

1930
*Mar. 13, 14.
*June 11.

HIS MAJESTY THE KING (RESPOND-
ENT)

APPELLANT;

AND

DOMINION OF CANADA POSTAGE
STAMP VENDING COMPANY
LIMITED (SUPPLIANT)

RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Licence—Revocation—Licence by Postmaster General to sell postage stamps, etc., by automatic machines—Period of agreement—Termination by Postmaster General—Right to terminate—Authority of Postmaster General in contracting for the Crown—Post Office Act, R.S.C., 1927, c. 161, ss. 2 (1), 4, 5, 7, 8, 66-80.

By agreement between the Postmaster General of Canada and respondent, the Postmaster General granted to respondent a general licence to sell (on commission) postage stamps, etc., by means of automatic machines, "such licence to be for a period of ten years * * * and if this contract has been properly fulfilled then for a further period of ten years without further agreement and upon the termination of the said periods above the licence shall be renewed for further periods of ten years each successively unless and until" either party terminated by notice. The Postmaster General agreed that "during the term of this agreement or licence he will not licence the use of any other machine than those used by the licensee * * * if such other machine depends substantially on similar principles for its operation. But this clause shall not be interpreted as meaning that the department shall be precluded from using or licensing any other more satisfactory or advantageous machine." Provision was made for machines to have compartments for mailing of letters. The Postmaster General terminated the agreement at the end of 10 years. In an action by respondent for damages, and on questions of law raised, the Exchequer Court held that the agreement, if properly fulfilled by respondent, was to continue for 20 years, and could not be terminated by the Postmaster General at the end of 10 years. The Crown appealed.

Held (Anglin C.J.C. and Lamont J. dissenting): The licence was revocable at the Postmaster General's discretion. He had no authority to grant it so as to bind his successor or the country at a future time. It is of the quality of a licence that it shall be revocable. An implied covenant in this case not to exercise his power of revocation would be in excess of his powers to bind the Crown. A minister cannot by agreement deprive himself of a power which is committed to him to be exercised from time to time as occasion may require in the public interest, or validly covenant to refrain from the use of that power when it may be requisite, or expedient in his discretion, upon grounds of public policy, to execute it (*Ayr Harbour Trustees v. Oswald*, 8 App. Cas., 623). The question was one of statutory administration of the public service; the Minister could depute the performance of

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

his duties only so far as authorized by Parliament; and, compatibly with the statute (*Post Office Act*, R.S.C., 1927, c. 161; ss. 2 (1), 4, 5, 7, 8, 66-80, referred to), he should have remained free to revoke the licence as the exigencies of the case in the public interest might require.

Per Anglin C.J.C. and Lamont J. (dissenting): The Postmaster General, in making the agreement, did not exceed his powers under the *Post Office Act*. S. 9 (n) of c. 66, R.S.C., 1906, as amended, 1911, c. 19, (now s. 7 (m) of c. 161, R.S.C., 1927), on its proper construction, authorizes him to secure by contract the erection and use of machines such as those in question, and implies authority to contract for a period of time, that period, in the absence of statutory limit, being left to his discretion, which in this case he exercised by fixing the period provided in the agreement. That period was not shown to have been, in the circumstances, unreasonable. While he cannot by contract deprive either himself or his successors of the right to close a post office if the public interest requires its closing, that right was not interfered with by the agreement; a machine was a post office only when, with his consent, mailable matter might be placed in a compartment thereof, and on the closing of that compartment the machine would cease to be a post office. The granting in the contract of permission to respondent to have and use compartments in the machines for certain purposes of its own, was within the Minister's authority. The Postmaster General had no right to determine the agreement as he did, even assuming that it was a mere licence. A licence, if given for value, or a licence with an agreement not to revoke it, if given for value, is an enforceable right and cannot be revoked without sufficient cause; further, if the agreement for the giving or continuing of a licence, or the circumstances under which it is given or continued, are such as to make it inequitable that the licence should be revocable at the will of the licensor a court will exercise its equitable jurisdiction to prevent an unjust revocation (*Ramsden v. Dyson*, L.R. 1 H.L., 129; *Plimmer v. Mayor, etc., of Wellington*, 9 App. Cas., 699; *Hurst v. Picture Theatres Ltd.*, [1915] 1 K.B. 1; *Whipp v. MacKey*, [1927] I.R., 372, and other cases, cited). Even if the agreement in question could have been revoked before respondent expended money in construction of the machines (as to which *quaere*), once it had expended money on the faith of the licence, an equity was created in its favour which rendered a revocation unjust; the agreement, in the light of what was contemplated by and done under it, should be construed as containing an implied contract not to revoke it except in accordance with its provisions for its determination.

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada, holding that it was not competent for the Postmaster General of Canada to terminate the agreement in question at the expiration of 10 years from its date arbitrarily and without cause, but reserving to the parties the right to have determined the issue as to the proper fulfilment of the agreement.

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The original agreement was dated 20th May, 1911, and was made between the Postmaster General of Canada and one Katrine Ellen Fawns. It was amended by agreement dated 22nd May, 1913, made between the Postmaster General and the respondent, the latter, as recited in the agreement, being then the holder of the licence granted by the original agreement. The licence was to have effect as if originally granted by the agreement as amended, and as if the respondent were the original licensee.

By the agreement the Postmaster General granted to respondent a general licence to sell (on commission) postage stamps, etc., by means of automatic machines; Such licence to be for a period of ten years from the date hereof, and if this contract has been properly fulfilled then for a further period of ten years without further agreement and upon the termination of the said periods above the licence shall be renewed for further periods of ten years each successively unless and until either party shall during the six months preceding the expiry date of any such period give to the other party notice of intention to terminate this agreement. The material clauses of the agreement, with regard to the questions before the Court on this appeal, are sufficiently set out in the judgments now reported, and are indicated in the above head-note.

By letter dated November 3, 1920, signed by the Acting Deputy Postmaster General, the respondent was notified that the Postmaster General intended to terminate the agreement "at the end of the ten-year period, namely, on the 19th May, 1921," and the Postmaster General terminated the agreement accordingly. The respondent claimed that the Postmaster General had no right to do so, and sued for damages by way of petition of right. Clauses 2 and 4 of the Crown's answer read as follows:

(2) * * * it was competent for His Majesty rightfully to terminate the agreement * * * at the expiration of ten years from the said 20th day of May, 1911, by giving to the suppliant during the six months preceding the expiration of the said period of ten years notice of his intention to terminate the same, which notice was duly given * * *.

(4) * * * the petition of right does not disclose any cause of action which entitles the suppliant to relief sought herein.

The questions of law raised in said paragraphs 2 and 4 were (pursuant to order made for that purpose) set down for hearing. Maclean J. held

that paragraph one [above quoted in part] of the agreement * * * means, that if the agreement was being properly fulfilled by the licensee, the contract was to continue for two ten year periods, altogether twenty

years, and the Postmaster General could not arbitrarily terminate the agreement without cause, at the end of the first ten year period, which was attempted to be done. I do not think that this clause of the agreement is capable of any other interpretation. I am therefore of the opinion that it was not competent for the Postmaster General to terminate the agreement of May 20, 1911, as amended, at the expiration of ten years from such date, by giving to the suppliant six months notice preceding the expiration of the said period of ten years. I am of the opinion therefore that the Petition of Right does disclose a cause of action.

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The Crown appealed to the Supreme Court of Canada.

F. P. Varcoe for the appellant.

Hamilton Cassels for the respondent.

The judgment of the majority of the court (Duff, Newcombe and Smith JJ.) was delivered by

NEWCOMBE J.—The action is by Petition of Right, upon an instrument under seal of 20th May, 1911, to which the parties are the Postmaster General of Canada, of the first part, and Katrine Ellen Fawns, of the second part, as amended by a supplementary instrument of 22nd May, 1913, executed in like manner, between the Postmaster General and the suppliant company; the latter substituted for the party of the second part. The Postmaster General grants to the suppliant a general licence to sell, by means of automatic machines, postage stamps, post cards, stamped envelopes and such other post office supplies, as may from time to time be specified by the Postmaster General, the licence to be for ten years from the date of the original instrument, and, “if this contract has been properly fulfilled,” then for another period of ten years, and, at the end of that term, to be renewed for a further period of ten years, and so on, successively, “unless and until either party shall during the six months preceding the expiry date of any such period give to the other party notice of intention to terminate this agreement.”

It is recited by the amending instrument that the suppliant company (now the respondent), “are the present holders of the said licence and the Postmaster General has requested that certain amendments be made thereto to which request the Company has agreed.” There are many clauses regulating in detail the business provided for; but these clauses are interwoven and dependent, the whole being

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based upon the main licensing provision, whereby the suppliant becomes a general licensee of the Postmaster General for the sale of the commodities mentioned, and, assuming performance on the suppliant's part, the licence is to continue in force for a period of at least twenty years or perhaps thirty years, and thenceforward indefinitely, subject to the agreed terms. The licence is thus designed to continue forever, unless, after twenty years, it be terminated by notice within the six months next preceding any subsequent decennial. Not only so, but by the second paragraph of clause 1, of the indenture of 20th May, 1911,

The Postmaster General agrees that during the term of this agreement or licence he will not licence the use of any other machine than those used by the Licensee from time to time to carry out this agreement, if such other machine depends substantially on similar principles for its operation;

although, by the amending indenture of 22nd May, 1913, this paragraph is modified by adding the following provision:

But this clause shall not be interpreted as meaning that the department shall be precluded from using or licencing any other more satisfactory or advantageous machine.

And thus the Postmaster General undertakes to limit the power which is committed to him generally by paragraphs (m) and (o) of section 7 of the Act which I am now going to quote.

The powers and duties of the Postmaster General are defined by the *Post Office Act*, R.S.C., 1927, chap. 161. By sections 4 and 5 it is provided that

4. There shall be at the seat of Government of Canada a department, known as the Post Office Department, for the superintendence and management, under the direction of the Postmaster General, of the postal service of Canada.

5. The Postmaster General shall be appointed by the Governor General, by commission under the Great Seal of Canada, and shall hold office during pleasure.

By section 7 the Postmaster General may

(a) establish and close post offices and post routes;

(b) remove or suspend any postmaster or other officer or servant of the post office;

(c) enter into and enforce all contracts relating to the conveyance of the mails, or other business of the post office;

* * * * *

(f) cause to be manufactured and distributed postage and registration stamps necessary for the prepayment of postages and registration charges, under this Act; also stamped envelopes for the like purpose, and post cards and stamped post bands or wrappers for newspapers or other mailable matter not being post letters;

* * * * *

(m) establish and provide street letter boxes or pillar boxes or boxes of any other description, for the receipt of letters, and such other mailable matter as he deems expedient, or for the sale of stamps or other post office supplies, in the streets of any city or town in Canada, or at any railway stations or other public places where he considers such boxes necessary;

* * * * *

(o) grant licences to agents other than postmasters, for the sale to the public of postage stamps and stamped envelopes, and allow to such agents a commission not exceeding two per centum of the amount of their sales;

* * * * *

(w) make and alter rules and orders for the conduct and management of the business and affairs of the Department and for the guidance and government of the postmasters and other officers, clerks and servants of the post office in the performance of their duties;

(x) make such regulations as he deems necessary for the due and effective working of the post office and postal business and arrangements, and for carrying this Act fully into effect.

By subsection 2

Every such regulation shall have force and effect as if it formed part of the provisions of this Act.

By section 8

Every regulation made by the Postmaster General under this Act, other than those made solely for the guidance and government of the officers or other persons employed in the postal service, which may be communicated by departmental order or otherwise, as the Postmaster General sees fit, shall have effect from and after the day on which the same is published in the *Canada Gazette*.

By section 2, which embodies the interpretation clauses,

In this Act, unless the context otherwise requires,

* * * * *

(l) "post office" means any building, room, post office railway car, street letter box, street stamp-vending box, receiving box or other receptacle or place where post letters or other mailable matter are received or delivered, sorted, made up or despatched.

By the fasciculus of sections 66 to 80, under the title, "Mail Contracts and Contractors," the Postmaster General is expressly empowered to make contracts for carrying the mail; but these are not to stipulate for more than four years; see section 77, as follows:

No contract shall be entered into for a longer term than four years: but the Postmaster General may, in special cases, when in his opinion the service has been satisfactorily performed under an expiring contract, and on conditions advantageous to the public interest, renew the contract with the same contractor for a further term not exceeding four years.

I find nothing to authorize or suggest that the Postmaster General may grant a licence for the sale of postage stamps, by means of automatic machines or otherwise, so as to bind his successor or the country at a future time, when this method of conducting the business of the post

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office may, in the discretion of the ruling authority, be found to be undesirable or in conflict with the public interest. The licence, as I have shewn, is granted by the Postmaster General under an express statutory power to grant licences to agents. It is of the quality of a licence that it shall be revocable; it is said to be implied in the instrument that the licence will not be revoked; but, if it can continue beyond the will of the Postmaster General only upon an implication that he has covenanted with the suppliant not to exercise his power of revocation, that covenant is, I think, in excess of his powers to bind the Crown; and such a covenant would, I am persuaded, serve to aggravate rather than to cure the vice of the transaction. A Minister cannot, by agreement, deprive himself of a power which is committed to him to be exercised from time to time as occasion may require in the public interest, or validly covenant to refrain from the use of that power when it may be requisite, or expedient in his discretion, upon grounds of public policy, to execute it; that follows, I think, as a deduction from the principle enunciated by the judgment of the House of Lords in *Ayr Harbour Trustees v. Oswald* (1). The whole question here is one of statutory administration of the public service; and, in my view, the Minister has invoked a power which he did not possess. It seems to me that he can constitutionally and validly depute the performance of his duties, only so far as authorized by Parliament; and, compatibly with the statute, the Postmaster General should have remained free to revoke the licence as the exigencies of the case in the public interest might require.

I would therefore allow the appeal and declare the licence revocable at the discretion of the Postmaster General. There are raised by the petition some minor questions of accounting and responsibility for loss of commission earned, as to which the suppliant may proceed if so advised; otherwise the petition should be dismissed with costs and the respondent should have the costs of the appeal.

(1) (1883) 8 App. Cas., 623.

The judgment of Anglin C.J.C. and Lamont J., dissenting, was delivered by

LAMONT J.—This is an appeal by His Majesty the King from a decision of the President of the Exchequer Court in favour of the respondent in an action for damages for breach of contract.

On May 20, 1911, the Postmaster General of Canada and one Katrine Ellen Fawns entered into an agreement in writing by which Katrine Ellen Fawns obtained the right to erect stamp vending machines and a licence to sell stamps by means thereof. The respondent was incorporated to take over the rights and obligations of Katrine Ellen Fawns under the agreement and did take them over. The agreement, with some minor alterations, was confirmed to the respondent by the Postmaster General by an agreement dated May 20, 1913. Clauses 1, 2, 3 and 4 of the agreement as confirmed read as follows:—

1. The Postmaster General hereby grants to the Licensee a general licence to sell postage stamps, post cards, stamped envelopes and such post office supplies as may from time to time be specified by the Postmaster General, by means of automatic machines. Such licence to be for a period of ten years from the date hereof, and if this contract has been properly fulfilled then for a further period of ten years without further agreement and upon the termination of the said periods above the licence shall be renewed for further periods of ten years each successively unless and until either party shall during the six months preceding the expiry date of any such period give to the other party notice of intention to terminate this agreement.

The Postmaster General agrees that during the term of this agreement or licence he will not licence the use of any other machine than those used by the Licensee from time to time to carry out this agreement, if such other machine depends substantially on similar principles for its operation. But this clause shall not be interpreted as meaning that the department shall be precluded from using or licensing any other more satisfactory or advantageous machine.

2. The Licensee shall have the right to erect automatic machines at any point or place at which the Postmaster General under the Post Office Act or otherwise has authority to place boxes for the receipt of letters or machines for vending stamps, but no automatic machine shall be erected in a place outside of a district or territory served by letter carriers if such automatic machine is to be under the control of a postmaster until the written consent of the Postmaster General has been obtained. Machines may be placed in any post office under the conditions above mentioned providing that in the event of a machine being already installed it shall be purchased by the Licensee from the Postmaster General if he so desires. In any event except as to post offices and points where boxes are already erected, the other points and places where such automatic machines will be erected must have been submitted beforehand to the Postmaster General and approved by him.

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3. All automatic machines erected in public streets and highways shall be erected by the Licensee for or on behalf of the Postmaster General but at the expense of the Licensee. Such machines may, as hereinafter provided, contain suitable compartments for the mailing of letters as well as for the vending of stamps or other postal supplies but the Licensee shall have the right to control and use all the other parts or compartments in such automatic machines as set out in paragraph ten other than such stamp and postal supply vending and letter receiving compartments. On the termination of this agreement such automatic machines shall become the property of the Licensee with the exception of the locks thereof, and any other devices connected therewith, that have been provided by the Postmaster General.

4. When the Licensee reports to the Postmaster General that an automatic machine has been erected under the authority of this agreement and with his consent as above provided, the Postmaster General shall thereupon supply and keep supplied the nearest post office or other supply office with the required rolls of stamps.

In the agreement the Postmaster General agrees to keep a full and complete record of all stamps or other postal supplies sold by means of the automatic machines erected under the agreement and also agrees to pay to the Licensee quarterly a commission of 2% on the amount so sold, (clauses 6 and 7).

The stamp vending compartments of all automatic machines erected within any district which is served by letter carriers or any other place approved by the Postmaster General are to be under his exclusive control; the locks for these compartments are to be furnished by the Post Office Department and the key for each lock is to be held by a postmaster named by the Postmaster General (clauses 9 and 10).

The last paragraph of clause 10 reads as follows:—

The Postmaster who is in charge of any automatic machine shall be required to see that all moneys are collected from and that such automatic machines are kept supplied with the necessary stamps or other post office supplies.

By clause 11 it is provided that where automatic machines are erected by the Licensee and the stamp vending compartment is not under the control of the Postmaster General he shall issue a stamp vending licence to the Licensee, or to any other person designated by the Licensee, and approved of by the Postmaster General, who shall be paid a commission of 2% on all stamps or other postal supplies sold by means of such machine.

On November 3, 1920, the respondent was notified that the Postmaster General intended to terminate the agreement on May 19, 1921, and the privileges which the re-

spondent had thereunder were terminated accordingly. On November 14, 1922, the respondent brought action by way of a petition of right in the Exchequer Court alleging that His Majesty had no right to terminate the agreement, and claiming damages for breach thereof. In answer to the petition His Majesty's Attorney-General for Canada appeared and filed a statement of defence on behalf of His Majesty, paragraphs 2 and 4 of which are as follows:—

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2. His Majesty's Attorney-General says that it was competent for His Majesty rightfully to terminate the agreement of May 20, 1911, as amended by the agreement of May 22, 1913, (both of which agreements are referred to in the Suppliant's Petition of Right) at the expiration of ten years from the said 20th day of May, 1911, by giving to the Suppliant during the six months preceding the expiration of the said period of ten years notice of his intention to terminate the same, which notice was duly given to the Suppliant in November, 1920.

4. His Majesty's Attorney-General further says that the Petition of Right does not disclose any cause of action which entitles the Suppliant to relief sought herein.

Upon motion on behalf of the respondent the court ordered that the question of law raised in paragraphs 2 and 4 of the statement of defence be set down for hearing.

This motion was heard by the President of the Exchequer Court, who was of opinion that

paragraph one of the agreement as it originally stood, and as amended, means, that if the agreement was being properly fulfilled by the Licensee, the contract was to continue for two ten year periods, altogether twenty years, and the Postmaster General could not arbitrarily terminate the agreement without cause, at the end of the first ten year period.

He therefore held that the Petition of Right disclosed a cause of action. He, however, left it open to the parties to try out the issue as to the proper fulfilment of the agreement by the Licensee during the first ten years. From that decision His Majesty appeals to this court.

On the argument before us counsel for His Majesty did not seriously question the correctness of the construction placed by the learned President upon clause 1 of the agreement, and with that construction I entirely agree. The main questions argued before us was as to the authority of the Postmaster General to make the contract, and his right subsequently to terminate it. Counsel for His Majesty contended that he had no authority to make it because authority had not been given to him to make a contract for the vending of stamps which would fetter the future exercise of his discretion, or that of his successor in office, as to what might be in the public interest.

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That the Postmaster General could only exercise the power vested in him admits of no doubt. It also, in my opinion, admits of no doubt that as the executive head of the Post Office Department, carrying on the business of the department for the public good, the Postmaster General would have no authority, by means of a contract, to restrict or limit the exercise of his discretion, or that of his successor in office, as to what at any time the public interest required unless authority to make such a contract had been vested in him either expressly or by necessary implication. Without such authority the contract would not be binding upon His Majesty. This, I think, is clear upon the decided cases, to one of which only I need refer. In *Ayr Harbour Trustees v. Oswald* (1), the legislature had conferred upon the Harbour Trustees power to compulsorily take land for a particular purpose. The trustees took the respondent's land but sought to lessen the compensation which should be paid to him by agreeing that the conveyance to them should restrict their use of the land taken so as not to interfere with the access from the remaining property of the owner to the harbour. It was held that the trustees could not bind either themselves or their successors by the agreement. In his judgment, at page 634, Lord Blackburn says:—

I think that where the legislature confers powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void.

The question then is: Was authority vested in the Postmaster General to make the contract which he, in fact, did make?

Section 2 of the *Post Office Act* then in force (R.S.C., 1906, c. 66, as amended 1911, c. 19), defines a post office as follows:—

In this Act, unless the context otherwise requires, "post office" means any building, room, post office railway car, street letter box, street

stamp vending box, receiving box or other receptacle or place where post letters or other mailable matter are received or delivered, sorted, made up or despatched.

and section 9, in part, reads:—

The Postmaster General may, subject to the provisions of this Act,—

(n) establish and provide street letter boxes or pillar boxes or boxes of any other description, for the receipt of letters, and such other mailable matter as he deems expedient, or for the sale of stamps or other post office supplies, in the streets of any city or town in Canada, or at any railway stations or other public places where he considers such boxes necessary.

(o) grant licences, to agents other than postmasters, for the sale to the public of postage stamps and stamped envelopes, and allow to such agents a commission not exceeding two per centum of the amount of their sales.

As the Parliament of Canada has, by section 91 (5) of the *British North America Act, 1867*, exclusive legislative jurisdiction over the Postal Service, section 9, above quoted, vests in the Postmaster General authority to establish and provide in the places therein mentioned boxes for the sale of stamps, that is automatic stamp vending machines. It also authorizes him to grant licences for the sale of stamps and to pay a commission on the amount of the stamps sold thereunder. To “provide” boxes, means to procure, furnish or supply them. It is not, in my opinion, confined to furnishing boxes by purchase, but includes obtaining them by hire or lease, or securing their erection and use by means of a contract to that effect. Authority to hire, lease or contract for the use of automatic vending machines, implies authority to make a contract for a certain period of time. The statute places no limit upon the time for which a contract, under the section, may be made. That is left to the discretion of the Postmaster General and, in the present case, he has exercised his discretion by fixing the period at that set out in the agreement.

In his petition the respondent alleges that he has expended large sums of money “in the acquisition of the said licence and in erecting pillar boxes and vending machines.” To recoup himself for this expenditure by means of a 2% commission on the sales made would require some considerable time. As a matter of business therefore, the Postmaster General, in order to secure the construction and erection of the machines, with an expenditure only of a 2% commission, was necessarily obliged to grant a licence to sell stamps for a long period. Without such a licence no

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one would incur the initial expenditure for the machines. It is not suggested that the period fixed by the agreement was more than sufficient to enable the respondent to recoup himself for his expenditure and secure a reasonable interest thereon. The period for which the licence was granted is, therefore, not shewn to have been unreasonable.

The object the parties had in view is, I think, clear: The Postmaster General was obtaining, for the convenience of the public, without the expenditure of one dollar of the public money beyond the statutory 2% commission, machines which would automatically sell to the public whatever stamps it might require; while the respondent was obtaining a virtual monopoly of the stamp vending business for twenty years (unless machines more suitable for the purpose were invented) and a 2% commission on the stamps sold. In addition he would have whatever advantages might be derived from advertising or vending his own goods or those of his assigns or lessees in compartments of the vending machines other than those used for vending stamps or receiving mailable matter. With the advertising and vending of these goods the Postmaster General had nothing to do beyond granting permission to the respondent to have compartments for these purposes in the boxes erected in streets and highways, and to use them for such purposes. It was contended that the Postmaster General had no authority to make a contract "whereby the Post Office business was to be mixed up with a merchandising and advertising scheme." In my opinion, if the Postmaster General had been buying stamp vending machines he could, without at all exceeding his authority, have purchased machines having all the compartments which the respondent's machines possessed, and, if certain of these compartments were not required for post office purposes, I can see no reason why they should not, by leasing or otherwise, be made to yield a revenue for the department.

It was also contended that if section 9 were construed as giving authority to contract for the use of stamp vending machines for a definite period of time, it would enable the Postmaster General "to contract himself and his successors out of the right to close post offices and discontinue stamp vending boxes in his discretion." In my opinion the right

of the Postmaster General to close a post office depends upon considerations entirely different from his right to discontinue the use of a stamp vending machine, the use of which he has contracted to continue. The right in the former case depends upon a consideration of what the public interest requires. The public has no more interest in the individual who sells stamps than it has in the individual with whom the Postmaster General contracts for post office supplies. I quite agree that the Postmaster General cannot, by contract, deprive either himself or his successors in office of the right to close a post office if the public interest requires that it should be closed. Authority to close a post office is given to him by the statute, but his right to close a post office is in no way interfered with by the agreement in question. Under section 2 (1) a stamp vending box becomes a post office only when it contains a receptacle or compartment in which letters or other mailable matter may be placed. They can only be so placed with the consent of the Postmaster General. In my opinion section 2 does not mean that a street stamp vending machine which, during the time letters were deposited in a compartment thereof, was a post office, continues to be a post office after the Postmaster General has closed that compartment. The moment the compartment has been closed, the vending machine ceases to be a post office.

Another contention advanced was that the Postmaster General, being the owner of the vending machines erected in streets and highways and having the exclusive control of the stamp vending compartments therein, could use or refrain from using those compartments at his option. This, I think, would be true unless he was under a contractual obligation to continue the use of the vending compartments during the term of the agreement. Such a contractual obligation I find in the last paragraph of clause 10.

I am therefore, of opinion that the Postmaster General, in making the agreement in question with the respondent, did not exceed the powers vested in him by the statute. Had Parliament altered the law so as to no longer require the use of stamps on mailable matter, other considerations would apply, but as Parliament by authorizing the use of stamp vending machines declared such use not to be con-

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trary to the public interest, and has, up to the present, continued in force that statutory provision, a change in the personal views of the Postmaster General would not, in my opinion, justify the breaking of a contract validly made by him for the sale of stamps.

The only remaining question is, had the Postmaster General authority to determine the agreement at the end of the first period of ten years? If the agreement is to be construed as a valid contract, then its termination by the Postmaster General undoubtedly constituted a breach thereof for which His Majesty is liable. In *Windsor and Annapolis Railway Co. v. The Queen and the Western Counties Railway Co.* (1), the Privy Council said:—

Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown.

It is, however, suggested that the agreement on its true construction amounts to no more than a bare licence to sell stamps by means of stamp vending machines if the respondent wished to set up such machines. It is quite true that the agreement places the respondent under no obligation whatever to erect a single machine or to sell a single stamp. The agreement, nevertheless, was based on the assumption that he would do both. And, in view of the fact that the Postmaster General was to have vested in him the property in the machines erected in streets and highways until the termination of the agreement and to have the exclusive control of the stamp vending compartments in all machines, except those referred to in clause 11, I find it difficult to reach the conclusion that the agreement was not something more than a mere licence. Assuming however, in favour of His Majesty, that it was not, I am still of opinion that the respondent is entitled to succeed.

At common law a mere licence (that is one not coupled with a grant or an interest), whether under seal or not and whether for valuable consideration or not, was revocable at any time by the licensor. If coupled with a grant or interest it was not in general revocable because the licence was necessary to make the grant effective. *Wood v. Lead-*

bitter (1). Even before the *Judicature Act*, if the licence was continuous and the licensee had expended money on the faith of it, courts of equity would not permit the licence to be revoked except upon terms. *Jackson v. Cator* (2); *Ramsden v. Dyson* (3). Since the *Judicature Act* the court is bound to give effect to equitable rules and it can no longer be said that a mere licence is always revocable.

In *Plimmer v. Mayor, etc., of Wellington* (4), the plaintiff's lessor had, prior to 1856, obtained a revocable licence from the Government to erect a wharf and a jetty. In 1856, at the request of the Government and for its benefit, he incurred a large expenditure for the extension of his jetty and the erection of a warehouse. These the Government used and made payments for such use. In 1880 the land was vested in the defendants by statute and two years later they took possession. Plimmer claimed compensation. In giving the judgment of the Privy Council, Sir Arthur Hobhouse, at page 712, after referring to the *Ramsden v. Dyson* case (3), said:—

In the present case, the equity is not claimed because the landowner has stood by in silence while his tenant has spent money on his land. This is a case in which the landowner has, for his own purposes, requested the tenant to make the improvements. The Government were engaged in the important work of introducing immigrants into the colony. For some reason, not now apparent, they were not prepared to make landing-places of their own, and in fact they did not do so until the year 1863. So they applied to John Plimmer to make his landing-place more commodious by a substantial extension of his jetty and the erection of a warehouse for baggage. Is it to be said that, when he had incurred the expense of doing the work asked for, the Government could turn round and revoke his licence at their will? Could they in July, 1856, have deprived him summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible.

In *Hurst v. Picture Theatres, Limited* (5), the plaintiff purchased a ticket for a seat in the theatre and paid for it and was shewn to a seat by an attendant. Under the mistaken belief that he had not paid for it the defendant ejected him. He brought an action for damages and it was held that he was entitled to recover. At page 10, Buckley L.J., says:—

There is another way in which the matter may be put. If there be a licence with an agreement not to revoke the licence, that, if given for

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(1) (1845) 13 M. & W., 838; 153

E.R., 351.

(2) (1800) 5 Ves. 688.

(3) (1865) L.R. 1 H.L., 129.

(4) (1884) 9 App. Cas. 699.

(5) [1915] 1 K.B. 1.

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value, is an enforceable right. If the facts here are, as I think they are, that the licence was a licence to enter the building and see the spectacle from its commencement until its termination, then there was included in that contract a contract not to revoke the licence until the play had run to its termination. It was then a breach of contract to revoke the obligation not to revoke the licence, and for that the decision in *Kerrison v. Smith* (1) is an authority.

In *Whipp v. MacKey* (2), the court had before it an agreement in writing, dated May 10, 1919, by which the defendant's assignor obtained liberty to moor eel tanks to an island in the river Shannon at an annual rental. One of the clauses provided that if the tenant should "commit any breach of this agreement the landlord shall be at liberty, upon giving one week's notice, * * * to determine the licence hereby created." A breach was committed by the non-payment of rent and the requisite notice given. The plaintiff brought an action in which he claimed an injunction restraining the defendant from mooring eel tanks to the island. It was held that the agreement was simply a licence for valuable consideration for the period specified; that such an agreement was revocable according to the terms of the contract *but not otherwise*; that the non-payment of the rent was a breach thereof, but that it was one against which the defendant ought to be relieved on equitable grounds as the clause had been inserted as a penalty.

See also *British Actors Film Co. v. Glover* (3); *King v. David Allen & Sons Bill Posting, Limited* (4); *McManus v. Cooke* (5); *Wilson v. Tavener* (6); *Lowe v. Adams* (7); *James Jones & Sons v. Tankerville* (8).

These authorities establish that a licence, if given for value, or a licence with an agreement not to revoke it, if given for value, is an enforceable right and cannot be revoked without sufficient cause. I think they go even further and justify the conclusion that if the agreement for the giving or the continuing of a licence, or the circumstances under which it is given or continued, are such as to make it inequitable that the licence should be revocable at the will of the licensor, a court will exercise its equitable

(1) [1897] 2 Q.B. 445.

(2) [1927] I.R. 372.

(3) [1918] 1 K.B. 299.

(4) [1916] 2 A.C. 54.

(5) (1887) 35 Ch. D. 681.

(6) [1901] 1 Ch. 578.

(7) [1901] 2 Ch. 598.

(8) [1909] 2 Ch. 440.

jurisdiction to prevent the unjust revocation of the licence. If the agreement itself contains a clause providing for its determination that method of terminating it must be followed. If no such provision is made then reasonable notice must be given and the court may in applying equitable remedies select that remedy which is most suitable to the circumstances of the particular case.

In the case before us, even if the agreement could have been revoked before the respondent expended money in the construction of the machines, as to which I express no opinion, once the respondent had expended money on the faith of the licence given by the agreement, an equity, in my opinion, was created in his favour which rendered it unfair and unjust that the licence should be revoked. The agreement, in the light of what was contemplated by and done under it, should, therefore, be construed as containing an implied contract not to revoke it except in accordance with the provisions for its determination contained therein. As it has not been shewn that the respondent failed to properly fulfil his obligations under the agreement during the first ten year period, its determination at the end of that period constituted a breach of the agreement.

The respondent's petition therefore shews a cause of action to be tried. That cause of action is the loss which he has sustained through being deprived of his right to vend stamps for the period of his agreement and to earn a 2% commission on the amount which would have been sold.

The appeal should be dismissed with costs.

Appeal allowed with costs, reserving right to suppliant to proceed on questions of accounting and responsibility for loss of commission earned as alleged by it.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondent: *Cassels, Brock & Kelley.*

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