HER MAJESTY THE QUEEN .....APPELLANT;

AND

WILLIAM THOMAS ALEXANDER DOIG ..... } RESPONDENT.

1962

*May 25
**Oct. 2

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Conviction for counterfeiting—Monies in possession of accused at time of arrest filed as exhibits—Disappearance of monies from registry—Application for return of exhibits or equivalent sum—Alternative claim a claim to recover monies from Crown—Proceedings to be initiated by petition of right—Crown's liability to be first determined by Supreme Court of the province.

The respondent was convicted on charges of counterfeiting. At the time of his arrest he had in his possession two envelopes, each of which was said to contain a specified amount of American currency, and the envelopes said to contain these monies were filed as exhibits at the trial. After his conviction they remained in the custody of the registrar of the Court, but later they disappeared from the registry. An application for an order that the money exhibits be returned to the respondent or alternatively that a sum of money equivalent in value to the said money exhibits be paid to the respondent in lieu of the return of the money exhibits was dismissed. On appeal, the Court of Appeal held that the appeal should be allowed and an order made that the money exhibits be returned to the respondent. By leave of this Court the Crown appealed from that judgment.

Held: The appeal should be allowed.

The alternative claim advanced was a claim to recover monies from the Crown. The Court of Appeal dealt with the matter on the footing that the monies were then in the custody of the registrar, whereas there were no such monies. Since this was made known to the Court in a report made by the County Court judge and was common ground between the parties, the proper construction to be placed upon the judgment was that it constituted an award against the Crown in favour of the respondent in the amount stated. The respondent's remedy, if any, was by proceedings initiated by petition of right under the provisions of the *Crown Procedure Act*. The question of the Crown's liability must first have been determined by the Supreme Court of the province before the Court of Appeal acquired jurisdiction to deal with the matter. The order dismissing the application should therefore be restored upon the ground that the County Court was without jurisdiction to deal with the money claim made against the Crown.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], setting aside an order of Remnant C.C.J. Appeal allowed.

*PRESENT: Locke, Fauteux, Abbott, Martland and Ritchie JJ.
**The reasons for judgment of Locke J., who retired from the bench on September 16, 1962, were handed down by Fauteux J., pursuant to s. 27(2) of the *Supreme Court Act*.

[1] (1961), 130 C.C.C. 95.

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W. G. Burke-Robertson, Q.C., for the appellant.

H. Rankin, for the respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal brought by leave granted by this Court from a judgment of the Court of Appeal for British Columbia[1] setting aside an order made by His Honour Judge Remnant in the County Court of Vancouver and directing that a sum of $3,275 in American funds, or the equivalent thereof in Canadian funds, be paid to the respondent.

The respondent Doig was on April 25, 1957, found guilty in the County Court Judge's Criminal Court of Vancouver of four charges of counterfeiting and conspiracy to counterfeit and sentenced to four years' imprisonment. At the time of his arrest he had in his possession two envelopes, one of which was said to contain $2,200 in American currency and the second $1,075 of such currency, and the envelopes said to contain these monies were filed as exhibits at his trial. After his conviction they remained in the custody of the registrar of the Court.

Following the release of Doig from the penitentiary, his solicitor served a notice on counsel for the Crown which was entitled "In the County Court Judge's Criminal Court In the Matter of Regina vs. William Thomas Alexander Doig" and which stated that an application would be made before the judge in chambers on September 19, 1960, for an order

> that the money exhibits in the criminal case of Regina vs. Doig, number 31/57 be returned to the Defendant.

This application was supported by an affidavit of Mr. Lawrence E. Hill, the solicitor for Doig, which stated, *inter alia*, that he had been advised by the registrar that:

> the original money exhibit is no longer within the custody of the said Registrar, the said original exhibit having disappeared from the said Registry and that whatever disposition is made of the monies hereinbefore referred to it will be necessary that the Province of British Columbia replace the said monies with an equivalent amount.

Thereafter, a notice dated October 3, 1960, was served by the solicitor for Doig informing the Crown that:

> the application will be for an Order directing that the money exhibits in the criminal case of Regina vs. Doig be returned to the Defendant or alternatively that a sum of money equivalent in value to the said money exhibits be paid to the Defendant in lieu of the return of the said money exhibits.

[1] (1961), 130 C.C.C. 95.

While the amended notice did not say in terms that what was proposed was an order against the Crown to pay the missing monies, it is common ground that this was the relief sought.

The learned County Court judge dismissed the application and while no written reasons were given at the time, when the appeal was taken by Doig from the order the learned judge made a report to the Court of Appeal, stated to be made pursuant to s. 588(1) of the *Criminal Code,* in which it was said that all the monies were proved to be the proceeds of the criminal activities of Doig and that they should remain in custody of the Court. The report concluded by stating that the fact that the money had disappeared from the registry was beside the point.

The formal order dismissing the application was entitled "In the County Court Judge's Criminal Court" and the style of cause was "Regina vs. William Thomas Alexander Doig."

The judgment delivered by the learned Chief Justice of British Columbia did not mention the fact that the monies were missing. After saying that it had been agreed by counsel on the hearing of the appeal that it had not been established that the money had been obtained by the commission of the offence for which the appellant had been convicted, he said:

> It is clear as a result of the foregoing that the question here and the order appealed from affect a right to property in the custody of the County Court in respect of which there is no applicable provisions of the Criminal Code. The order sought by the appellant is not one to be made or refused under the criminal jurisdiction of the County Court. This Court, in my opinion, has jurisdiction to entertain the appeal and the motion of the Crown to quash should be denied.

After referring to authorities indicating that monies taken from an accused person, unless they are shown to have been obtained by the commission of an offence, should be returned to him, the learned Chief Justice said:

> This Court has jurisdiction to make the order that should have been made in the Court below, the appeal should be allowed and an order made that the money be paid out to the appellant.

The style of cause in the formal judgment entered in the Court of Appeal was "Regina, Respondent, William Thomas Alexander Doig, Appellant." After stating that the appeal was allowed, the judgment reads:

> and the said money exhibits amounting to Three Thousand Two Hundred and Seventy-five dollars in American funds or the equivalent thereof in Canadian funds are hereby ordered returned to the appellant.

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Locke J.

It will be seen from the foregoing that the matter has been treated in both Courts as if the monies in question were in the hands of the proper official of the Court, the registrar, presumably as a servant of the Crown. While, as I have pointed out, it was known to the parties before the matter came before the learned County Court judge that the monies were missing, the solicitor for the present respondent, while appreciating that he could not obtain the form of relief sought in the original notice of motion, failed to appreciate that the alternative claim advanced was a claim to recover monies from the Crown.

If there was any basis for such a claim, presumably it would be for damages for conversion or for negligence of some servant of the Crown. In whatever form the claim might have been advanced, the matter would be governed by the provisions of the *Crown Procedure Act,* R.S.B.C. 1960, c. 89, and the Court having jurisdiction, the Supreme Court of British Columbia, if a fiat were obtained from the Lieutenant-Governor in Council, and the proceedings would be by petition of right.

This aspect of the matter does not appear to have been drawn to the attention of the learned County Court judge who treated the application as if it were made in the criminal proceedings against the respondent which had been terminated years before. The appeal to the Court of Appeal which was brought by leave was not one under Part 18 of the *Criminal Code* and s. 588(1), requiring a report by the judge in appeals and applications for leave to appeal taken under that part, was inapplicable.

In the judgment of the Court of Appeal it was pointed out that the order sought was not one to be made or refused in the exercise of the criminal jurisdiction of the County Court. However, that judgment, with great respect, dealt with the matter on the footing that the monies were then in the custody of the registrar, whereas there were no such monies.

Since this was made known to the Court in the report made by the County Court judge and was common ground between the parties, the proper construction to be placed upon the judgment is, in my opinion, that it constitutes an award against the Crown in favour of the respondent in the amount stated.

Claims of this nature against the Crown may not be established in proceedings initiated by notice of motion in the County Court. As I have pointed out, the respondent's remedy, if any, was by proceedings initiated by petition of right under the provisions of the *Crown Procedure Act*. The question of the Crown's liability must first have been determined by the Supreme Court of the province before the Court of Appeal acquired jurisdiction to deal with the matter.

The appeal should be allowed with costs and the order dismissing the application be restored upon the ground that the County Court was without jurisdiction to deal with the money claim made against the Crown. The dismissal should be without prejudice to any claims the respondent may be advised to make in the matter in proceedings properly constituted.

Appeal allowed and the order dismissing the application restored.

Solicitor for the appellant: George L. Murray, Vancouver.

Solicitor for the respondent: Lawrence E. Hill, Vancouver.