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*June 12.

RUSSELL McKENZIE AND ALLEN McKENZIE .. .. } APPELLANTS;

AND

WILLIAM HUYBERS AND THE SHERIFF OF THE COUNTY OF HALIFAX. } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Statutes—Act to come into force on day to be fixed by proclamation—Proclamation fixing day—Appointment made under the Act before it came into force—Validity of appointment—Nova Scotia Acts, 1923, c. 30; 1924, c. 54; R.S.N.S. 1923, c. 1, s. 23 (44)—Imprisonment under The Collection Act, R.S.N.S., 1923, c. 232—Habeas corpus.

The appellants were imprisoned under *The Collection Act*, R.S.N.S., 1923, c. 232, for fraudulently contracting a debt which formed the subject of a judgment in the Supreme Court of Nova Scotia, they "intending at the time of the contracting of said debt not to pay the same." Their appeal to this Court was from the judgment of the Supreme Court of Nova Scotia *en banc* affirming (on equal division) the judgment of Mellish J. refusing, on return of a summons for a writ of *habeas corpus*, to discharge them from custody. The appellants attacked the committing order, mainly on the ground that M., the Ex-

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

(1) (1896) 26 Can. S.C.R. 200, at p. 202.

aminer who committed them (and whose adjudication was, on appeal, affirmed by Harris C.J., who, however, set aside the warrants issued and directed the issue of a new warrant), had no jurisdiction, as his appointment was void. S. 1 of c. 30, 1923, provided for the appointment of one or two Examiners for the city of Halifax. The Act was to come into force on a day to be fixed by proclamation. C. 54 of 1924, passed May 9, 1924, repealed s. 1 of c. 30, 1923, and substituted another section providing for the appointment of one or two Examaminers for the city of Halifax. On May 23, 1924, it was proclaimed that c. 30, 1923, as amended, should come into force on June 1, 1924. On the same day—May 23, 1924—M. was appointed as an Examiner for the city of Halifax. Appellants contended that his appointment was void, because made under the authority of a statute that was not in force at the time of his appointment.

Held (affirming the judgments below) that the proclamation that c. 30, 1923, as amended, should come into force on June 1, 1924, had the same effect as if that date had been fixed by the statute itself as the date when it should become effective as law; and it was common ground that in the latter case appointments could be made in anticipation of the statute coming into force; the proclamation made that certain which had been contingent; it must be presumed that everything was done regularly unless the contrary was shown; the proclamation and order of appointment bore the same date and were gazetted the same day; and it must be presumed that the proclamation preceded the appointment; the appointment was, therefore, valid, and this ground of appeal failed.

Held, also, that the appeal failed on the other grounds taken; as to the contention that the evidence before the Examiner and, on appeal, before Harris C.J., did not disclose any fraud within the meaning of s. 27, subs. 1 (*a*) and (*d*) of *The Collection Act,* it was held that the evidence could not be gone into for the purpose of ascertaining whether there was anything in it to warrant the finding of fraud; the principle of the decision in *R.* v. *Nat. Bell Liquors, Ltd.* [1922] 2 A.C. 128, applied.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc,* dismissing, on an equal division of the court, the present appellants' appeal from the refusal by Mellish J. of their application, on the return of a summons for a writ of *habeas corpus,* to discharge them from custody in the county jail at Halifax, where they were imprisoned under an order of Harris C. J., under *The Collection Act,* R.S.N.S., 1923, c. 232.

The appellants, against whom a judgment had been obtained for $8,400.40, were examined under *The Collection Act* before Richard A. MacLeod, Esq., who made two warrants of commitment, dated February 16, 1928, one against each appellant, committing him to gaol for six months or until he should pay the debt, on the ground that he "fraudu-

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lently contracted such debt, intending at the time of the contracting of said debt not to pay the same." These warrants were signed by Mr. MacLeod as "A Commissioner of the Supreme Court in and for the County of Halifax and an Examiner under *The Collection Act* for the City of Halifax. An appeal was taken, and was heard by Harris C. J., who confirmed the adjudication of Mr. MacLeod, but directed that the two warrants of commitment be set aside and that one warrant be issued, and that against both appellants, to keep them and each of them for the term of six months (to commence February 16, 1928) or until they or either of them should pay the debt.

A summons was taken out on appellants' behalf for a writ of *habeas corpus*, and, on its return, Mellish J. refused their application for discharge from custody; and their appeal from his order was dismissed by the Court *en banc*, on equal division of that court. They then appealed to the Supreme Court of Canada. Special leave to take such appeal was granted by the Court *en banc*.

The main ground of attack on the committing order (and the only ground on which there was a difference of opinion in the Court *en banc*) was that Mr. MacLeod had no jurisdiction, as his appointment as Examiner was void, and that the order of Harris C. J., on appeal, was likewise void, for want of jurisdiction in the Examiner. Other grounds were taken, including the grounds that the order of Harris C. J., was bad on its face, as showing that a Commissioner originally acted in the examination, such Commissioner being forbidden so to act (in the order of Harris C.J., Mr. MacLeod was designated as "a Commissioner of the Supreme Court of Nova Scotia" and not as Examiner); and that the evidence taken before Mr. MacLeod, and Harris C. J., on appeal, did not disclose any fraud within the meaning of s. 27, subs. 1 (a) and (d) of *The Collection Act*.

Chapter 30 of the Acts of 1923 (An Act to amend *The Collection Act*, R.S.N.S. 1900, c. 182), passed April 23, 1923, provided, by s. 1 (adding a subsection to s. 5 of said c. 182), that

> The Governor in Council may appoint a person to be a functionary or two persons to be functionaries respectively for the purposes of this Act in the city of Halifax, each such functionary to be called "An Examiner under the Collection Act for the city of Halifax.

The Act (c. 30 of 1923) was to come into force on a day to be fixed by proclamation of the Governor-in-Council. On May 9, 1924, before such proclamation was made, Chapter 54 of the Acts of 1924 (An Act to amend c. 30 of 1923, and *The Collection Act,* c. 232, R.S.N.S. 1923) was passed. By s. 1 of that Act, s. 1 of c. 30, 1923, was repealed, and there was substituted a provision that

> The Governor in Council may appoint one or more persons to be a functionary or functionaries respectively for the purposes of this Chapter in the city of Halifax, each such functionary to be called "An Examiner under 'The Collection Act' for the city of Halifax."

By proclamation dated May 23, 1924, it was declared that c. 30 of 1923, as amended, should come into force on June 1, 1924. On the same day—May 23, 1924—Mr. MacLeod was appointed to be an Examiner under *The Collection Act* for the City of Halifax.

It was contended on behalf of the appellants that the appointment of Mr. MacLeod was void, because made under the authority of a statute that was not in force at the time of his appointment.

In the Court *en banc,* Chisholm J., with whom Graham J. concurred, was of opinion that subs. 44 of s. 23 of c. 1, R.S.N.S. 1923 (*The Interpretation Act*), applied to c. 30 of 1923, and that it was proper to appoint Mr. MacLeod as Examiner as was done. Jenks J., with whom Carroll J. concurred, took a different view.

A. H. Russell K.C. for the appellants.

No one appeared for the respondents.

At the conclusion of the argument for the appellants, the judgment of the court was orally delivered by

ANGLIN C. J. C.—It is not necessary to reserve judgment in this case. We are all of the opinion that the judgment delivered by Mr. Justice Chisholm in the court below is correct. The basis of his judgment is that the proclamation that the amendments to the Debt Collection Act should come into force and operation on a date therein named had the same effect as if that date had been fixed by the statute itself as the date when it should become effective as law. It is common ground that in the latter case appointments could be made in anticipation of the statute coming into force. The proclamation made that certain which had been contingent.

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It must be assumed that everything was done regularly in such a case as this unless the contrary is shewn. The proclamation and order of appointment bear the same date and were gazetted on the same day. It must be presumed that the proclamation fixing the date for the Act to come into force preceded the making of the appointment.

As to the other points taken—if some of them are open to review at all here, which we very much doubt—I do not think they call for any extended opinion from us.

The suggestion that the examining officer is wrongly designated in the order of the learned Chief Justice is scarcely worthy of consideration. His jurisdiction being clear, it is of little moment that there is not precise accuracy in his designation. He was a well known official, and there can be no doubt as to the capacity in which he acted. It was as Examiner under the Statute.

The evidence cannot be gone into for the purpose of ascertaining whether there was anything in it to warrant the finding of fraud. The principle of the decision in *Rex* v. *Nat. Bell Liquors Ltd.* (1) applies. The sole question of importance is that of the validity of the Examiner's appointment, and of that we entertain no doubt.

The appeal is dismissed, and, as no one appeared for the respondent, without costs.

Appeal dismissed.

Solicitor for the appellants: *J. H. Power.*