BETWEEN:

1958

HER MAJESTY THE QUEEN .....PLAINTIFF;

Oct. 14

Oct. 28

AND

ERNEST FRANK PFINDER AND EDITH EMELINE PFINDER .. } DEFENDANTS.

Practice—Information—Counterclaim joined to defence—Motion to strike out counterclaim—Fiat—Petition of Right Act, R.S.C. 1927, c. 158 (R.S.C. 1952, c. 210) s. 4, as enacted by 1951 (1 Sess.) c. 33, s. 1—Exchequer Court Act, R.S.C. 1952, c. 98, s. 36(1)—Exchequer Court r. 6(2).

Held: That by the repeal of s. 4 of the *Petition of Right Act,* R.S.C. 1927, c. 158 (now R.S.C. 1952, c. 98) by S. of C. 1951 (1 Sess.), c. 33, s. 1, and the enactment of a new s. 4, the necessity of obtaining a fiat as a condition precedent to proceeding against the Crown by petition of right was brought to an end. Under the new s. 4 an action may now be brought against the Crown by filing the original and two copies of the petition in the Exchequer Court of Canada.

2. That as a counterclaim is in effect a new suit in which the party named as defendant in the bill is plaintiff, and the party named as plaintiff under the bill is defendant, a fiat is no longer required to permit the filing of a counterclaim.

SEMBLE the enactment of the new s. 4 of the *Petition of Right Act* has rendered the reference to "fiat" contained in the *Exchequer Court Act,* R.S.C. 1952, c. 98, s. 36(1) and Exchequer Court r. 6(1), purposeless.

MOTION to strike out a counterclaim joined to a statement of defence filed in an action for damages brought in the Exchequer Court on the information of the Deputy Attorney General of Canada.

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T. E. Armstrong for the motion. No one appearing *contra.*

DUMOULIN J. now (October 28, 1958) delivered the following judgment:—

The plaintiff herein, Her Majesty the Queen, consequent to a collision between one of her motor vehicles and the defendants' automobile, in the City of Amherst, N.S., on January 15, 1958, filed an information for damages to her property in the sum of $838.75.

The statement of defence, coupled with several other grounds, urges a counterclaim to an extent of $2,047.52, as a result of personal injuries suffered by Mrs. Edith E. Pfinder, on that unfortunate occasion, and the cost of repairs to defendants' car.

It is moved, on plaintiff's behalf, that this counterclaim be struck out as derogatory to the *Exchequer Court Act,* c. 98, s. 36. (1), 1952 R.S.C., and to r. 6(2) of this Court.

It would seem that such an exception is probed for the first time since *An Act to amend the Petition of Right Act,* 1951 (1 Sess.), 15 Geo. VI, c. 33, was enacted in 1951, abrogating the former necessity of obtaining the Governor General's "fiat" as a condition antecedent to a claim at law against the Crown. I therefore believe an outline of the decision reached should be given, though this motion was unopposed.

Section 36 (1) of c. 98, 1952 R.S.C., cited as the *Exchequer Court Act,* reads thus:

> 36. (1) Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the department in connection with the administration of which the claim arises.

And r. 6(2), *Exchequer Court Rules,* prescribes that:

> 2. Actions, suits or proceedings against the Crown are to be instituted by filing a Petition of Right, or in any case where there is a Reference of a claim against the Crown by the Head of any Department, by filing a Statement of Claim.

This latter rule was substituted for the old one on August 21, 1951.

Conformably to the abrogating measure of 1951, the Revised Statutes of 1952, c. 210, rewrote the *Petition of Right Act* in appropriate context wherein no mention is made of the lapsed "fiat". Having thus disposed of a Crown prerogative and endowed the subject with a substantive and

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untrammelled right of impleading the Sovereign, it could be expected some delay might elapse before expunging, from the relevant statutes or rules, all traces of the old law, henceforward of no avail.

A rather cogent corroboration of this opinion derives, I think, precisely from s. 36. (2) of the *Exchequer Court Act,* whose s-s. (1) was quoted to me, with different expectations, by plaintiff's counsel.

Subsection (2) states:

> (2) If any such claim [against the Crown] is so referred [by the head of a department] no *fiat* shall be given on any petition of right in respect thereof.

As indicated above, c. 98, the *Exchequer Court Act,* of which s. 36 is a part, was passed in 1952, one year after the 1951 statute (15 Geo. VI, c. 33) had rendered any mention of "fiat", in connection with the petition of right, an obsolete and purportless word.

For reasons even stronger, since r. 6 (2) is merely procedural, a similar conclusion attaches to a similar argument attempted by counsel.

Procedure necessarily abates whenever no substantive right remains to be implemented.

So far, I have not overstepped, I trust, the pale of legitimate inferential deductions welling out of the law laid down by Parliament.

Let us now approach the subject-matter itself, quite apart from ancillary considerations of procedure.

Previously to the statute of 1951, there could be but one conclusion, namely that the legal requirement of a fiat acted as a compelling condition to all litigation against the Crown, in both eventualities of petition of right or counterclaim, for motives completely similar: the King's paramount rank as Fount of all Justice, *"Princeps fons omnis justitiae"*. The Sovereign now agrees to be impleaded before His Courts in the ordinary manner. If then claim and counterclaim are considered absolutely alike, in their practical objects, the subsequent removal of any hindrance in the prosecution of a claim likewise affects counterclaims. The trite dictum that "two things equal to a third [the fiat] are coequal between themselves" still remains sound enough logic, and, with evident modifications, also helps to assimilate petition of right and counterclaim.

Furthermore, counsel agrees that the law, obtaining since 1951, grants to every litigant a free access to a recourse against the Crown, but would except a counterclaim from such unimpeded "right of way". Why? Simply because s. 36 (1), (1952 R.S.C. c. 98), provides that: "Any claim against the Crown may be prosecuted by petition of right, . . ." and r. 6 (2) that: "Actions, suits or proceedings against the Crown are to be instituted by filing a Petition of Right, . . ." This was spoken to previously.

Now looking closer at the essence of a counterclaim we, at once, see that it is nothing but a "claim" emanating from the defendant.

In Black's Law Dictionary (fourth edition), v°: Counterclaim, we read:

> COUNTERCLAIM. A *claim* [italics are mine] presented by a defendant in opposition to or deduction from the claim of the plaintiff . . .

And some lines down, that:

> It is an *offensive* as well as a *defensive* plea . . .

And again:

> *It is in effect a new suit in which the party named as defendant under the bill is plaintiff and the party named as plaintiff under the bill is defendant . . .*

Exactly the situation foreseen by Parliament when it enacted c. 33 of the 1951 statutes.

Should it be objected, as a last retort, nor would I concede the point without some hesitation, that such a proceeding is a roundabout way of impleading the Crown, then, even so, whatever is directly permitted also is indirectly permissible.

For the reasons preceding, plaintiff's motion is dismissed without costs.

Judgment accordingly.