

IN THE MATTER OF A REFERENCE TO THE SUPREME COURT
OF NOVA SCOTIA FOR HEARING AND CONSIDERATION UNDER
CHAPTER 226 OF THE REVISED STATUTES OF NOVA SCOTIA,
1923, OF THE MATTER OF THE CLAIM OF THE PROVINCIAL
TREASURER OF NOVA SCOTIA THAT CERTAIN FINES OUGHT
TO BE PAID OVER TO HIM UNDER SECTION 1036 OF THE
CRIMINAL CODE.

1937
* April
28, 29.
* June 1.

THE ATTORNEY - GENERAL OF } APPELLANT;
NOVA SCOTIA..... }

AND

THE ATTORNEY - GENERAL OF } RESPONDENT.
CANADA..... }

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA
IN BANCO

Criminal law—Constitutional law—Application of fines—Whether payable to the Province or to the Dominion—Cr. Code, s. 1036—Proceeding instituted at the instance of a Department of the Government of Canada in which that Government “bears the cost of prosecution” (exception (b) in s. 1036 (1), Cr. Code).

The question was whether certain fines in question should be paid to the Treasurer of the Province of Nova Scotia or to the Minister of Finance for Canada.

An information was laid at Halifax, Nova Scotia, at the instance of the Department of National Revenue of the Government of Canada, against certain persons as having conspired to commit specified indictable offences against the *Excise Act* and the *Customs Act*, and contrary to s. 573 of the *Criminal Code*.

The accused were, on a preliminary inquiry at Halifax, committed for trial, were subsequently admitted to bail, later they surrendered to the gaol keeper, they were granted writs of *habeas corpus* and *recipias corpus* to bring them before the stipendiary magistrate in and for the City of Halifax, before whom they were brought and charged, they consented to be tried by him under Part XVI of the *Criminal Code*, pleaded guilty, were convicted and adjudged to be imprisoned and to pay the fines now in question, aggregating \$16,000, which were paid to the treasurer of the City of Halifax.

Counsel for the informant, on instructions of the Department of National Revenue, appeared at the preliminary inquiry, on the applications for bail and for writs of *habeas corpus*, etc., and at the trial. The prosecuting officer for the County of Halifax, or his assistant, appeared on behalf of the Attorney-General of Nova Scotia on the same proceedings except the preliminary inquiry.

The Province or the Municipality of the County of Halifax made no disbursements. The Department of National Revenue paid direct to the parties concerned the fees of informant's counsel, costs of stenogra-

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

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pher's notes, and other costs, and fees of witnesses for the prosecution and fees and allowances of the justice of the peace on the preliminary inquiry. Witnesses' fees or the justice's fees and allowances were never certified to be correct nor produced or presented to the treasurer of the municipality in manner prescribed under *The Costs and Fees Act*, R.S.N.S. 1923, c. 252 (which provides for payment thereof) and no claim for fees by witnesses or the justice was made to the treasurer of the municipality. The Dominion Government did not pay for the services of the said prosecuting officer (or his assistant) or of the stipendiary magistrate (who each receive remuneration annually from the Government of Nova Scotia or the municipality).

Held: The fines in question were imposed in a proceeding instituted at the instance of the Government of Canada or of a department thereof, in which that Government bore the cost of prosecution, within the meaning of exception (b) in s. 1036 (1) of the *Criminal Code*, and were payable to the Minister of Finance for Canada.

Judgment of the Supreme Court of Nova Scotia *in banco*, 11 M.P.R. 335, affirmed on above ground.

Per Duff C.J., Rinfret, Kerwin and Hudson JJ.: The words "in which that Government bears the cost of prosecution" in said exception (b) in s. 1036 (1) do not relate to what may take place in a particular prosecution; they connote something broader than the mere casual occurrence of the payment of the costs in an individual case; they imply a consistent course of action sanctioned by law or by custom. The existence of *The Costs and Fees Act* of Nova Scotia cannot affect the construction nor preclude the true effect of s. 1036 of the *Criminal Code*, which is essentially federal legislation. As to custom or practice, the Government of Canada had full right to institute the proceedings and to conduct the prosecution in question; and the costs thereof were such as would usually and properly be borne by the Dominion of Canada; and, moreover, they in fact were so borne.

The provinces establish and maintain the ordinary criminal courts and, for this reason in itself, the "cost of prosecution" referred to in said exception (b) must be of a character apart from the ordinary costs of maintenance of those courts.

The said words "cost of prosecution" which the "Government bears" are necessarily referable to cost specially incurred in connection with the proceeding it has instituted. The fact that the trial was presided over by a stipendiary magistrate who is not paid by the Government of Canada, or the participation by the prosecuting officer, or his assistant, who are not paid by that Government, does not affect the situation. When acting in the premises, said magistrate and prosecuting officer (who receive their remuneration annually as aforesaid) are doing so merely as part of their regular duties; they were not paid specifically in connection with the prosecution in question.

Per Davis J.: Without attempting to define the full scope and extent of the statutory condition that the Government of Canada "bears the cost of prosecution," it is plain that in this case that Government did bear such cost within the meaning of that condition; and this is sufficient for the purpose of deciding the present question.

Quaere, as to the jurisdiction of this Court to entertain the appeal (on noting the language of the relevant provisions—ss. 1 and 6 of c. 226, R.S.N.S. 1923, under which the Reference was made to the Supreme Court of Nova Scotia, and s. 43 of the *Supreme Court Act*, R.S.C. 1927, c. 35)

APPEAL by the Attorney-General of the Province of Nova Scotia from the judgment of the Supreme Court of Nova Scotia *in banco* (1), holding that the amount of certain fines which the Provincial Treasurer of Nova Scotia claimed should be paid over to him by the City of Halifax or the Treasurer of the City of Halifax under s. 1036 of the *Criminal Code*, and which claim was referred to that Court by order in council under and by virtue of R.S.N.S. 1923, c. 226 (*Of the Decision of Constitutional and Other Provincial Questions*), was not payable over to the Provincial Treasurer under s. 1036 of the *Criminal Code* in the circumstances set forth in the statement of facts contained in the order in council, but that the same was payable to the Minister of Finance of Canada.

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The material facts are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The appeal to this Court was dismissed.

J. H. MacQuarrie K.C. for the appellant.

H. P. MacKeen K.C. for the respondent.

The judgment of Duff C.J., Rinfret, Kerwin and Hudson JJ. was delivered by

RINFRET J.—By order in council dated the 12th day of June, 1936, the Lieutenant-Governor of Nova Scotia, by and with the advice of the Executive Council of Nova Scotia, and acting under chapter 226 of the Revised Statutes of Nova Scotia 1923 (Entitled: "Of the Decision of Constitutional and other Provincial Questions"), referred this matter to the Supreme Court of Nova Scotia for hearing and consideration.

The Provincial Treasurer claims that the amount of certain fines hereinafter mentioned should be paid over to him by the City of Halifax, or the Treasurer of that city, under section 1036 of the *Criminal Code*; and the question to be decided in this appeal is whether the fines in question belong to the Province, represented by the Provincial Treasurer, or to the Dominion of Canada, represented by the Minister of Finance, under the following circumstances set forth in the order in council:

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On the 10th day of June, 1935, an information was laid in the city of Halifax, before a justice of the peace in and for the county of Halifax, by Frank E. McGowran, a corporal of the Royal Canadian Mounted Police, on the instructions of the Commissioner of the Royal Canadian Mounted Police at the instance of the Department of National Revenue of the Government of Canada.

The information and complaint were to the effect that certain persons therein named and domiciled respectively in the provinces of Nova Scotia, New Brunswick and Prince Edward Island had, at Halifax and elsewhere, between the 1st day of January, 1927, and the 8th day of June, 1935, conspired together and with one another to commit the following offences:

1. The indictable offence of having in their possession without lawful authority spirits unlawfully imported contrary to section 181 of the *Excise Act* 1927, and section 169 of the *Excise Act*, 1934, and section 573 of the *Criminal Code* of Canada.

2. The indictable offences of harbouring, keeping, concealing, purchasing and selling without lawful excuse alcoholic liquor unlawfully imported into Canada of a value for duty exceeding two hundred dollars, to wit, of a value of upwards of one millions dollars, without paying the duties lawfully payable thereon contrary to section 217 (3) of the *Customs Act*, 1927, and section 573 of the *Criminal Code* of Canada.

3. The indictable offence of smuggling and clandestinely introducing into Canada alcoholic liquor subject to Customs Duty of a value for duty of over two hundred dollars, to wit, of a value of upwards of one million dollars, contrary to section 203 (3) of the *Customs Act* as amended, and section 573 of the *Criminal Code* of Canada.

4. The indictable offence of by deceit or falsehood or other fraudulent means defrauding His Majesty the King in the Right of the Dominion of Canada of Customs and Excise duties to the extent of upwards of one million dollars.

The several persons charged in this information appeared before the justice of the peace in the city of Halifax to answer the charge; and a preliminary inquiry was held, as a result of which they were committed to the common gaol at the city of Halifax for trial on the said charge.

At the preliminary inquiry, the prosecution was conducted by counsel for the informant on instructions of the Department of National Revenue.

The persons charged were subsequently admitted to bail by a judge of the Supreme Court of Nova Scotia. On the application for bail counsel appeared on behalf of the informant, again on the instructions of the Department of National Revenue. On that occasion, the assistant to the

prosecuting officer for the county of Halifax appeared on behalf of the Attorney-General of Nova Scotia.

Later on, on the 27th day of September, 1935, the persons charged surrendered to the keeper of the common gaol and applied to a judge of the Supreme Court of Nova Scotia for writs of *habeas corpus* and *recipias corpus* to bring them before the stipendiary magistrate in and for the city of Halifax. On the application for these writs both the prosecuting officer for the county of Halifax appeared on behalf of the Attorney-General of Nova Scotia and counsel appeared on behalf of the informant on instructions of the Department of National Revenue.

The writs were granted, and by virtue thereof the accused were brought before the stipendiary magistrate and charged with the offence set forth in the information (then amended as will be mentioned later). They consented to be tried before the stipendiary magistrate under Part XVI of the *Criminal Code*. The amendment to the information consisted in striking off paragraphs 2 and 3 the words: "to wit, of a value of upwards of one million dollars"; thus leaving the "value for duty" of the alcoholic liquor unlawfully imported, or introduced, into Canada as exceeding two hundred dollars, without stating any definite amount. The information was further amended by striking out paragraph 4 thereof.

The accused pleaded guilty and they were convicted and adjudged to be imprisoned for terms varying in length, and also to forfeit and pay certain fines to be "applied according to law," the aggregate of which amounted to \$16,000.

At the trial, the prosecuting officer appeared on behalf of the Attorney-General of Nova Scotia, and counsel appeared on behalf of the informant on the instructions of the Department of National Revenue.

The fines imposed by the stipendiary magistrate were paid to the Treasurer of the City of Halifax, who has since held the same; and, in effect, the question submitted to the Supreme Court of Nova Scotia was: To whom, of the Provincial Treasurer or of the Minister of Finance of Canada, the amount of the fines should now be paid over by the Treasurer of the City of Halifax?

The judges of the Supreme Court of Nova Scotia were unanimous in the opinion that the amount of the fines were

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not payable over to the Provincial Treasurer under section 1036 of the *Criminal Code*, in the circumstances set forth in the statement of facts contained in the order in council; but that the same were payable to the Minister of Finance. Their reasons, however, for reaching that conclusion differed in the following respects: The Chief Justice (Mr. Justice Carroll and Mr. Justice Doull concurring) was of opinion that the fines should go to the Dominion Government, both because they have been "imposed in respect of the breach of the revenue laws of Canada" and also because they were imposed "in a proceeding instituted at the instance of the Government of Canada, or of a department thereof, in which that Government bore the cost of prosecution." Mr. Justice Ross (with whom Mr. Justice Hall concurred), while sharing the opinion on the second point and, therefore, on the result, stated that he was "not prepared at the moment to agree that the fines were imposed in respect of a breach of the revenue laws of Canada."

The matter is now referred to us under section 43 of the *Supreme Court Act*, in view of the fact that, by section 6 of chapter 226 of the Revised Statutes of Nova Scotia, 1923, the opinion of the Supreme Court of Nova Scotia upon the reference, although advisory only, is, for all purposes of appeal to this Court, to "be treated as a final judgment of the court between parties."

The answer to the question put by the Lieutenant-Governor in Council of Nova Scotia must result from the interpretation of the first paragraph of section 1036 of the *Criminal Code*.

That paragraph is as follows:

1036. Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any law or of the proceeds of an estreated recognizance, the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed or recovered, except that

- (a) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada, or imposed upon any officer or employee of the Government of Canada in respect of any breach of duty or malfeasance in his office or employment, and the proceeds of all recognizances estreated in connection with proceedings for the prosecution of persons charged with such breaches or malfeasances; and
- (b) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of

Canada or of any department thereof in which that Government bears the cost of prosecution, and the proceeds of all recognizances estreated in connection with such proceedings, shall belong to His Majesty for the public uses of Canada, and shall be paid by the magistrate or officer receiving the same to the Minister of Finance and form part of the Consolidated Revenue Fund of Canada.

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(N.B.—We omit the last part of the paragraph which concerns exclusively the province of Ontario.)

By force of the enactment, as will be observed, the general rule is that fines are payable over to the Treasurer of the province. They belong to His Majesty for the public use of Canada, they are to be paid to the Minister of Finance and to form part of the Consolidated Revenue Fund of Canada only in some particular cases which are exceptions to the rule.

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The Dominion government claims that the fines here in question come within either of two of the exceptions prescribed in the enactment. It is contended by the Attorney-General of Canada that they were "imposed in respect of the breach of any of the revenue laws of Canada," and that they were "imposed * * * in a proceeding instituted at the instance of the Government of Canada or of a department thereof in which that Government bore the cost of prosecution." The Dominion, to succeed, must establish that the fines came within one of the exceptions mentioned; but, on the other hand, the Province cannot succeed unless it is able to eliminate both exceptions.

For that reason, we find it sufficient to examine the question submitted in its relation to the second exception relied on by the Attorney-General of Canada. Our reason for doing so is obvious: it was the ground upon which all the learned judges of the Supreme Court of Nova Scotia agreed in their answers upon the reference; and, moreover, if we should reach the same conclusion as they have, it becomes unnecessary to deal with the respective claims of the parties in their relation with the first exception.

It is conceded that the proceeding as a result of which the fines were imposed was instituted at the instance of a department of the Government of Canada. It remains only to be seen whether it was a proceeding in which "that Government bears the cost of prosecution," within the meaning of subsection (b) of section 1036.

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The order in council states in terms that "no disbursements in connection with the said prosecution have been made by the Province of Nova Scotia or by the municipality of the county of Halifax." It is also therein stated that the fees of counsel who appeared on behalf of the informant on instructions of the Department of National Revenue, the amount of the account of the stenographer for taking shorthand notes of the evidence on the preliminary inquiry and for transcribing the same, and any other costs, fees, charges or expenses there may have been in connection with the said prosecution, were paid direct to the parties concerned also by the same Department of National Revenue. This Department likewise paid direct to them the sums of money required to the witnesses for the prosecution on the preliminary inquiry, or to the justice of the peace for fees and allowances claimed by him for his services in respect of the preliminary inquiry. No claim or demand by or on behalf of the witnesses or of the justice of the peace was ever made to the Treasurer of the municipality of the County of Halifax.

But, on behalf of the Province, the Attorney-General of Nova Scotia points out that, of course, the services of the prosecuting officer and those of the stipendiary magistrate were not paid by the Dominion Government. It is further asserted that, although the fees and allowances claimed by the justice of the peace and the witnesses' fees were paid by the Dominion, that was on the latter's part a purely voluntary and gratuitous payment, because these fees, charges and expenses are already provided for in a provincial statute, *The Costs and Fees Act* (ch. 252 of the Revised Statutes of Nova Scotia, 1923); and that such fees and charges were never certified to be correct, nor produced and presented to the Treasurer of the municipality of the county of Halifax in the manner prescribed in the schedule to Part II of that provincial statute; whereas, if the prescriptions of that statute had been followed by the justice of the peace and the witnesses, their fees and charges would have been met and paid as provided for therein.

The respective rights of the parties, however, must be determined in accordance with the true construction of the section of the *Criminal Code* which applies; they cannot be made to depend upon what may have happened in this

particular instance. It may not be left to the option of one party to act in a certain way and later to claim the fines on the strength of the procedure it has elected to follow. The answer which the court must give must flow essentially from the language of the statute. And when the statute enacts that the fines are to belong to the Government of Canada in a proceeding "in which that Government bears the cost of prosecution," that language does not relate to what may take place in a particular prosecution.

The phrase in the enactment: "in which that Government bears the cost of prosecution" connotes something broader than the mere casual occurrence of the payment of the costs in an individual case; it implies a consistent course of action sanctioned by law or by custom.

Moreover, the words "cost of prosecution" which, so it is enacted, the "Government bears" are necessarily referable to cost specially incurred in connection with the proceeding it has instituted and resulting in the imposition of the fines which, under the exception, become payable to the Minister of Finance.

For that reason, the fact that the trial was presided over by a stipendiary magistrate, who is not paid by the Government of Canada; or the participation of the prosecuting officer and his assistant, who are not paid by that Government, does not affect the situation. The magistrate and the prosecuting officer are receiving their remuneration annually either from the municipality or from the Government of Nova Scotia; and, when acting in the premises, they are doing so merely as part of their regular duties; they were not paid specifically in connection with the prosecution with which we are concerned, or with the proceeding herein instituted at the instance of the Government of Canada.

It cannot be questioned, as stated moreover in the order in council, that all the "costs, fees, charges or expenses there may have been in connection with the said prosecution" have been incurred and paid by the Government of Canada, and the question is whether they were costs which the Government of Canada bore within the meaning of section 1036.

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Whether the stipendiary magistrate could or could not have ordered the costs to be paid otherwise, it is sufficient to note that, in the convictions adjudging the payment of the fines, no order was made as to costs.

We have said that subs. (b) implied a consistent course of action sanctioned by law or custom. As to the law, there are no provisions in the *Criminal Code* expressly dealing with the matter in issue. Of *The Costs and Fees Act* of Nova Scotia, it is sufficient to say that, in our view, its existence cannot affect the construction, nor preclude the true effect, of section 1036 of the *Criminal Code*, which is essentially federal legislation. As to custom or practice, it cannot be doubted that the Government of Canada had full right to institute the proceedings and to conduct the prosecution before the court.

The provinces establish and maintain the ordinary criminal courts and, for this reason alone, we think that the costs of prosecution referred to in section 1036 of the *Criminal Code* must be of a character apart from the ordinary costs of maintenance of these courts.

As stated by Chief Justice Chisholm in his reasons for judgment in the present case:

It has always been the practice to permit counsel for the Government of Canada to act in revenue cases, nominally under the Attorney-General of the Province. The Attorney-General has the nominal, the counsel for the Government of Canada has the virtual conduct of such prosecutions. In no other way can the revenues of Canada be adequately or at all protected unless the Dominion is represented and given the conduct of the case.

We have no doubt that this statement of the learned Chief Justice, concurred in by the other judges of the court, rightly represents the situation.

In our view, the costs of prosecution in this case are such as would usually and properly be borne by the Dominion of Canada and, moreover, they here in fact were borne by the Dominion of Canada. For these reasons, we think that the amount of the fines in question is not payable to the Provincial Treasurer but is payable to the Minister of Finance of Canada.

The appeal should, therefore, be dismissed. There will be no order as to costs.

DAVIS J.—I agree that this appeal should be dismissed, but it is sufficient, in my opinion, to rest that conclusion upon the sole ground that the particular facts stated in the Reference satisfy the condition of section 1036 (b) of the *Criminal Code* that the Government of Canada “bears the cost of prosecution,” it being admitted that the proceedings were instituted at the instance of a department of that Government.

The facts are not in dispute. It is stated in the Reference that the information was laid by a member of the Royal Canadian Mounted Police on the instructions of the Commissioner at the instance of the Department of National Revenue of the Government of Canada; that the preliminary inquiry before a Justice of the Peace in the City of Halifax extended to eleven days during the months of July and August, 1935; that at the said preliminary inquiry the prosecution was conducted by two counsel for the informant, on instructions of the said Department of National Revenue; that on the application before a Judge of the Supreme Court of Nova Scotia of the several accused for bail, counsel appeared on behalf of the informant, on the instructions of the said department, and that an assistant to the prosecuting officer for the County of Halifax (receiving an annual salary from the Government of Nova Scotia) appeared on behalf of the Attorney-General of Nova Scotia; that subsequently on the return of writs of *habeas corpus*, counsel appeared on behalf of the informant, on instructions of the said department, and the prosecuting officer for the County of Halifax appeared on behalf of the Attorney-General of Nova Scotia; that at the trial counsel appeared on behalf of the informant, on instructions of the said department, and the said prosecuting officer for the County of Halifax appeared on behalf of the Attorney-General of Nova Scotia; that no disbursements in connection with the said prosecution have been made by the Province of Nova Scotia or by the Municipality of the County of Halifax, but the said prosecuting officer was receiving an annual salary from the Provincial Government; that the fees of counsel for the informant in connection with the said prosecution and the amounts of the account of a stenographer for taking shorthand notes of the evidence on the said preliminary inquiry and tran-

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scribing the same, and any other costs, fees, charges or expenses there may have been in connection with the said prosecution (other than those prescribed in the Schedule to Part II of *The Costs and Fees Act*, ch. 252 of the Revised Statutes of Nova Scotia, 1923) were paid direct to the parties concerned by the said Department of National Revenue; that the said department paid sums of money direct to the witnesses for the prosecution on the said preliminary inquiry, as fees claimed by them and prescribed in the said Schedule to said Part II of *The Costs and Fees Act* for their travel and actual attendance; that the said Department of National Revenue paid sums of money direct to the said Justice of the Peace as the fees and allowances claimed by him and prescribed in the said Schedule to said Part II of *The Costs and Fees Act*, for his services in respect of the said preliminary inquiry.

Without attempting to define the full scope and extent of the statutory condition that the Government of Canada "bears the cost of prosecution," it is plain, I think, in this case that the Government of Canada bore the cost of the prosecution within the contemplation of the statutory condition. It would, in my opinion, entirely defeat the object of the provision of sec. 1036 (b) if the facts of this case were held not to come within the language of the provision. That being so, there is no necessity to consider whether or not the Dominion could recover by virtue of the provision of sec. 1036 (a).

As the appeal is to be dismissed, it is not necessary to discuss the question of the jurisdiction of this Court to entertain the appeal, but it may be observed that sec. 43 of the *Supreme Court Act* gives a right of appeal to this Court

from an opinion pronounced by the highest court of final resort in any province on any matter referred to it for hearing and consideration by the Lieutenant-Governor in Council of such province whenever it has been by the statutes of the said province declared that such opinion is to be deemed a judgment of the said highest court of final resort and that an appeal shall lie therefrom as from a judgment in an action.

The provincial statute under which this Reference was made by the Lieutenant-Governor of Nova Scotia in Council to the Supreme Court of Nova Scotia is chapter 226 of the Revised Statutes of Nova Scotia, 1923. The relevant sections, 1 and 6, are as follows:

1. The Governor in Council may refer to the Supreme Court of Nova Scotia, for hearing or consideration, any matter which he thinks fit to refer, and the court shall thereupon hear and consider the same.

6. The opinion of the court upon any such reference, although advisory only, shall, for all purposes of appeal to the Supreme Court of Canada, or to His Majesty in Council, be treated as a final judgment of the court between parties.

Had we reached a different conclusion on the merits of this appeal, the question of the jurisdiction of this Court to entertain the appeal would have presented some difficulty.

Appeal dismissed.

Solicitor for the appellant: *F. F. Mathers.*

Solicitor for the respondent: *H. P. MacKeen.*

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