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*Feb. 23.
*April 20.

THE CUSTODIAN (RESPONDENT).....APPELLANT;

AND

LOTHAIR WILLIAM GEBHARD BLUCHER (CLAIMANT) ..... } RESPONDENT;

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Interest—Exchange—Dividends on company shares—Right to receive dividends suspended during the War—Trading with the enemy regulations—Dividends payable in United States currency—Payment after the War—Conversion into Canadian funds—Rate of exchange—Time as to which prevailing rate applied—Right to interest on dividends withheld.

At the beginning of the War the claimant, a British subject, owned shares of stock in C. Co. As these shares were registered in the name of an enemy bank, payments of dividends were withheld during the War, the Custodian becoming entitled to receive them by the trading with the enemy regulations. The dividends were, however, retained by C. Co. After the peace, the claimant established his right to the shares and accrued dividends; the Custodian released them; and on 1st June, 1921, C. Co. registered the shares in the claimant's name and paid him the dividends accrued after 1st October, 1917, but still withheld the previous dividends. These were paid in March, 1924, except as to disputed claims to premium of exchange and interest. The dividends were payable in United States currency. The payment in 1924 was in the Canadian equivalent of the amount in United States funds, as of February, 1924. The Custodian, under an arrangement, assumed C. Co.'s liability to the claimant for the balance of his claim, both for premium of exchange and for interest, and the claimant sued the Custodian in the Exchequer Court. Audette J. held ([1926] Ex. C.R. 77) that the claimant should be paid at the rate of exchange ruling on the date when each dividend became due and payable to the Custodian, and should be paid interest from 1st June, 1921. The Custodian appealed, denying the claimant's right to interest; and the claimant cross-appealed, claiming the difference in exchange as of 1st June, 1921, or, in the alternative, more interest.

Held, the rate of exchange should be that which ruled at the time when each of the dividends became due and payable to the Custodian, who was the lawful recipient during the war, and not that of 1st of June, 1921, when the claimant became entitled to receive them; had there been no war, the conversion to Canadian money should have been made as at the time when the obligation to pay in foreign currency was incurred, that is, the respective dates when the dividends were declared to be payable (cases cited); and the fact that, at the times fixed for payment, the claimant's right to receive them was suspended by reason of the war, was not a ground for application of a different rule.

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

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Held, further, that, having regard to s. 34 of the Ontario *Judicature Act,* and to its interpretation in *Toronto Railway Co.* v. *City of Toronto* ([1906] A.C. 117, at pp. 120-121), interest should be paid from 1st June, 1921, as upon a just debt improperly withheld; the dividends constituted a "debt" within the meaning of the interpretation given to the statute; the right of recovery was in suspense during the war, but the debt nevertheless remained; that the dividends were payable in U.S. currency did not alter their character as a debt (*In re Severn and Wye and Severn Bridge Ry. Co.,* [1896] 1 Ch. 559; *Ehrensperger* v. *Anderson, 3 Ex. 148; Société des Hôtels le Toquet Paris-Plage* v. *Cummings,* [1922] 1 K.B. 451; *Manners* v. *Pearson,* [1898] 1 Ch. 581, referred to); the claimant's contention that interest should be reckoned from the respective dates when the dividends were declared, could not succeed, because these were not contractually interest bearing debts, and the withholding of the dividends during the war was lawful, and therefore should not be visited by damages.

APPEAL by the Custodian from the judgment of Audette J. in the Exchequer Court of Canada (1) in so far as it allowed the claimant's claim to interest; and cross-appeal by the claimant from the said judgment in so far as it held that the rate of exchange for conversion into Canadian currency of the dividends payable to him must be the rate ruling on the date when each dividend became due and payable to the Custodian, and not the rate of exchange as of 1st June, 1921, as claimed by the claimant; and, in the alternative, if the said judgment be held to be correct as to the time or times for conversion into Canadian funds of the dividends in question, then in so far as the said judgment awarded interest only from 1st June, 1921, and not from the respective dates when each dividend became due and payable to the Custodian.

The material facts of the case, and the respective contentions of the parties, are sufficiently stated in the judgment now reported.

G. Wilkie K.C. and *J. Mulvey* for the appellant.

J. W. Bain K.C. and *E. Bristol* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—This case was tried upon admissions, and there is an appeal and cross-appeal.

At the beginning of the War, 420 shares of the capital stock of the Canadian Pacific Railway Company, which were registered in the name of the Nationalbank fur

(1) [1926] Ex. C.R. 77.

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Deutchsland, belonged to the claimant, who was a British subject; and, as this was an enemy bank, payments of dividends upon the stock were of course withheld during the War, the Custodian becoming entitled to receive them by the trading with the enemy regulations. The dividends were nevertheless retained by the Railway Company, although subsequently, by order of the Superior Court of Quebec of 23rd April, 1919, the shares registered in the name of the Nationalbank fur Deutchsland, including those of the claimant, were, together with the dividends, declared to be vested in the Custodian, and moreover, pursuant to the order, the stock was registered in his name. The claimant, after the peace with Germany, established his status as a British subject, and his right to the 420 shares and the accrued dividends; the Custodian released them; and, on 1st June, 1921, the Railway Company registered the shares in the name of the claimant, and paid to him the dividends accrued after 1st October, 1917, but the previous dividends, amounting to $13,650, were still withheld by the company. It is admitted that these dividends were payable in United States currency, and the claimant therefore sought to recover from the company payment, not only of the said sum of $13,650, but also 12% thereof for excess value of United States funds, that being the rate of exchange in favour of the United States prevailing on 1st June, 1921, when the claimant's stock was restored; he also claimed interest thereon from the latter date. The Railway Company having refused to recognize this claim, the claimant instituted an action in Ontario against the company to recover these amounts, and that action was, on 3rd March, 1924, settled by payment of $14,085.09, the Canadian equivalent of $13,650 in United States funds as of February, 1924, the latter being then at a premium of 3·2%. At the same time an arrangement was made between the parties and the Custodian, the reasons for which are not disclosed, by which the Custodian assumed the liability of the Railway Company to the claimant for the balance of his claim, both for premium of exchange and for interest. Afterwards the claimant instituted proceedings in the Exchequer Court of Canada against the Custodian to recover $3,309.72, according to the following particulars:

1st June, 1921—		
Market value in Canada of $13,650 in United States funds then at a premium of 12 per cent	$15,288.00	
Interest thereon to 3rd March, 1924, at 5 per cent	2,106.81	
	$17,394.81	
3rd March, 1924—		
By cash, being value of $13,650 in United States funds then at a premium of 3·2 per cent	14,085.09	
Balance due as of 3rd March, 1924	$ 3,309.72	

By the judgment of the Exchequer Court, the claimant recovered $1,641.27, the learned judge finding, for reasons which he states and upon the authorities to which he refers,

> that the rate for conversion must be the rate ruling on the date when each dividend became due or payable to the Custodian, and not either the 1st of June, 1921, or the 3rd of March, 1924, that is at the date of the breach or default (such) a sum in Canadian currency as would at that date have been produced by the American currency.

And he found that the claim for interest, upon the amount as so figured, should be allowed.

The Custodian appeals, denying the plaintiff's right to interest; and the claimant cross-appeals, claiming the difference in exchange as of 1st June, 1921; or, in the alternative, more interest.

On behalf of the Custodian, it is maintained that this is an action, not of debt, but to recover damages for non-delivery of United States currency which must be treated as a mere commodity, and that the measure of damages is not interest to compensate for delay in payment, but is to be ascertained as in the case of goods, by comparison of the contract price with the market price at the time of delivery.

Now it is settled law that interest is payable only by statute, or when contracted for, and, as there is in this case no contract to pay interest, the right therefore must rest upon statute. The liability for interest in judicial proceed-

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ings is regulated in Ontario by sections 34 and 35 of the *Judicature Act;* and, although there was some discussion of s. 35 at the hearing, it became in the end matter of common ground that s. 34 is, for this case, the governing provision; it enacts that " Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it." Mr. Holmested, in his 4th ed. at p. 195, very truly says that " Interest is in practice more frequently allowed by our juries than English authorities would seem to warrant," and the highest authority for this statement is to be found in Lord Macnaghten's judgment in the Judicial Committee in *Toronto Railway Co.* v. *City of Toronto* (1), where, referring to the section which I have quoted, and to the provincial decisions in which it had been expounded, His Lordship said:

> The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right.

This interpretation of the statute appears to me conclusive of the appeal. The Custodian presents a powerful argument to demonstrate that the liability was not for a sum certain, or payable by virtue of a written instrument at a time certain, and that there had been no demand in writing claiming interest from the date of the demand. This might have been effective if the claim were founded solely upon s. 35 of the *Judicature Act,* but the claimant, very judiciously I think, does not rely upon this section, and these considerations do not, in the circumstances of the case, make against the equity or fairness of an allowance of interest to compensate for the delay. When, on 1st June, 1921, the Railway Company registered the claimant as owner of the stock, and when it paid him the dividends accrued since October, 1917, it knew that he was equally entitled to the earlier dividends; that these amounted to 13,650 United States Dollars, and that the exchange, whatever the proper rate might be, was in favour of the United States. Moreover it ought to have been reasonably plain to the company that the claimant should have had the

(1) [1906] A.C. 117, at pp. 120, 121.

benefit of exchange, at least to the same extent as if the payments could have been made quarterly from time to time as the dividends were declared. Therefore I think that the fair and equitable character of the claim for interest is not, and cannot be, successfully assailed. Then, was the liability for payment of the $13,650 a just debt? That it was just is not in question. Ordinarily, when a company declares a dividend, a debt becomes payable to the shareholder in respect of his dividend for which he can sue at law. *In re Severn & Wye & Severn Bridge Railway Co.* (1). The right of recovery was in suspense during the War, but the debt nevertheless existed; it was payable, it is true, in United States currency, but in *Ehrensperger* v. *Anderson* (2), it was held to be no objection to an action upon the common count for money had and received, that the money had been received in rupees and not in English currency. Parke B., said:

> Upon that objection, certainly, we consider that the plaintiff is not prevented from recovering. There are two authorities on the subject: one of these is a case of *Harington* v. *Macmorris* (3), in which an objection having been made, that the money received was foreign money, Lord Chief Justice Gibbs, then Mr. Justice Gibbs, treated that objection as having been exploded for thirty years. The real meaning of such a count is, that the defendant is indebted for money of such a value or amount in English money. However, the objection appears to have been listened to, perhaps more than it ought to have been, in a subsequent case of *McLachlan* v. *Evans* (4); but the Court of Exchequer held that an action for money had and received for English money would not lie, unless there had been a reasonable time, after the receipt of the foreign money, to convert it into English. Possibly that case cannot be received as being very satisfactory; at all events, we do not decide this case against the plaintiff on this ground.

Apparently a similar view was entertained in *Société des Hôtels le Touquet Paris-Plage* v. *Cummings* (5). Obligations payable in foreign money which, if payable in English money, would constitute debts are spoken of in the books as debts payable in foreign money. There is essentially no difference between a debt payable in England and one payable in a foreign country, except that, when a debt payable in foreign currency is recovered in England, the foreign amount must be converted into English money,

(1) [1896] 1 Ch. 559.
(2) (1848) 3 Ex. 148.
(3) (1813) 1 Marsh. 33; 5 Taunt. 228.
(4) (1827) 1 Y. & J. 380.
(5) [1922] 1 K.B. 451.

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because the court has generally no jurisdiction to order payment in any other currency. I have not overlooked the fact that the claimant, by his pleading, claims to recover the premium of exchange as damages by reason of the failure of the Railway Company to deliver to him United States funds representing the nominal amount of the dividends withheld, and I am aware that a suggestion in support of the propriety of a claim for damages is to be found in the judgment of Vaughan Williams L.J., in *Manners* v. *Pearson* (1); but I think the claim should be considered and effect given to the rights of the parties upon the facts admitted, and that, in the circumstances of this case and under the authorities which I have mentioned, the dividends constitute a debt within the meaning of the statute as interpreted. In substance there is a liquidated demand in money, and the withholding of payment is the cause of action. The form does not matter.

I am therefore of the opinion that the interest is payable, and I would dismiss the appeal with costs.

Upon the cross-appeal the claimant contends that the proper date for conversion of the dividends from United States currency to Canadian currency was 1st June, 1921, when, in view of the state of war which had existed and the identification of his stock with the enemy, he first was entitled to claim them. And moreover he contends, by his factum, that, if the dates for conversion should be as found by the trial judge, the interest should run from those dates.

As to the time for conversion, I think the learned judge of the Exchequer Court was right in principle, and upon the authority of the decisions, which in England have been substantially uniform, that the rate is that which ruled at the time when each of the quarterly dividends became due or payable to the Custodian, who was the lawful recipient during the War. The dates which were set up in competition are 1st June, 1921, when, after the War was over, the claimant became entitled to receive the dividends, and 3rd March, 1924, when the Railway Company paid to the claimant $14,085.09, the amount then representing, in Canadian funds, the unpaid dividends. I see no reason,

(1) [1898] 1 Ch. 581, at p. 594.

however, why the exchange should be computed as of a date depending upon the termination of the War and the diligence of the claimant in rectifying his title, nor why the claimant should derive any benefit from the fact that the Railway Company had failed to deposit these dividends with the Custodian as required by the trading with the enemy regulations. If the War had not occurred, the dividends would have been paid to the Nationalbank fur Deutchsland from time to time as they were declared and became payable. Neither the Company nor the Custodian is answerable for the legal delay in payment which was brought about by the War, although that is a condition with which the parties have to reckon. If there had been no war, the authorities are conclusive that, if payment were claimed in Canadian money, the conversion should be made as at the time when the obligation to pay in foreign currency was incurred, that is, the respective dates when the dividends were declared to be payable. See the following cases: *Cockerell* v. *Barber* (1); *Scott* v. *Bevan* (2); *Bertram* v. *Duhamel* (3); *Manners* v. *Pearson* (4); *Di Ferdinando* v. *Simon, Smits & Co. Ltd.* (5); *SS. Celia* v. *SS. Volturno* (6); *Société des Hôtels le Touquet Paris-Plage* v. *Cummings* (7); *In re British-American Continental Bank, Lim., Goldzieher and Penso's claim,* also *Liegeois' claim* (8); *Peyrae* v. *Wilkinson* (9).

The claimant, in effect, now seeks, in this action, the conversion of the debt into Canadian funds. The rate and times of payment of the dividends were regulated by the Railway Company when they were declared. Is there then a different rule because, at the time fixed for payment, the right was suspended by reason of the War? I say no. The obligation remained; it was by reason of the original obligation that payment was exigible, and, although the exercise of the right of conversion was, by the law, postponed, the right, when it became exercisable, had reference to the original subject-matter, and remained the same. It results

(1) (1810) 16 Ves. 461.
(2) (1831) 2 B. & Ad. 78.
(3) (1838) 2 Moore's P.C. 212.
(4) [1898] 1 Ch. 581.
(5) [1920] 3 K.B. 409.
(6) [1921] 2 A.C. 544.
(7) [1922] 1 K.B. 451.
(8) [1922] 2 Ch. 575 and 589.
(9) [1924] 2 K.B. 166.

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only in confusion to think of the time for conversion as shifting according to contingent or uncertain events, or the election of the claimant as to when he would establish his title.

The claimant's contention that interest should be reckoned from the respective dates when the dividends were declared cannot succeed, because these were not contractually interest bearing debts, and the withholding of the dividends during the War was lawful, and therefore is not to be visited by damages.

The cross-appeal should therefore be dismissed with costs.

Appeal and Cross-appeal dismissed with costs.

Solicitors for the appellant: *Wilkie & Hamilton.*

Solicitors for the respondent: *Bain, Bicknell, White & Gordon.*

On the 30th May, 1927, an application was made to the Court, on behalf of the Custodian, for a re-hearing of the above appeal, on the ground that the laws applicable to the issues raised upon the appeal of the Custodian were the laws of the province of Quebec, whereas the appeal had been submitted to the Court as if the laws of Ontario were the only laws applicable. The application was refused, the Court stating that the case was not one in which a re-hearing should be granted; it would be establishing a very dangerous precedent, to grant a re-hearing because of a point overlooked in argument; that was really all that the motion came to; that it was satisfied, from counsel's statement, that other cases would not be affected, as the point desired to be raised on the re-hearing applied for was still open to be raised in other cases; other cases would be affected only on such points as the judgment of this Court had directly decided.