BETWEEN: 1938

WILLIAM JOHN SYKES.....SUPPLIANT; Mar. 29 & 30.

AND 1938

HIS MAJESTY THE KING.....RESPONDENT. Dec. 30.

Crown—Government Annuities Act, R.S.C., 1927, c. 7—Crown bound by doctrine of waiver—Mistake of fact—Unilateral mistake—Loss to be borne by party making the mistake—Specific performance decreed against the Crown—Exchequer Court Act, R.S.C., 1927, c. 34, s. 18 and s. 36—Rule 2, Exchequer Court Rules.

Suppliant, on December 20, 1934, applied to the Government of Canada for the purchase of a deferred annuity of $1,200 per annum, payable in quarterly instalments, the first payment to be made on December 20, 1936. The suppliant agreed to pay for this annuity at the monthly rate of $260.20 or $3,122.40 yearly. The application contained a clause reading ". . . reserving, however, the right to complete the contract by periodical payments and lump sums; or by paying lump sums of varying amounts and at regular intervals; or by a single payment; or by such other plan as may be authorized and approved by the Government; and with the understanding that such an annuity will in any event be granted to me as the total amount paid in by me improved at four per cent compounded yearly will purchase at the rates in effect at the date of this application, the same not to exceed $1,200; and with the further understanding that in case the payments made by me are not sufficient to purchase an annuity of $10 the payments I make will be returned to me or to my legal representatives with compound interest at four per cent."

Pursuant to the Government Annuities Act, R.S.C., 1927, c. 7, a contract, duly signed by the proper officers of the Government, was issued to suppliant. It provided for payments by the suppliant at the rate of $260.20 on the 20th day of each month, commencing on December 20, 1934, for a period of two years; for the payment to suppliant of $1,200 per annum in quarterly instalments, the first instalment to be payable on December 20, 1936, if the suppliant be then living, and an instalment of $300 every three months thereafter, the contract to end with the last payment prior to the annuitant's death. The contract contained a clause reading: "This contract witnesseth further that in consideration of payments made in any other manner than in the manner above indicated, such an annuity shall be paid at the date fixed for the commencement of the annuity as the total payments made (increased at 4 per cent compounded yearly), will purchase at the rate in effect at the date of this contract."

Payments made by the suppliant were made irregularly and not in strict compliance with the terms of the application and the contract. He did pay the full amount called for by the contract, within the two years, the last payment of $444.80 being made on October 2, 1936.

Prior to making the last payment, suppliant was advised by the Superintendent of Annuities that the yearly premium of $3,122.40 quoted to him was due to "an error in computing the rate" and that the annual premium for such an annuity contract as that issued to suppliant was $3,834.24. Suppliant was advised that after crediting the last payment made by him the balance necessary to be paid was $1,783.18.

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Suppliant by his petition of right asks specific performance of the contract by His Majesty, or in the alternative, damages for non-fulfilment of the contract.

Held: That the Crown is bound by the doctrine of waiver as related to conditions or forfeitures in contracts to which the Crown is a party, and by accepting payment of instalments subsequent to the dates stipulated in the contract the officers of the Government waived any right arising on behalf of the Crown to rescind or vary the contract by reason of suppliant's defaults.

2. That the error in computing the proper rate for payment of the annuity in question was a mistake of fact.

3. That the mistake was a unilateral one, made by the officers of the Government, and of which the suppliant could not be cognizant, nor did he silently acquiesce in the making of the mistake.

4. That any loss ensuing from the error in question should be borne by the respondent.

5. That the Court has jurisdiction to decree specific performance of the contract by the Crown.

PETITION OF RIGHT by suppliant herein asking specific performance by His Majesty of a contract entered into between suppliant and the Government of Canada pursuant to the Government Annuities Act, R.S.C., 1927, c. 7, or in the alternative, damages for non-fulfilment of the contract.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

Charles Morse, K.C. and *H. A. Aylen, K.C.* for suppliant.

S. M. Clark, K.C. and *Alastair MacDonald* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (December 30, 1938) delivered the following judgment:

By his petition of right herein the suppliant seeks a declaration of the Court directing performance by His Majesty of a contract entered into by the suppliant for the purchase of an annuity from the Government of Canada, under the Government Annuities Act, R.S.C., 1927, c. 7, or, in the alternative, that the suppliant may be declared entitled to damages in the sum mentioned in his petition.

The suppliant, on December 20, 1934, then Librarian at the Ottawa Public Library, and aged 69 years, made written application to the Government of Canada for the purchase

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of a deferred annuity of $1,200 per annum, payable in equal quarterly instalments, the first payment to be made two years from the date of the first payment of the purchase money, that is, on December 20, 1936. The annuity was one sold under what was called Plan B, for which the suppliant agreed to pay at the monthly rate of $260.20, or $3,122.40 yearly, making a total payment of $6,244.80 in two years. The annuity was purchased through a Mr. Hall who is a special agent of the Department of Labour, in Ottawa, appointed by the Minister on a commission basis, and who has been with the Department for several years, in that capacity. The application contained this clause: . . . "reserving, however, the right to complete the contract by periodical payments and lump sums; or by paying lump sums of varying amounts and at regular intervals; or by a single payment; or by such other plan as may be authorized and approved by the Government; and with the understanding that such an annuity will in any event be granted to me as the total amount paid in by me improved at four per cent compounded yearly will purchase at the rates in effect at the date of this application, the same not to exceed $1,200; and with the further understanding that in case the payments made by me are not sufficient to purchase an annuity of $10 the payments I make will be returned to me or to my legal representatives with compound interest at four per cent."

On January 14, 1935, a contract entitled "Plan 'B'—Deferred Annuity Contract," signed by W. M. Dickson, Deputy Minister of Labour, and E. G. Blackadar, Superintendent of Annuities, was received by the suppliant together with a pass-book, in which to record the payments made. The contract provided for payments by the suppliant at the rate of $260.20 on the 20th day of each month, commencing on December 20, 1934, until payments for two years shall have been made; for the payment to the suppliant of $1,200 per annum in quarterly instalments, the first to become due and payable on December 20, 1936, if the annuitant be then living, and an instalment of $300 every three months thereafter, the contract to end with the last payment prior to the annuitant's death. The following clauses are included in the contract:

If the annuitant should die before the date fixed for the first instalment of annuity to be paid, the purchaser or his or her legal representa-

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tives shall not be entitled to claim any part of the amount paid as purchase money.

This contract witnesseth further that in consideration of payments made in any other manner than in the manner above indicated, such an annuity shall be paid at the date fixed for the commencement of the annuity as the total payments made (increased at 4 per cent compound yearly), will purchase at the rate in effect at the date of this contract.

Those two clauses are, I think, self explanatory. Some contention was advanced on behalf of the Crown, based on the last of those two clauses, but I am not disposed to attach any importance to it.

The suppliant testified that at the time he applied for the annuity he explained to Hall that he would be obliged to sell securities which he owned to make the stipulated purchase payments, and that he would sell the same as and when the market appeared favourable, and that it was understood between Hall and himself that as long as the total purchase money was paid, with interest on any deferred payments, it would be satisfactory. The suppliant made his payments through Hall. When ready to do so he would make out a cheque payable to the Receiver-General, hand the cheque and pass-book to Hall, and later he would receive back by mail the pass-book with the entry of payment made therein. Payments by the suppliant were made irregularly and not in strict compliance with the terms of the application and the contract. He did, however, pay in full the purchase money called for, namely, $6,244.80 within the two years, the last payment of $444.80 being made on October 2, 1936.

Prior to making the last payment the suppliant was advised by letter dated September 3, 1936, written by Hall, that an additional sum of $2,215.59 would be required to be paid on September 20, 1936, in order to complete the purchase of an annuity of $1,200. The suppliant had at the date of this letter paid $5,800 on account of the purchase price. A number of letters then passed between the suppliant and the Superintendent of Annuities. In one of these letters, dated October 2, 1936, written by Mr. Blackadar, the Superintendent, the suppliant was informed that the yearly premium of $3,122.40 quoted him at the time he applied for the contract, was due to "an error in computing the rate," and that the annual premium for such an annuity contract as was issued to suppliant

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was $3,824.24. After crediting the payment of $444.80, made on October 2, 1936, the balance necessary to be paid was stated to be $1,783.18.

A duplicate of the contract in question was later tendered the suppliant but with the endorsement thereon that the annuity to be paid the suppliant was to be in the sum of $944.47, and payment of this amount has since been accepted by the suppliant, without prejudice, it is agreed, to his rights under the contract.

The issues joined between the parties, and the relevant points of law that here arise, may be discussed in the following order: (1) The validity of the contract in respect of form, parties, and mutuality, under the provisions of the Government Annuities Act, (2) the effect of the waiver, by officers of the Department of Labour, of the suppliant's obligation to make punctual payment of the purchase instalments as they matured on the dates mentioned in the contract, (3) the effect on the contract of a mistake on the part of officers of the Crown in fixing the rate applicable to the purchase price of an annuity such as applied for by the suppliant, and (4) the jurisdiction of the Court to make a declaratory order as to the suppliant's right to performance of the contract in question, by the Crown.

No serious doubt, I think, arises as to the validity of the contract in respect of form, parties and mutuality under the provisions of the Government Annuities Act. The contract both in substance and form, appears to be in accordance with the requirements of that Act. The suppliant was eligible to purchase an annuity at the date of the contract, and the contract itself declares that it was entered into in pursuance of the Government Annuities Act. The contract was signed by the Deputy Minister of Labour, and the Minister of Labour is charged with the administration of the Government Annuities Act. By sec. 31 (1) of the Interpretation Act, words directing or empowering a Minister of the Crown to do any act or thing, include his deputy lawfully appointed.

Turning now to the second point, and that is, whether the conduct of the officers of the Department of Labour in accepting from the suppliant payment of the instalments of the purchase price subsequent to the dates prescribed by the contract, constitutes a waiver in law of any right

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arising to the Crown to make the suppliant's delay in making such payments a ground for rescinding or reforming the contract. Waiver is implied when the person entitled to anything does or acquiesces in something inconsistent with that to which he was entitled, and I think it is clearly established by the authorities that the Crown is bound by the doctrine of waiver as related to conditions or forfeitures in contracts to which he is a party. Time was not here made "of the essence of the contract." Fry on Specific Performance, 6th Ed., page 520, states the principle of waiver, whether or not time was originally of the essence of the contract, as follows: "Objections grounded on the lapse of time are waived by a course of conduct inconsistent with the intention of insisting on such an objection; and in this respect it is immaterial whether time was originally of the essence or was subsequently engrafted on the contract." And at page 522 he further states: "The mere extension or giving of time, where time is of the essence of the contract, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essentiality of the time." This principle will be found enunciated in all the standard text books on contract, and is supported by such cases as *Davenport* v. *The Queen* (1); *A.-G. of Victoria* v. *Etterbank* (2); *Dominion Corporation* v. *The King* (3); and *Peterson* v. *The Queen* (4). I think it is well settled law that the Crown is bound by the doctrine of waiver as related to conditions or forfeitures in contracts to which he is a party, and I think that by accepting payment of instalments subsequent to the dates stipulated in the contract the officers of the Department of Labour waived any right arising on behalf of the Crown to rescind or vary the contract by reason of the suppliant's defaults.

I come now to the question of the effect upon the contract of the mistake on the part of the officers of the Crown in fixing the purchase price of annuities of the kind here in question. The Attorney-General pleads that the rate given the suppliant for the annuity in question was one determined erroneously by an official or officials of the

(1) (1877) 3 A.C. 115.
(2) (1875) L.R. 6 P.C. 354.
(3) (1933) A.C. 533.
(4) (1889) 2 Ex. C.R. 67.

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Annuities Branch of the Department of Labour, and in a manner contrary to and unauthorized by the provisions of the Government Annuities Act, and particularly sec. 4 thereof, or by any regulations made thereunder. Sec. 4 of the Act authorizes the Minister to contract with any person for the sale of annuities, according to one of several plans. Sec. 13 empowers the Governor in Council to make regulations as to the rate of interest to be allowed in the computation of the values of annuities, and as to the preparation and use of tables for determining the value of annuities, and the revocation of such tables and the preparation and use of other tables, and certain regulations were accordingly made thereunder.

In connection with Canadian Government Annuities there was published, pursuant to s. 13 a manual containing the rates for determining the value of annuities at different ages, and upon plans therein indicated, and which rates are referred to by the Crown as "authorized" rates, because they were approved of by the Governor in Council. This approved manual of rates, it appears, makes no provision for the case of an applicant for a deferred annuity, according to plan B, whose age was the same as that of the suppliant, upon the date of his application. For such and some other cases a special table of rates was prepared by hand, on one sheet of paper, by actuarial assistants to the Superintendent of Annuities; and this table of rates had been in use, in effect, and available to authorized agents, in the Annuities Branch, I understand, for several years, and it was resorted to by any authorized person when quoting to applicants the cost of an annuity similar to that applied for by the suppliant. This table of rates, referred to as "office rates" by the Superintendent, it is claimed by the Crown, was "unauthorized" because the same was never approved by the Governor in Council. One of the regulations made under the provisions of s. 13 of the Act states that in the case of an application for a contract where the rate to be charged is not obtainable from the authorized tables, the said rate shall be the rate "which the Actuary of the Department or Branch holding office under the Act at the time being shall determine" in accordance with the provisions of s. 4 of the Act. I have no doubt that it was under this regulation that the Annuities Branch acted in compiling what is called the

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"unauthorized" rates, the source of the mistake here alleged. It was just before the suppliant made his last payment that the error in this table of values or rates was discovered and it was accordingly amended no doubt, by the actuarial officers of the Annuities Branch. It does not appear that the amended rate was approved by the Governor in Council, and the Annuities Branch no doubt acted under the regulation, in making the amended rate. The amended rate had the effect of increasing very considerably the cost of an annuity on the plan selected by the suppliant, and for one at his age, and for which nearly two years he believed was to give him $1,200 per year; or, to state it in another way, the sum of money paid by the suppliant, according to the amended rate, would provide an annuity of $944.47 instead of $1,200, a serious reduction no doubt in the mind of the suppliant. The amended or new rate is now sought to be applied to the suppliant's contract which would, of course, vary the terms of the contract. However, the rate quoted the suppliant at the date of his application, was "the rate in effect at the date of this contract," to use the words of the contract itself. It was a rate which had been in effect for several years.

The Crown, it will be seen, relies upon an error made by some actuarial officer or officers of the Annuities Branch of the Department of Labour in fixing the value or cost of an annuity contract of the type applied for by the suppliant, and applicable to his age at the date of his application, and which value or cost appeared in the table prepared by the actuaries of the Annuities Branch. The mistake relied on by the Crown to relieve him from his obligation under the contract is therefore a unilateral one, and not a bilateral one. This is not a case where both parties have been in error as to some fact lying at the root of the contract. Here, one party only, the Crown, complains that he entered into the contract under a mistake of fact; and it was a mistake, it is claimed on behalf of the suppliant, to which he was not a party, or of which he could be cognizant. It was a contract of sale and purchase, the price or cost of the thing sold being fixed by the seller, the Crown, who was authorized by the Government Annuities Act to sell the thing, and to fix the price or cost in the manner I have indicated.

Mistake in the law of contract is usually a difficult subject. The mistake alleged in this case is, I think, one of fact, and not of law, and therefore we need not enquire as to what constitutes a legal mistake, probably the most troublesome branch of the law of mistake, a satisfactory definition of which has not yet been found, according to some text-writers. The authorities seem to be in agreement in making a distinction between cases of mutual mistake, and those of unilateral mistake; the former usually falls into two main divisions, (1) cases in which both parties have contracted in the mistaken belief that some fact which lies at the root of the contract is true, and (2) cases where there has been no *consensus ad idem,* while in cases of unilateral mistake only one party was in error, or the victim of a mistake. That there should be a distinction would seem reasonable and logical. One cannot say that there appears to be any fixed rule of law applicable to mutual mistakes, or to unilateral mistakes, because of the numerous exceptions to be found in the case law. Very many persuasive criticisms have been made of the doctrine which permits of the rescission of a contract on account of a unilateral mistake, and yet relief of that nature has been granted. However, the courts, it would appear from the decided cases, are not so willing to grant relief where one party only has contracted under a mistake concerning the true facts as where both have erred. I was referred to a work on Mistake In The Law of Contract, by Champness, and in the author's chapter on Unilateral Mistake, he observes that it was obvious that the law of contract would become a farce if a party could, after agreement, shed his obligations by simply pleading that he had been mistaken over some matter concerned with the contract, and yet this author concedes that the courts will under certain circumstances, and in accordance with certain principles, evolved from time to time, relieve a party who has entered into a contract under a mistaken belief, even though the other contracting party was himself under no misapprehension as to the true facts. But generally, where a party seeking to enforce a contract which he has entered into in good faith, and unaware of a mistake of a fact made by the other party, such lack of knowledge will as a rule operate to make the contract enforceable, notwithstanding the unilateral mistake. And the question here is whether

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this case falls within this general rule, or whether it falls within some exceptions to that rule. It was said by James L.J. in *Tamplin* v. *James* (1): "If a man will not take reasonable care to ascertain what he is contracting about he must take the consequences," and in Halsbury, 2nd Ed., Vol. 23, page 14, I find this remark: "But the Court will not interfere in favour of a man . . . who commits a mistake without exercising the due diligence which the law would expect of a reasonable and careful person, nor will relief be granted when the ignorance was due to the negligence of the party's legal adviser." In the case of *Scriviner* v. *Pask* (2), where a builder took a contract for some work to be completed for a certain sum relying upon an erroneous statement of quantities taken out by an architect, the other party not knowing of it or being in any way responsible for the mistake, it was held the contractor must perform the contract. And much the same case is *Islington Union* v. *Brentnall and Cleland* (3), where the defendants, in answer to the plaintiffs' advertisements tendered for the supply of coal for one year, which tender was duly accepted by the plaintiffs. The defendants then sought to withdraw their tender on the ground that the price quoted was a mistake, and the plaintiffs thereupon bought elsewhere and sued the defendants for the difference in price. It was held that the defendants were not entitled to withdraw their tender once it had been accepted by the plaintiff, and that in the absence of any evidence of *mala fides,* the plaintiffs were held to be entitled to succeed in their action. The last two mentioned cases are in effect very similar to the one under discussion. Here the Crown was invited to make an offer for the sale of a certain type of annuity contract, and an offer being made it was accepted, and a contract entered into.

Now what are the facts in this case? The parties assented to the same thing, at the same time, and there was no reason on the part of either to suspect the possibility of any mistake, and particularly would this be true of the suppliant. The one was willing to sell an annuity contract of a type for a stated amount, at a rate which was in effect at the time, upon certain terms as to pay-

(1) (1880) 15 Ch. D. 215 at 221. (2) (1866) L.R. 1 C.P. 715.
(3) (1907) 71 J.P. 407.

ment, and the other party was willing to buy that annuity, upon such terms, and each being in agreement as to the vital elements in the transaction they entered into a contract, which accurately expressed their minds. In contemplation of carrying out his obligation, as to payments under the contract, covering a period of two years, the suppliant was obliged to sell and did sell, from time to time, certain assets which he possessed, from the proceeds of which he was to make the instalment payments required by the contract. And apparently he resigned his position in the Ottawa Public Library to become effective shortly before the first quarterly instalment would be paid him under the contract, and before the mistake in question was discovered. His position had therefore altered, and could not be restored. The error in question was accessible only to the Crown, and could not possibly be known or accessible to the suppliant. The suppliant did not silently acquiesce in a mistake of which he was cognizant. There was nothing which the suppliant knew about annuity rates which he could communicate to the officers or agents of the Crown, in order to assist them in discovering an error made several years earlier, in making up a table of rates. There was nothing that would suggest to the suppliant that the actuaries of the Annuities Branch had made a mistake many years back, or had acted carelessly or negligently. The Annuities Branch had for years been willing to sell the same annuity contract, at the same rate, to any other applicant, and it is possible that they did so. The rate quoted the suppliant was the rate in effect at the time, and no mistake was made in quoting that rate. I doubt if it can be said that any mistake was made by the Crown when the annuity was sold to the suppliant. The mistake made was referable to something else than the contract. The discovery that the purchase price of the annuity contract was unsound from an actuarial standpoint is not, in my opinion, a sufficient ground for seeking to avoid the obligations of the contract. If any loss ensues from the error in question it should be borne by those who sold the annuity.

Now as to the remaining point for discussion. I do not think there can be any serious doubt as to the jurisdiction of the Court to make a declaratory order as to the sup-

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pliant's right to performance by the Crown of the contract in question. Sec. 36 of the Exchequer Court Act provides that in cases not provided for by that Act, or by rules made thereunder, the practice and procedure of the High Court of Justice in England shall regulate the practice and procedure of the Exchequer Court. As the Exchequer Court Rules do not contain any provision in respect of a declaratory order, the English Rule is brought into force by the provisions of Rule 2 of the Exchequer Court Practice. Order 25, rule 5, of the English Rules of the Supreme Court of Judicature provides that: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." In the case of *Dominion Building Corporation Ld.* v. *The King,* a Canadian case (1), Lord Tomlin, discussing the competency of the Court to make a declaratory judgment or order, said:

> It is no doubt true that an operative order for specific performance cannot be made against the Crown. In fact, no order can be made against the Crown in the sense in which it can be made against the subject, but under the Petition of Right Act, R.S. Can., 1906, c. 142, s. 8, there is jurisdiction in respect of claims of the subject against the Crown to consider and determine what is right to be done and, as their Lordships do not doubt, to make a declaration as to the right of the subject to specific performance if the circumstances justify it. It is, in their Lordships' opinion, too narrow a view to treat the applicability of the rule as limited by reason of the status of the Crown. In the present case their Lordships think that the circumstances are such as would have justified an order for specific performance by a court of equity, had the contest been one between two subjects.

In the same connection I might refer to *Qu'Appelle Long Lake Ry. Company* v. *The Queen* (2), and the well known case of *Dyson* v. *The Attorney-General* (3). Further, s. 18 of the Exchequer Court Act provides that the Court shall have "exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown," and "in all cases in which the lands, goods or money of the subject are in possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown."

(1) (1933) A.C. 533 at 548. (2) (1901) 7 Ex. C.R. 105.
(3) (1911) 1 K.B.D. 410.

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I am of the opinion therefore that the suppliant is entitled to a declaration to the effect that the Crown should perform the terms of the contract, subject to a slight qualification. I should have pointed out earlier that the Crown does not seek here a rescission or reformation of the contract. As already stated the suppliant made his payments under the contract irregularly, and it is conceded that some amount would be due the Crown by way of interest, which the suppliant stated he offered to pay, and is still willing to pay. Mr. Blackadar, at my request, filed of record a memorandum to the effect that assuming the monthly premium payments of $260.20, quoted to the suppliant and as set out in the annuity contract, to be the correct rate to purchase an annuity of $1,200, the total annuity to which the suppliant would be entitled would be $1,159.78, by reason of his having made his payments under the contract irregularly. I am assuming that this figure is correct, and the declaration will be accordingly, unless the parties agree otherwise in respect of any amount justly due the Crown in respect of interest, in which event the contract, of course, should be performed in its entirety. The suppliant will have the costs of his petition.

Judgment accordingly.