way of sales tax upon the sale of a hot mill pursuant to a written agreement dated April 15, 1963, with a party therein described as “Atlas Steels Company, a division of Rio Algom Mines Ltd.” and hereinafter called “Atlas”.

At the date of the contract, the mill would have been exempt from sales tax as machinery and apparatus to be used in the manufacture or production of goods within the meaning of Schedule III of the Excise Tax Act. However, that exemption was repealed by s. 7 of c. 12 of the statutes of 1963. By virtue of s. 8 this had effect as of June 14, 1963. However, under s. 10, it was provided as follows:

10. (1) Where any tax under Part VI of the Excise Tax Act has become payable by any person in respect of any designated goods that were, not later than December 31, 1964, sold and delivered by that person, or applied by that person to a use resulting in the property in the goods passing from that person, pursuant to a bona fide contract in writing
- (a) that provided for the sale of those goods or their application to that use for a fixed amount stated in the contract and that did not permit the adding of the tax to the amount payable to that person under the contract, and
 - (b) that was signed by the parties thereto
 - (i) on or before June 13, 1963,...

a refund, or deduction from any of the taxes imposed by the said Act, of the tax or such part thereof as could not under the contract be added to the amount payable to that person thereunder may, where application therefor is made to the Minister of National Revenue by that person within two years from the time the goods were delivered by that person or applied by him to that use, be granted to that person. In the agreement with Atlas, under the heading "Price Adjustment", the following was stipulated in clause 18:

The price for the Mill shall be subject to the following adjustments:

- (a) the amount of any Federal or Provincial Sales Tax imposed by law; ...

Under date December 31, 1964, a letter-agreement executed on behalf of Atlas was addressed to and accepted by the respondent in the following terms:

We acknowledge receipt of your invoice dated December 31, 1964 for the instalment of \$4,250,000 due today pursuant to our contract of April 15, 1963 (as amended) for the purchase of a Hot Planetary Mill. In response to the demand for payment in that invoice of a further \$340,000 in respect of federal sales tax, we assert that no liability for federal sales tax arises in respect of the production machinery and apparatus purchased by us under the said contract of April 15, 1963.

In order to prevent penalties or penalty interest arising under The Excise Tax Act, we are enclosing our cheque to you in the amount of \$340,000 as an amount equivalent to the sales tax demanded but not in recognition of any liability to pay such tax.

This payment is made on the following conditions and your acceptance thereof is hereby agreed to be upon the following conditions:

1. That we make this payment under protest that no federal sales tax liability arises in respect of this sale of products or machinery pursuant to our contract of April 15, 1963;
2. That you will remit the amount of \$340,000 to The Department of National Revenue in respect of federal sales tax related to the aforesaid contract, under protest making known our protest;
3. That it is understood and agreed that we may seek judicial interpretation of the respective rights and obligations of your company and ours in respect of federal sales tax under the said contract of April 15, 1963 as amended.

It is further understood and agreed that you will at our request and at our expense, originate or become a party to such proceedings at law as we may deem expedient to obtain a final judicial interpretation as to the exigibility of federal sales tax under the said contract and such further and other action as may be necessary to obtain a refund of such federal sales tax. If any such interpretation should result in the refund of any sales tax under this contract you will promptly refund to us the said sum of \$340,000 or any part thereof when you shall have received the same plus any other sums which may hereafter be payable in like manner under the said contract, together with interest thereon if paid to you.

In accordance with that letter-agreement, respondent made in January 1965 a first sales tax payment of \$340,000. A letter dated January 29, 1965, was addressed to the Department of National Revenue stating that this amount was being paid under protest, that solicitors for Atlas had been informed by the Department that the contract did not qualify for relief under s. 10 of the 1963 Act and that:

It is intended to seek judicial interpretation in the Ontario courts as to whether, under the terms of that contract, our company has the right to pass on to Atlas Steels Company the burden of sales taxes imposed by the amendment to the Excise Tax Act, effective June 13, 1963. If the result of such a determination should be that we have not the right to demand such payment from Atlas Steels Company, it is our intention to apply to the department for a refund of the above amount of \$340,000.00, as well as any other amount similarly collected from Atlas Steels Company pursuant to the above contract.

In June 1965, without notice to the Department, a motion was made in the Supreme Court of Ontario by counsel for Atlas in the presence of counsel for the respondent for “an order declaring and determining the rights of the parties” under the agreement dated April 15, 1963. The affidavit annexed to the notice of motion made reference solely to that agreement and a copy thereof appears to have been the only material submitted. On July 2, 1965, judgment was rendered by Landreville J. declaring that the liability to pay the sales tax rested upon the respondent. Reasons for judgment were delivered, the material part being as follows:

The contract between the parties is on file. The relevant clauses are 15, 17 and 18. ... After reading the contract as a whole and more particularly the above-numbered clauses, I have come to the conclusion that the contract, while referring to the sales tax, does not specifically and clearly state who is to pay same. Due to the fact that the statute which subsequently came into existence imposes on the manufacturer the tax, it is not that clear language necessary for me to displace the obligation to the purchaser.

I accept the argument of the applicant that the words imposed “by law” make reference and contemplate the tax which might be in existence at that time. I understand that the goods manufactured could have been pleaded to have been exempted from taxation at the time of contract.

After that judgment respondent paid on account of sales tax and under protest further amounts as follows:

On July 29, 1965\$64,770.65

On April 21, 1966\$46,964.83

From a letter written by the respondent on September 16, 1965, it appears that the July payment was made out of funds provided by Atlas. Nothing shows it was otherwise for the April payment.

Application for refund having been refused, a petition of right was filed on January 27, 1967. At the hearing, an agreed statement of facts was produced in which nothing of importance appears beyond the above summary.

Cattanach J. allowed the petition solely because he considered himself obliged to take the view “that judgments of courts of equal or coordinate jurisdiction should be followed in the absence of strong reason to the contrary”. He indicated what “strong reason” would, in his opinion, justify a departure from such a decision by quoting the following passage from *McRuer C.J. in Rex. v. Northern Electric Co.*[3]:

I think that “strong reason to the contrary” does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was given without consideration of a statute or some authority that ought to be followed. I do not think “strong reason to the contrary” is to be construed according to the flexibility of the mind of the particular judge. He made it clear that his conclusion was based solely on that view of judicial comity by stating:

... I must say that if the matter had come before me initially, untrammelled by the judgment of Landreville J., I would have come to a conclusion contrary to his. Considering the contract as a whole and what I conceive to be the fair and plain meaning of the language of paragraph 18(a) thereof, I would have concluded that the parties thereto contemplated that any federal sales tax imposed by law would be the subject matter of a price adjustment to be borne by the purchaser....

I cannot agree with Landreville J. that “the words imposed ‘by law’ make reference and contemplate the tax which might be in existence at that time”. First, because there was no federal sales tax imposed by law at that time, secondly, because the words “imposed by law” is the adjectival use of a participle modifying the word “tax” and thirdly, because of the inclusion of the word “any”. It accordingly seems clear to me that the language employed contemplates a possible future tax being borne by the purchaser by way of an increased price.

It will thus be seen that we are faced in this appeal with the unusual situation of a trial judge making a very strong and persuasive argument against the view that he finally took of the merits of the case because of what he conceived it to be his judicial obligation of comity towards another court of coordinate jurisdiction. On account of the implications of such a question, a re-hearing of this case before the full Court was directed.

In considering what weight should be given to Landreville J.’s judgment, the first question must be whether he had jurisdiction. There can be no doubt that as a general rule the proper court to adjudicate upon the rights of private parties under a contract is the superior court of their province. It is indeed conclusively established by the decision of this Court in *Consolidated Distilleries Ltd. v. Consolidated Exporters Corp Ltd.*[4], that the Exchequer Court does not have general jurisdiction to entertain claims between subject and subject because in s. 101 of the B.N.A. Act “laws of Canada” means laws within the competence of the Parliament of Canada only.

However, when the facts of this case are scrutinized, it becomes apparent that the question raised by the motion in the Supreme Court of Ontario did not really concern the rights of the parties between themselves but solely their claim against the Crown in right of Canada. This is because the rights of the parties between themselves no longer stood at that time as they were after the execution of the original agreement. They had entered into another binding agreement whereby there could no longer be any dispute as to the incidence of the added sales tax burden. Under that later agreement, respondent's right to recover the sales tax from Atlas was put beyond doubt. Indeed Atlas agreed to provide the money for paying it. Because the rights of the parties were no longer governed by the original contract but by the subsequent agreement, Atlas did in July 1965, after the judgment declaring that it was not liable to pay the sales tax, provide money for paying it. It must also be noted that by virtue of the letter-agreement the respondent is really claiming the refund not for its own use but for Atlas' benefit.

Therefore, if the question submitted to the Supreme Court of Ontario is considered in the light of all the relevant facts including those that were then left undisclosed, it becomes clear that, in view of the provision for refund in the 1963 Act, the real question was not whether one of the parties was entitled to recover the sales tax from the other but whether one of them was entitled to recover it from the Government of Canada for the benefit of the other. This was not really a dispute between subject and subject but a request for a finding on which a claim against the Crown would automatically fall to be allowed in favour of the respondent because none of the other requirements was in dispute. The making of such a finding under those circumstances was not within the jurisdiction of the Supreme Court of Ontario by virtue of the provisions of s. 18(1) (d) of the Exchequer Court Act, R.S.C. 1952, c. 98: 18. (1) The Exchequer Court also has exclusive original jurisdiction to hear and determine the following matters:

* * *

- (d) every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council;

It must be observed that notice of the motion before the Supreme Court of Ontario was not given to the Department of National Revenue. The letter of January 29, 1965, can in no way be considered as such a notice, it merely informed the Department of the intention to initiate proceedings, it did not advise of the proceedings themselves. The Department officials certainly were under no obligation to make enquiries as to the actual carrying out of the intention disclosed to them. Seeing that no notice was given, it is clear that the objection to the jurisdiction must be considered in these proceedings. This in no way implies that it would be otherwise if notice had been given and no opinion is expressed as to whether notice could or should be given of proceedings between subjects susceptible of having an influence on rights of the Crown.

The hearing before Landreville J. was not such a proceeding. It had only the appearance of a contest between litigants. In fact, by virtue of the letter-agreement of December 31, 1964, counsel for both parties represented the same interest: Atlas. The adverse interest, the Crown, was not represented. Even the adjudication of costs was purely illusory; due to the letter-agreement Atlas

was to bear them irrespective of any order that might be made. The fact that the Department was informed of the intention to apply to the Supreme Court of Ontario for an order determining the construction of the original agreement might indicate that the parties to it believed that, in spite of their subsequent arrangement, this was the proper jurisdiction. If so, they were mistaken. At that time, the only dispute was not between the parties but with the Crown and the matter was therefore within the exclusive jurisdiction of the Exchequer Court.

During the hearing in this Court, counsel for the appellant in answer to a question from the Bench stated that it was not alleged that the proceedings before Landreville J. were taken or conducted in bad faith. I have already indicated a reason for believing that it was really done in good faith. However, it does not seem to me that this is of any help to the respondent. In order to ascertain the legal effect of an operation one must look at the substance and a Court is not prohibited by the form of the documents from ascertaining its true nature: *Monarch Securities Ltd. v. Gold*[5], *Maas v. Pepper*[6].

Applying this principle to the application before Landreville J. no other conclusion is possible but that its true object was not a determination of the rights of the parties between themselves. The only object was a finding against the Crown in favor of Atlas, respondent being a nominal claimant and acting as an agent or trustee for its benefit.

Under such circumstances, it does not seem to me that Atlas can be considered as a stranger to this litigation. It is in the same situation as any other person for whose benefit an action is instituted. In *Gough v. Toronto and York Radial R.W. Co.*[7], Middleton J. said in a judgment that was unanimously upheld in appeal:

Where the insurance company sues in the name of the assured, no doubt he is a nominal plaintiff, and in proper cases security for costs may be ordered; and also the insurance company is a person for whose benefit the action is brought, and so discovery may be had against it.

In *Deisler v. U.S. Fidelity Co.*[8], Duff J. (as he then was) said (at p. 1053):

Admittedly notice of assignment was not proved and therefore under the statutory law of British Columbia the assignment was not complete as a statutory assignment, that is to say, the chose in action did not, by virtue of the statute, become vested in the assignee. Treating the assignment as an equitable assignment, the absence of the assignee, the action being brought in the name of the assignor, would be no answer to the action but only a ground for aiding the assignee for the purpose of protecting the defendant; the assignor being a trustee for the assignee by virtue of the equitable assignment, the chose in action being a legal chose in action and inhering in the assignor as the legal owner of it.

In my opinion Atlas must be considered as the real claimant against Her Majesty and as having sought from the Supreme Court of Ontario a finding on which to base that claim. As that finding was an essential part of the process of determining whether the claim was well-founded or not, the Exchequer Court had exclusive jurisdiction over the determination of that fact as well as over all other facts on which the decision of the case in first instance depended.

Having come to the conclusion that the judgment of Landreville J. was pronounced without jurisdiction, it follows that this case should be decided without reference thereto. In my opinion, Cattnach J. was correct in his opinion as to what the proper conclusion should be on that view of the matter.

For those reasons, the appeal should be allowed and respondent's petition of right dismissed with costs in both courts.

Appeal allowed with costs.

Solicitor for the appellant: D.S. Maxwell, Ottawa.

Solicitors for the respondent: Rosenfeld, Schwartz & Brown, Toronto.

- [1] [1968] 2 Ex. C.R. 590, [1968] C.T.C. 391, 68 D.T.C. 5246.
- [2] [1968] 2 Ex. C.R. 590, [1968] C.T.C. 391, 68 D.T.C. 5246.
- [3] [1955] 3 D.L.R. 449 at 466, 21 C.R. 45, [1955] O.R. 431, 111 C.C.C. 241.
- [4] [1930] S.C.R. 531, [1930] 3 D.L.R. 704.
- [5] [1940] 3 D.L.R. 124, [1940] 2 W.W.R. 615, 55 B.C.R. 70.
- [6] [1905] A.C. 102, 74 L.J.K.B. 452, 92 L.T. 371.
- [7] (1918), 42 O.L.R. 415 at 417.
- [8] (1917), 59 S.C.R. 676, [1917] 3 W.W.R. 1051, 49 D.L.R. 688.

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