

# CASES

DETERMINED BY THE

## SUPREME COURT OF CANADA ON APPEAL

FROM

THE COURTS OF THE PROVINCES

AND FROM

THE EXCHEQUER COURT OF CANADA.

LUCY McQUEEN (SUPPLIANT IN THE } APPELLANT ;  
COURT BELOW)..... }

1886  
\*Nov. 30.

AND

HER MAJESTY THE QUEEN (RES- } RESPONDENT.  
PONDENT IN THE COURT BELOW)..... }

1887  
\*Dec. 13.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Petition of Right Act, 1876, sec. 7—Statute of Limitations—32 Henry 8 ch. 9—Rideau Canal Act, 8 Geo. 4 ch. 1—6 Wm. 4 ch. 16—7 Vic. ch. 11 sec. 29—9 Vic. ch. 42—Deed—Construction of—Estoppel.*

Under the provisions of 8 Geo. 4 ch. 1, generally known as the Rideau Canal Act, Lt.-Colonel By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one Grace McQueen, as necessary for making and completing said canal, but only some 20 acres were actually used for canal purposes. Grace McQueen died intestate, leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death, on

\*PRESENT.—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

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the 31st January, 1832, Alexander McQueen released to William McQueen all his interest in the said lands, and by deed of Feb. 6th, 1832 the said William McQueen conveyed the whole of the lands originally granted to Grace McQueen to said Lt.-Colonel By in fee for £1,200.

By 6 William 4 ch. 16, persons who acquired title to lands used for the purpose of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation.

By the Ordnance Vesting Act, 7 Vic. ch. 11, the Rideau Canal, and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by sec. 29 it was enacted: "Provided always, and be it enacted, that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the use of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken."

By 9 Vic. ch. 42, Canada, it was recited that the foregoing proviso had given rise to doubts as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks, under 8 Geo. 4 ch. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to Sparks for the land retained for canal purposes, and for revesting in him and his grantees the portions of lands taken but not required for such purposes.

By the 19-20 Vic. ch. 45, the Ordnance properties became vested in Her Majesty for the uses of the late Province of Canada, and by the British North America Act they became vested in Her Majesty for the use of the Dominion of Canada.

The appellant, the heir-at-law of William McQueen, by her petition of right sought to recover from the crown 90 acres of the land originally taken by Colonel By, but not used for the purposes of the canal, or such portion thereof as still remained in the hands of the crown, and an indemnity for the value of such portions of these 90 acres as had been sold by the crown.

Held per Gwynne J. (in the Exchequer)—Under the statute 8 Geo. IV the original owner and his heirs did not become divested of their estate in the land until after the expiration of the period given by the act for the officer in charge to enter into a voluntary agreement with such owner, unless in virtue of an agreement with such owner. Nor was there any conversion of realty into

personally effected by the act until after the expiration of said period. By the deed made by William McQueen of the 6th February, 1832, all his estate in the 110 acres, as well as in the residue of the 600 acres, passed and became extinguished, such deed operating as a contract or agreement made with Col. By as agent of His Majesty within the provisions of the act and so vesting the 110 acres absolutely in His then Majesty, his heirs and successors.

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2. Such deed was not avoided by the statute 32 Hy. VIII ch. 9, Col. By being in actual possession as the servant and on behalf of His Majesty and taking the deed from William McQueen while out of possession, the statute having been passed to make void all deeds executed to the prejudice of persons in possession by persons out of possession to persons out of possession, under the circumstances stated in the act.
3. There was no reversion or re-vesting of any portion of the land taken by reason of its ceasing to be used for canal purposes. When land required for a particular purpose is ascertained and determined by the means provided by the Legislature for that purpose, and the estate of the former owner in the land has been by like authority divested out of him and vested in the crown, or in some persons or body authorized by the legislature to hold the expropriated land for the public purpose, if the estate of which the former owner is so divested be the fee simple, there is no reversion nor anything in the nature of a reversionary right left in him in virtue of which he can at any subsequent time claim upon any principle of the common law to have any portion of the land of which he was so divested to be re-vested in him by reason of its ceasing to be used for the purpose for which it was expropriated.
4. Assuming that Grace McQueen had by operation of the act become divested of her estate in the land in her lifetime and that her right had become converted into one merely of a right to compensation which upon her death passed as personalty, the non-payment of any demand which her personal representative might have had could not be made the basis or support of a demand at the suit of the heir-at-law of William McQueen to have re-vested in him any portion of the lands described in the deed of the 6th February, 1832, after the execution of that deed by him, whether effectual or not for passing the estate which it professed to pass.
5. The proviso in the 29th section of 7 Vic. chap. 11, as explained by 9 Vic. ch. 42, was limited in its application to the lands

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which were originally the property of Nicholas Sparks and not conveyed or surrendered by voluntary grant executed by him and for which no compensation or consideration had been given to him.

6. Her Majesty could not be placed in the position of trustee of the lands in question unless by the express provisions of an act of Parliament to which she would be an assenting party.

In the Supreme Court held :—

1. Per Ritchie C.J. By the deed of the 6th February, 1832, the title to the lands passed out of William McQueen, but assuming it did not, he was estopped by his own act and could not have disputed the validity and general effect of his own deed, nor can the suppliant who claims under him.
2. Per Ritchie C.J. and Strong and Gwynne JJ. The suppliant is debarred from recovering by the Statute of Limitations, which the crown has a right to set up in defence under the 7th section of the Petition of Right Act of 1876.
3. Per Strong J. Independently of this section, the crown, having acquired the lands from persons in favor of whom the statute had begun to run before the possession was transferred to the crown that body incorporated under the title of "The Principal Officers of Ordnance" would be entitled to the benefit of the statute.
4. Per Strong J. The act 9 Vic. ch. 42 had not the effect of restricting the operation of the revesting clause of 7 Vic. ch. 11 to the lands of Nicholas Sparks, and was passed to clear up doubts as to the case of Nicholas Sparks and not to deprive other parties originally coming within sec. 29 of 7 Vic. ch. 11 of the benefit of that enactment.
5. Per Strong J. A petition of right is an appropriate remedy for the assertion by the suppliant of any title to relief under sec. 29. Where it is within the power of a party having a claim against the crown of such a nature as the present to resort to a petition of right a mandamus will not lie, and a mandamus will never under any circumstances be granted where direct relief is sought against the crown.
6. Per Strong J. By the express terms of the 3rd section of 8 Geo. IV ch. 1, the title to lands taken for the purposes of the canal vested absolutely in the crown so soon as the same were, pursuant to the act, set out and ascertained as necessary for the purposes of the canal; and all that Grace McQueen could have been entitled to at her death was the compensation provided by

the act to be ascertained in the manner therein prescribed, and this right to receive and recover the money at which this compensation should be assessed vested, on her death, in her personal representative as forming part of her personal estate. Therefore as regards the 110 acres nothing passed by the deed of 6th February, 1832. And up to the passing of 7 Vic. ch. 11, no compensation had ever been paid by the crown, nor any decision as to compensation binding on the representative of Grace McQueen.

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7. Per Strong J. The proviso in sec. 29 of 7 Vic. ch. 11 applied to the 90 acres not used for the purposes of the canal, and had the effect of revesting the original estate in William McQueen as the heir-at-law of his mother, subject to the effect upon his title of the deed of 6th February, 1832. But if it had the effect of revesting the land in the personal representative, the suppliant is not such personal representative and would therefore fail.
8. Per Strong J. This deed did not work any legal estoppel in favor of Col. By which would be fed by the statute vesting the legal estate in William McQueen, the covenants for title by themselves not creating any estoppel. But if a vendor, having no title to an estate, undertakes to sell and convey it for valuable consideration his deed, though having no present operation either at law or in equity, will bind any interest which the vendor may afterwards acquire even by purchase for value in the same property, and in respect of such after acquired interest he will be considered by a court of equity to be a trustee for the original purchaser, and he, or his heir-at-law, will be compelled to convey to such purchaser accordingly. In other words, the interest so subsequently acquired will be considered as "feeding" the claim of the purchaser arising under the original contract of sale, and the vendor will not be entitled to retain it for his own use. Therefore, if the suppliant were granted the relief asked, the land and money recovered by her would in equity belong to the heirs of Col. By.

Although nothing passed under the deed of the 6th February, 1832, yet the suppliant could not withhold from the heirs or representative of Col. By anything she might recover from the crown under the 29th section of 7 Vic. ch. 11, but the heirs or representatives of Col. By would in turn become constructive trustees for the crown of what they might so recover by force of the rule of equity forbidding purchases by fiduciary agents for their own benefit.

9. Per Strong J. The deed of the 6th February, 1832, being in

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equity constructively a contract by William McQueen to sell and convey any interest in the land which he or his heirs might afterwards acquire, there is nothing in the statute 32 Henry 8 ch. 9, or in the rules of the common law avoiding contracts savoring of maintenance, conflicting with this use of the deed.

10. Per Fournier and Henry JJ. The mere setting out and ascertaining of the lands was not sufficient to vest the property in His Majesty, and Grace McQueen having died without having made any contract with Col. By the property went to William McQueen her heir-at-law.
1. Per Fournier, Henry and Taschereau JJ. The deed of the 6th February, 1832, made before the passing of 7 Vic. ch. 11 sec. 29, and five years after the crown had been in possession of the property in question, conveyed no interest in such property either to Col. By personally or as trustee for the crown, and the title therefore remained in the heirs of Grace McQueen.
2. The proviso in sec. 29 of 7 Vic. ch. 11 was not limited by 9 Vic. ch. 42 to the lands of Nicholas Sparks and the appellant is entitled to invoke the benefit of it.
3. The 90 acres now used for the purposes of the Canal did not by 19. Vic. c. 54 become vested in Her Majesty, nor were they transferred by the B. N. A. Act to the exclusive control of the Dominion Parliament. The words "adjuncts of the canal" in the first schedule of the B. N. A. Act could only apply to those things necessarily required and used for the working of the canal.
4. The crown was not entitled to set up the Statute of Limitations as a defence by virtue of sec. 7 of the Petition of Right Act, 1876, that section not having any retroactive effect.
5. Per Fournier, Henry and Tashereau JJ. There could be no estoppel as against William McQueen by virtue of the deed of the 6th February, 1832, in the face of the proviso in 7 Vic. ch. 11.

The court being equally divided the appeal was dismissed without costs.

**A**PPEAL from the judgment of Mr. Justice Gwynne in the Exchequer Court in favor of the crown.

The suppliant by her petition of right alleged:—

Paragraph 1. That by letters patent dated the 20th May, 1801, under the great seal of the province of

Upper Canada, lots lettered E and D, in concession C, in the township of Nepean, containing 400 acres, were granted unto one Grace McQueen in fee simple.

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Paragraph 2. That by letters patent, dated the 10th day of June, 1801, under the great seal of the said province, lots D and E in broken concession D on the river Rideau in the said township of Nepean were granted unto the said Grace McQueen in fee simple.

Paragraph 3. That the said Grace McQueen entered into possession of the lands so granted to her and, save as hereinafter appears, continued in possession of the said lands down to and at the time of her death.

Paragraph 4. That by an act of the Provincial Parliament of the said province of Upper Canada, viz.: 8 Geo. 4, ch. 1, passed on the 17th of February, 1827, commonly referred to as the Rideau Canal Act, it was enacted (as in this paragraph alleged, but which it is not necessary to set out at large).

Paragraphs 5, 6 and 7. That by the said act it was further enacted, as in these paragraphs alleged, but which it is unnecessary to set out here.

Paragraph 8. That Lieut.-Col. John By, of the Royal Engineers, was the officer employed by His Majesty to superintend the work of making the said Rideau Canal, and he set out and ascertained certain parts of the said parcels or tracts of land comprised in the said two several hereinbefore stated letters patent and deeds of grant respectively, as aforesaid, amounting altogether to 110 acres or thereabouts, as necessary for making and completing the said canal, and other purposes and conveniences mentioned in the before stated act, and said 110 acres were forthwith taken possession of by His said Majesty, his heirs and successors; and the land which he so set out and ascertained, as aforesaid, was described on a certain plan signed by him and lodged by him in the office of the Surveyor-General of the

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said late province of UpperCanada, and now fyled in the office of Her Majesty's Crown Land Department for the province of Ontario.

Paragraph 9. Some time after the passing of the said act the said Grace McQueen died intestate, being at the time of her death possessed of the said parcels or tracts of land comprised in the said two several deeds of grant, or of so much thereof as had not been set out and ascertained for the purposes of the said canal, as before mentioned; and she left Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. And on the 31st day of January, 1832, the said Alexander McQueen, by a deed poll of that date, under his hand and seal, released unto the said William McQueen all his right and interest to and in the said parcels of land, to hold the same unto the sole and proper use of the said William McQueen, his heirs and assigns forever.

Paragraph 10. The Rideau Canal was completed and opened for traffic throughout its length some time in the month of May, 1832.

Paragraph 11. That by an act passed the 9th day of December, 1843 (7 Vic. c. 11) the lands and other property therein mentioned, including the Rideau Canal and the lands and woods belonging thereto, were vested in the principal Officers of Her Majesty's Ordnance in Great Britain, and their successors in the principal said office, subject to the provisions of the said act.

Paragraph 12. That on or about the 20th day of October, 1845, the said William McQueen died intestate, leaving the suppliant his only legal issue and his sole heir-at-law,—him surviving.

Paragraph 13. No payment, indemnity or compensation was ever made to the said Grace McQueen, nor to the suppliant, nor to any person entitled to receive

the same, in respect of the said part of the said 110 acres so set out as necessary for the canal purposes, but not used for the purposes of the said canal.

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Paragraph 14. That the real property adjoining the said lots granted to the said Grace McQueen formerly belonged to one Nicholas Sparks. A portion of this was set out and ascertained as necessary for the purpose of the said canal, and was accordingly taken from the said Nicholas Sparks under the authority of the said Rideau Canal Act. And after the passing of the said Act, 7 Vic. c. 11, the said Nicholas Sparks applied for a restoration of part of the land so taken from him, and thereupon was passed an act of the Provincial Parliament of Canada (9th Vic., c. 42), A.D. 1846, intituled:—'An Act to explain certain provisions of the Ordnance Vesting Act, 7 Vic. c. 11, and to remove certain difficulties which have occurred in carrying the said provisions into effect.'

Paragraphs 15 and 16 set out what is alleged to be the most material part of 9 Vic. c. 42.

Paragraph 17 sets up the suppliant's contention as to what the effect of 7 Vic. c. 11, as explained by 9 Vic. c. 42, was.

Paragraph 18. That in pursuance of the last mentioned act a considerable portion of the land taken from the said Nicholas Sparks for the said Rideau Canal has since been restored to him ; but that no part of the land of the said Grace McQueen so set out and taken as aforesaid for canal purposes, held by Her Majesty but not used for canal purposes, to wit: 90 acres or thereabouts of the said 110 acres, has ever been restored to the said Grace McQueen, nor to the said late William McQueen, nor to suppliant.

Paragraphs 19, 20, 21 and 22. That by an act of the Provincial Parliament of Canada, viz., 19 Vic. c. 45,

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it was among other things enacted as in these paragraphs is alleged.

Paragraph 23. That several years after the death of the late William McQueen, to wit: in 1869-70, suppliant caused to be presented to the Governor General of Canada in Council a memorial urging the facts and circumstances aforesated, and praying for the restoration of the said 90 acres of land, but that no part of the said land has been restored to her.

Paragraphs 24, 25, 26, 27 and 28 contain an extended legal argument in support of the suppliant's claim to have the said 90 acres restored to her.

Paragraph 29. The suppliant insists that the said 90 acres not so used for the purpose of the said canal, and which passed to or became vested in Her Majesty therefore have, by lapse, passed to and are now vested in the suppliant, as if the said canal had never been made and the said acts had never been passed; yet Her Majesty's Government in Canada have all along, since the construction of the said canal, taken and held possession of the said 90 acres, and still hold possession thereof, and have taken the rents and profits thereof, and have sold parts thereof,—and made conveyances thereof to purchasers and given possession to such purchasers, and have received the purchase money thereof; and the suppliant submits that Her Majesty should deliver possession to the suppliant of the said land remaining unsold, and should pay to the suppliant the rents and profits of the lands unsold: and, as to the portions of the said lands so sold, should pay the present value thereof, and that the suppliant should have a re-conveyance of all such lands as have not been sold.

Paragraph 30. That by the British North America Act, 1867, the said lands and tenements were transferred to the Dominion of Canada.

Paragraph 31. That, in any case, Her Majesty was and is a trustee for the suppliant of all of the said lands that were not actually used for the purposes of the said canal, and it should be so declared. And the prayer of the petition is that all such parts of the said two parcels or tracts of land comprised in the said two several deeds of grant, dated respectively the 20th day of May and the 10th day of June, 1801, as were supposed to be taken to the use of the said Rideau Canal, but not used for that purpose, may be restored to and be re-vested in the suppliant, according to her right and interest to and in the same; and that an account of the rents and profits thereof may be taken, and, together with the costs of this petition, be paid to the suppliant; and as to such portions thereof as have been sold, that the values thereof may be paid to the suppliant, and also the rents and profits thereof prior to the selling thereof by Her Majesty, and that for the purposes aforesaid all necessary orders and decrees may be made and accounts taken.

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To this petition Her Majesty's Attorney General for the Dominion of Canada has filed an answer, wherein:—

Paragraph 1—He admits that letters patent issued, bearing date respectively the 20th day of May, 1801, and the 10th of June, 1801, as mentioned in the first and second paragraphs of the said petition, whereby certain lands were granted to Grace McQueen in the said petition mentioned.

Paragraph 2 admits the passing of the Act of Parliament of the late province of Upper Canada (being the Act 8 Geo. 4. c. 1), referred to in the fourth, fifth, sixth and seventh paragraphs of the said petition, to which, however, for greater certainty he refers.

Paragraph 3 admits that Colonel By, in the 8th paragraph of the said petition named, was the officer

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employed by His late Majesty to superintend the work of making the said canal, and that he set out and ascertained certain parts of the said parcels of land comprised in the said letters patent, comprising altogether 110 acres or thereabouts, as necessary for making and completing said canal, and other purposes and conveniences mentioned in the said act, and that the land which he so set out and ascertained as aforesaid is described in a plan lodged by Colonel By in the office of the Surveyor-General of the late province of Upper Canada, and signed by him. .

Paragraph 4 admits that the said Grace McQueen died intestate some time before the 31st day of January, 1832, and after the passing of the said act, but denies that she died seized or possessed of the whole of the said parcels of land ; and charges that the parts thereof set out and ascertained by Colonel By, as required for the uses and purposes of the said canal, were at the time of her death vested in His Majesty, and His Majesty was then in possession thereof for the purposes of the said canal.

Paragraph 5 admits that the said Grace McQueen left her husband, Alexander McQueen, her surviving, and also William McQueen, her eldest son and heir-at-law, and admits the execution of the deed dated 31st day of January, 1832, from Alexander McQueen to William McQueen, but denies that any estate or interest in the said lands set out and ascertained by Colonel By, as aforesaid, descended to the said William McQueen or passed to him under said deed.

Paragraph 6 charges that the said Colonel By was, at the time of the execution of the indenture dated 6th February, 1832, hereinafter referred to, an officer in the service of His Majesty the late King William IV, and had in charge for His Majesty the said canal and the works connected therewith, and the lands set apart and

taken therefor, including the lands in question in this matter; that by an indenture dated 6th day of February, 1832, made at Bytown, in the late province of Upper Canada, between the said William McQueen and Colonel By, the said William McQueen, for the consideration therein mentioned, granted, conveyed and confirmed unto the said Colonel By, his heirs and assigns forever, all the lands and premises which are the subject matter of the suppliant's petition, together with appurtenances and all the estate, right, title, interest, claim, property and demand whatsoever, either at law or in equity, of the said William McQueen, of or to or out of the same, and every part thereof; and submits that upon the death of the said William McQueen, after having conveyed to the said Colonel By the said lands and premises, and all his interest therein, no right or interest therein passed to the suppliant, as stated in the twelfth paragraph of her petition, and that she has no title to the said lands and premises and cannot now assert any claim in respect thereof.

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Paragraph 7 submits that any interest in the said lands and premises acquired by the said Colonel By, under the said indenture of 6th February, 1832, having been acquired by him under the circumstances above referred to, passed in equity to His Majesty, His successors and assigns, and that Her Majesty the Queen is now entitled thereto.

Paragraph 8 submits that the said conveyance by William McQueen to Colonel By was operative under the provisions of the second section of the said act 8 George IV., c. 1, and passed to the said Colonel By, on behalf of His Majesty, the fee simple and legal estate in the lands so set apart by him for the purposes of the said canal.

Paragraph 9. The ninth section of the said act 8

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George IV, ch. 1, provided that in estimating the claim of any individual to compensation for property taken or for damage done under the authority of the act, the arbitrators or jury in assessing such damages should take into their consideration the benefit likely to accrue to such individual from the construction of the said canals, by enhancing the value of his property or producing other advantages.

Paragraph 10. That some time after obtaining the conveyance of the 6th day of February, 1832, Colonel By took proceedings under the said act 8 George IV, ch. 1, to obtain, by arbitration, compensation or damages from His Majesty in respect of the lands comprised in the said conveyance of the 6th day of February, 1832, and that therein he claimed compensation or damages for the lands now in question.

Paragraph 11 charges that an award was duly made in writing in the course of the said arbitration proceedings, whereby it was awarded and determined that by reason of the enhancement of the value of the other land which at the time of her death belonged to the said Grace McQueen, and of other benefits and advantages which accrued to her, and those claiming under her, from the construction of the canal, as provided in the 9th section of the said act, His Majesty was not liable to make compensation for the lands in question in this matter taken under the said act.

Paragraph 12 charges that afterwards Colonel By, being dissatisfied with the said award, duly caused a jury to be summoned under the provisions of the said act, to assess the said damages and compensation claimed by him, and that the jury duly delivered their verdict to the same effect as the said award.

Paragraph 13 submits that by reason of the enhancement of the value of other lands of the said Grace McQueen, and of the other benefits and advantages

which accrued to her and those representing her, the crown never became liable to make compensation for the lands in question in this matter.

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Paragraph 14 charges that the said William McQueen, as heir-at-law of the said Grace McQueen, inherited the said other lands which had been so enhanced in the value, and by the said deed of 6th February, 1832, sold and conveyed the same to the said Colonel By, and received from him such enhanced value, by reason whereof the said William McQueen received the value of the lands in question in this matter.

Paragraph 15 admits the 7 Vic. ch. 2, and also the 9 Vic. ch. 42, but as to the effect thereof craves leave to refer to said acts.

Paragraph 16 submits that upon the true construction of the said acts the benefit of the said proviso was and is confined to Nicholas Sparks, therein mentioned, and that the same did not extend to the lands in question.

Paragraph 17 submits that the claim against the crown for compensation or damages by reason of the taking of the lands in question in this matter was personal estate of the said Grace McQueen, and passed at her death to her personal representative, and not to her heir-at-law; and by an act (2 Vic. ch. 19) it was expressly enacted that from and after the 1st day of April, 1841, all and every the provision of the said act, 8th year of King George the Fourth, ch. 1, should in respect of claims brought forward after that period, cease and determine.

Paragraph 18. And it was further by the last-mentioned act enacted that claims made before the said 1st day of April, but not duly prosecuted as required by the said act, should thenceforward be barred, as if they had never been made.

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Paragraph 19. And it was further by the last-mentioned act enacted that it might be lawful for the Lieutenant-Governor to issue a proclamation requiring all persons to prosecute their claims within the time so limited, or that such claims should thereafter be barred.

Paragraph 20 avers that on the 9th day of September, in the last-mentioned year, such proclamation was duly made by the Lieutenant-Governor in Her Majesty's name, and the same was published in the official gazette and claims, on behalf of Her Majesty, the benefit of the said act and proclamation, and submits that thereby all claims of every kind against Her Majesty, in respect of the said lands, by the said Grace McQueen or her representatives, or any person claiming through or under them or either of them, including the suppliant, became and were and are for ever barred on and after the 1st day of April, A.D. 1841.

Paragraph 21 admits that in pursuance of the acts of 1844 and 1846 some part of the lands taken from Nicholas Sparks for the said canal was restored to him, and that no part of the land in question was ever restored to the suppliant, or to those through whom she claims, and charges, that no land taken for the canal from any other person was restored to the owners under the said proviso and acts, other than to the said Sparks.

Paragraph 22 admits the passing of the act of the 19th of June, 1856, (19 and 20 Vic. c. 45), and by virtue thereof the lands in question became vested in Her Majesty for the uses of the late Province of Canada, and craves leave to refer to its provisions.

Paragraph 23 admits that by the British North America Act the same lands, or so much thereof as had not previously been sold or disposed of, became

vested in Her Majesty for the use of the Dominion of Canada.

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Paragraph 24 denies that Her Majesty is a trustee for the suppliant of the said lands, or any part thereof.

Paragraph 25 charges that from the original setting apart and taking of the said lands, until the year 1843, the said lands were vested in Her Majesty, in right of Her Imperial Crown, during all which time the suppliant, or those through whom she claims, might have proceeded against Her Majesty by petition of right or otherwise in Her Majesty's courts in England, but they never did so.

Paragraph 26 charges that from the year 1843 to the year 1856 the lands in question were vested in the principal officers of Her Majesty's Ordnance, and the said principal officers of Her Majesty's Ordnance were also during all the times last mentioned in possession thereof, and the suppliant or those under whom she claims might, during all the last mentioned time, have sued and impleaded the said principal officers in the courts of the late province of Canada for the recovery or restoration of the said lands, but they neglected so to do.

Paragraph 27 charges that the suppliant and those under whom she claims have been guilty of such laches and delay in respect of the said claims as precludes the suppliant in equity from now prosecuting the same.

Paragraph 28 claims, under the provisions of the Petition of Right Act, the statutes of limitations.

Paragraph 29 admits the presentation of the memorial mentioned in the 23rd paragraph of the suppliant's petition and that after mature deliberation and consideration the Privy Council refused to entertain it, of which due notice was given to the suppliant.

Paragraph 30 submits on behalf of Her Majesty

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that the petition shows no grounds for relief against Her Majesty in respect of any of the matters contained therein.

Paragraph 31 submits that under no circumstances is Her Majesty, as representing the Dominion of Canada, answerable or responsible to the suppliant for or in respect of any of the said lands heretofore sold or disposed of, or in respect of the rents and profits of any of the said lands and that the suppliant is not entitled to any such account as prayed for in the said petition.

Upon this petition and the answer thereto a special case has been agreed upon, which is also divided into paragraphs wherein it is admitted as follows:—

Paragraph 1, admits that by letters patent of the respective dates mentioned in the petition, the lots of land therein mentioned, containing 600 acres, were granted in fee simple to Grace McQueen.

Paragraph 2. That on the 17th February, 1827, the act 8 Geo. IV, ch. 1, (commonly called the Rideau Canal Act), was passed.

Paragraph 3. That on the 18th day of September, A. D. 1827, Grace McQueen died intestate, leaving, her surviving Alexander McQueen, her husband, William McQueen her eldest son and heir-at-law.

Paragraph 4. That as set forth in the 8th paragraph of this petition, prior to the death of Grace McQueen, Colonel By, the officer in charge of the Rideau Canal and works, acting under the provisions of the said Rideau Canal Act, for His then Majesty, for the uses and purposes of the said canal, had, from the parcels of land patented as aforesaid, ascertained, set out and taken possession of one hundred and ten acres thereof which he thought necessary and proper for the purposes of the said canal; and that the officers of

Her Majesty, for Her Majesty or the principal officers of Her Majesty's Ordnance, or the purchasers from Her Majesty hereinafter mentioned, as the case may be, have had possession of the same from thence hitherto.

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Paragraph 5. That as set forth in the 9th paragraph of the said petition, the said Alexander McQueen, by deed dated 31st January, 1832, released all his right, title and interest in all the said lands to the said William McQueen and his heirs, and that the said Alexander McQueen died in or about the year 1851.

Paragraph 6. That by an indenture dated the 6th February, 1832, a copy of the memorial of which is put in as evidence of its contents, the said Wm. McQueen, for the consideration therein mentioned, purported to grant, convey and confirm all the said lands patented as aforesaid unto the said Col. By, his heirs and assigns.

Paragraph 7. That at the time of the execution of the said indenture the said Col. By was the officer in the service of His Majesty the late King William the Fourth, who had in charge for His Majesty the said canal and the works connected therewith and all the lands set apart and taken therefor.

Paragraph 8. That the Rideau canal was completed and opened for traffic some time in the month of May, 1832.

Paragraph 9. That on the 20th day of April, 1836, the act of the late Province of Upper Canada, 6 Wm. IV. ch. 16, was passed.

Paragraph 10. That on the 11th of May, 1839, the act 2 Vic. c. 19, was passed, and on the 9th of September of that year a proclamation was issued and published as set forth in the 20th paragraph of the answer filed to the suppliant's petition.

Paragraph 11. That on the 9th day of December, 1843, the act 7 Vic. c. 11, was passed.

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Paragraph 12. That on the 20th day of October, 1845, the said Wm. McQueen died intestate, leaving him surviving the suppliant, Lucy McQueen, who for the purposes of this case is to be treated as his only child, heiress-at-law and next of kin.

Paragraph 13. That A.D. 1846, the act of the Legislature of the late Province of Canada 9 Vic. c. 42, was passed.

Paragraph 14. That in the year 1856 the act 19 and 20 Vic. c. 45, was passed.

Paragraph 15. That in the year of Our Lord 1859, the Consolidated Statutes of Canada, chapters 24 and 36, were passed.

Paragraph 16. That in the year 1867 the British North America Act was passed.

Paragraph 17. That on 12th day of April, 1867, an act was passed by the Parliament of Canada, called the 'Petition of Right Act.'

Paragraph 18. That of the 110 acres of the lands and premises so set out and ascertained and taken possession of as aforesaid, only about 20 acres thereof have been actually used for canal purposes.

Paragraph 19, sets out a provision of the 9th sec. of 8 Geo. IV. c. 1.

Paragraph 20. That after obtaining the conveyance of the 6th February, 1832, Colonel By took proceedings, under 8 Geo. IV c. 1, to obtain by arbitration compensation from His Majesty in respect of the lands now in question.

Paragraph 21. That an award was made in the matter of the said arbitration, whereby it was awarded and determined that by reason of the enhancement of the residue of the lands, whereof the said Grace McQueen at the time of her death was seized, from the construction of the canal, His Majesty, under the provisions of the 9th sec. of the act, was not liable to make

any compensation for the lands in question in this matter.

Paragraph 22 That upon the action of the said Col. By this award was afterwards affirmed by a jury empanelled under the act.

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Paragraph 23. That the documents relating to the said arbitration and assessment proceedings, in the three preceding paragraphs mentioned, are to be treated as part of the special case.

Paragraph 24. That the said McQueen, as heir-at-law of the said Grace McQueen, inherited the said other lands which are stated in the said arbitration proceedings to have been enhanced in value, and which are included in the said deed of the 5th February, 1832.

Paragraph 25. That no payment or compensation in money has ever been made by the crown to Grace McQueen, or to William McQueen, or to the suppliant, or to any person claiming under them, for the 20 acres actually used for canal purposes or for the residue of the 110 acres set out, ascertained and taken possession of as aforesaid, but not so used.

Paragraph 26. That in pursuance of the acts 7 Vic. ch. 11, and 9 Vic. ch. 42, some part of the lands taken from Nicholas Sparks for the said canal was restored to him, but that no part of the land in question was ever restored to the suppliant, or to those through whom she claims.

Paragraph 27. That on the 13th day of February, A.D. 1869, the Under Secretary of State for Canada, being duly authorized in that behalf to represent Her Majesty, advertised for sale by auction a portion of the said lands and premises for building lots, and on the 16th March, 1869, portions of the said lands were sold for the benefit of Her Majesty in pursuance of the said advertisement and that such sale took place, notwithstanding a formal protest of the suppliant in writing

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and set out at large in this paragraph was served upon the officer in charge of the Ordnance Lands Department and on the several purchasers at the sale.

Paragraph 28. That in the same year, 1869, the suppliant caused to be presented to the Privy Council of Canada a memorial to the effect set out in the 23rd paragraph of her petition, and that the Privy Council after mature consideration and deliberation upon the matters alleged in the said memorial, and on certain reports made to the Council by the Department of Justice, to which department the said memorial had been referred, to report thereon, resolved by an order duly made and notified to the suppliant that the claim preferred by her could not be entertained, and that reference may be made to the documents referred to in this paragraph for evidence of their contents.

Paragraph 29 is a *verbatim* admission of the matters of fact alleged in the 25th and 26th paragraphs of the answer of the Attorney-General of Canada to the suppliant's petition.

The questions submitted for the opinion of the court on the facts, documents and statutes referred to in the foregoing case are as follows:—

“1st. Did William McQueen take the lands in question, or any part thereof, as heir-at-law of Grace McQueen; and, if so, what part?

“2nd. Had Grace McQueen, at the time of her death, as to the portion of the said lands taken and used as aforesaid, any right to compensation or damages in respect thereof; and, if so, in respect of what portion did such right pass to her heir or to her personal representative?

“3rd. Were the deeds dated 31st January, 1832, or 6th February, 1832, or either of them, void at common law or under the statute 32 H. 8, ch. 9, or otherwise?

“4th. If the said lands, or any part thereof descended,

is Lucy McQueen entitled to recover the same or any part thereof, or is she barred or precluded from so doing by the statutes of limitations, or laches, or otherwise?

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“5th. If the said right to compensation or damages passed to the heir-at-law of Grace McQueen, in whom would it be now vested? Assuming it still to exist, is it barred by the statute of limitations, or by laches, or by the said arbitration proceedings, or otherwise? And would the fact that there never has been any person representative of Grace McQueen preserve the right as against the statute of limitations?

“6th. Is the statute of limitations any defence when pleaded by Her Majesty in this petition of right under the fact herein stated?

“7th. If at the time of his death William McQueen was residing out of Canada, and the suppliant was then a minor, residing out of Ontario, and if the suppliant has continued to reside out of Ontario ever since, would that prevent the statute of limitations from running in favor of Her Majesty, assuming that Her Majesty can set it up as a defence to the petition?

“8th. Is the suppliant entitled to recover by petition of right the said lands, or any part thereof, under the facts and circumstances herein stated?

“9th. Is the suppliant entitled to recover by petition of right compensation or damages for the taking of the said lands or any part thereof under the facts and circumstances herein stated?

“10th. Is the suppliant entitled to recover by petition of right the purchase money of the parts of the said lands sold by the crown, and, if so, is she entitled to interest thereon?

“11th. Is the suppliant entitled to recover by petition of right mesne rents and profits and, if so, from what date?

Mr. *Gormully* appeared on behalf of the suppliant and Mr. *Lash* Q.C. for the crown.

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GWYNNE J.—(After reading the above statement of the case delivered the following judgment in the Exchequer Court:—)

“In the year 1876 a similar petition of right was filed in this court by the heirs of the late Colonel By, claiming relief in their favor, similar to that which the suppliant, Lucy McQueen, now claims by her petition, and upon the answer of the Attorney-General having been filed to the petition, a special case was stated, wherein some questions were submitted to the court similar to some of those which are now submitted.

“The late Chief Justice of this court, Sir Wm. B. Richards, delivered his judgment in that case dismissing the petition.

“Upon the argument before me of the present case it was urged by Mr. Lash, upon behalf of the crown, that any of the questions decided by Sir W. B. Richards in that case, similar to those submitted now, should be deemed concluded by his decision; and upon the other side I was requested by Mr. Gormully to express my own views in the case, independently of the judgment of the late Chief Justice in the former case.

“In view of the apparent magnitude of the claim asserted by the suppliant, and inasmuch as upon a thorough consideration of the case as I am able to give it, I have arrived at the conclusion that there is no ground whatever upon which the claim of the suppliant to any portion of the relief prayed by her can be supported, and as in some minor particulars my mode of arriving at this conclusion may appear to be somewhat different from that by which the late learned Chief Justice arrived at the like result as to the claim of the heirs of Colonel By, I have thought it right that I should state fully, the mode of reasoning which has satisfied my mind that the claim of the suppliant can-

not be rested upon any foundation of either a legal or equitable character.

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“The act 8 Geo. 4, ch. 1 in its preamble recites that:

Whereas His Majesty has been most graciously pleased to direct measures to be immediately taken under the superintendence of the Military Department for constructing a canal uniting the waters of Lake Ontario with the River Ottawa, and affording a convenient navigation for the transport of naval and military stores, and whereas such canal when completed will tend most essentially to the security of this Province by facilitating measures for its defence and will also greatly promote its agricultural and commercial interests, and it is therefore expedient to provide by law any necessary facility towards the prosecution of so desirable a work.

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And it was therefore enacted that the officer employed by His Majesty to superintend the said work should have full power and authority to explore the country lying between Lake Ontario or the waters leading therefrom and the River Ottawa, and to enter into and upon the lands or grounds of or belonging to any person, and to survey and take levels of the same, or any part thereof, and set out and ascertain such part thereof as he shall think necessary and proper for making the said canal, locks, aqueducts, tunnels and all such other improvements, matters and conveniences as he shall think proper and necessary for making, effecting, preserving, improving, completing and using the said navigation, and also to make, build, erect and set up in and upon the said canal, or upon the lands adjoining or near the same, such and as many bridges, tunnels, aqueducts, sluices, locks, weirs, pens for water tanks, reservoirs, drains, wharves, quays, landing places and other works, as the officer aforesaid should think requisite and convenient for the purposes of the said navigation and also from time to time to alter the route of the said canal, and to amend, repair, widen and enlarge the same, or any other of the conveniences above mentioned; and also to construct, make and do all other matters and things which he shall think necessary and

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convenient for making, effecting, preserving, improving, completing and using the said canal, in pursuance of and within the true meaning of this act, doing as little damage as may be in the execution of the several powers to him thereby granted.

By the 2nd section it was enacted that after any lands or grounds should be set out and ascertained to be necessary for making and completing the said canal, and other purposes and conveniences thereinbefore mentioned, the officer aforesaid was thereby empowered to contract, compound, compromise and agree with all persons, &c., &c., who should occupy, be possessed of, or interested in, any lands or grounds which should be set out or ascertained as aforesaid, for the absolute surrender to His Majesty, His heirs and successors, of so much of the said land as should be required, or for the damages which he, she or they should reasonably claim in consequence of the said intended canal locks and other constructions and erections being cut and constructed in and upon his, her or their respective lands, and that all such contracts, agreements and surrenders should be valid and effectual in law, to all intents and purposes whatsoever.

By section 3 it was enacted that such parts and portions of land or lands covered with water as might be so ascertained and set out by the officer employed by His Majesty as necessary to be occupied for the purposes of the said canal, and also such parts as might, upon any alteration or deviation from the line originally out laid for the said canal, be ascertained and set out as necessary for the purposes thereof, should forever thereafter be vested in His Majesty, his heirs and successors.

By the 4th section it was enacted that if, before the completion of the canal through the lands of any person, no voluntary agreement should be made as to

the amount of compensation to be paid for damages according to the act, the officer superintending the said work should at any time after the completion of such portion of the canal, upon the notice or request in writing of the proprietor of such lands, or his agent legally authorized, appoint an arbitrator, &c., and provision was made for the determination, by arbitrators, one so appointed, another by the claimant and a third by the two so appointed, of the amount to be paid to such claimant.

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Sections 5, 6, 7, 8 provided for submission of the question of the amount to be paid to such claimant to a jury, in case the officer superintending the work or the party claiming should decline to abide by the award of the arbitrators, and

By the 9th section it was enacted that in estimating the claim of any individual to compensation for property taken or for damage done under the authority of the act, the arbitrators or jury assessing such damages should take into their consideration the benefit likely to accrue to such individual from the construction of the said canal by enhancing the value of his property: Provided also that it should not be competent for any arbitrators or jury to direct any individual claiming, as aforesaid, to pay a sum in consideration of such advantages over and above the amount at which the damages of such individual should be estimated.

Now the first question that arises under this act, as it appears to me, is : At what instant of time did Grace McQueen become, if she ever did in her lifetime become, divested of her estate in the 110 acres, part of the lands granted to her in fee? Unless she became divested of the fee simple estate granted to her, so that such estate in the 110 acres became, under the provisions of the statute, absolutely vested in His

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late Majesty King George the Fourth, His heirs and successors, the estate granted to her by the letters patent in the whole of the lands therein mentioned, including the 110 acres, must have devolved upon her heir-at-law William McQueen *eo instanti* of her dying intestate, subject, however, to the interest of her husband as tenant by the courtesy; but whichever be the correct view to take makes no difference in the result.

That Grace McQueen did not become divested of her estate immediately upon the lands deemed to be necessary by the officer in charge of the construction of the contemplated canal having been first ascertained on survey and staked out upon the ground, (which are acts that might have been done without the owner of the land having any knowledge whatever of them) appears to me to be clear from the provisions of the 2nd and 4th section of the act; for by the former the power given to the officer to contract with the owners for the amount to be paid for the lands, and for their surrender to His Majesty, is stated to be given as a power coming into operation only after the lands shall have been set out and ascertained to be necessary, &c., &c., and the section provides that all contracts, agreements and surrenders made under this power shall be valid and effectual to all intents and purposes whatsoever.

Now, for what purpose could they be valid and effectual, unless it be for the purpose of vesting the fee of the lands required in His Majesty, and how could they operate for that purpose if, *eo instanti* of the lands having been set out and ascertained, and therefore before the officer became empowered by the act to contract with the owner, the fee simple estate of such owner had become divested out of him and vested absolutely in His Majesty by the terms of the act? Then, again, by the 4th section the period

during which the officer in charge is empowered to enter into contracts with the owner of land taken, while such owners are deprived of all powers of having the amount of compensation to be paid to them determined by compulsory process, is made to extend over the whole period that the works shall be in progress of construction through the lands of the respective owners. The right of the owner to have the amount of his compensation determined by arbitration does not accrue to him until after the completion of the canal through his lands. The section says :

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If before the completion of the canal through the lands of any person no voluntary agreement shall have been made as to the amount of compensation to be paid for damages according to this Act, the officer superintendent of the work shall at any time after completion of such portion of the canal, upon notice or request in writing of the proprietors of such lands, appoint an arbitrator, &c. &c.

This section seems to me to regard the former owner as still proprietor of the land taken during the whole period that the work through his land is in progress, and at least until the time stated, when in default of a voluntary agreement having been entered into the proprietor of the land may enforce an arbitration to determine the amount to be paid to him for compensation. Then, again, the provision in the 9th section, that in estimating the claim of any person to compensation for property taken the arbitrator or jury assessing such damage shall take into consideration the benefit likely to accrue from the construction of the canal by enhancing the value of his property (namely the portion not taken), seems to exclude the possibility of any person being entitled to compensation for lands taken, other than the person entitled to the estate in the land ; for, if before a voluntary agreement should be entered into, and before the amount of compensation to be paid to an owner in fee for land

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taken from him should be determined by an award or by the verdict of a jury, and *eo instanti* of the required land being set out and ascertained by a survey, the owner should have become divested of his estate and the lands so set out should have been absolutely vested in His Majesty, and the title of the former owner in fee turned into a claim merely for compensation which upon his death, intestate, would devolve upon his personal representative, and if such personal representative could claim the compensation, the provisions of the 9th section could not be carried into effect; for such person, if entitled to recover, could by no possibility have his right affected by the benefit which the construction of the canal would attach to the remaining lands not taken which would belong to the heir-at-law of the intestate deceased. Moreover, the 4th section which alone provides for the ascertainment by compulsory process of the amount to be paid for land taken, names the proprietor of the land as the only person who can bring into action the compulsory process, and he is the only person with whom the provision of the 9th section would be given any effect. It is, moreover, contrary to the spirit of legislation to deprive any person of his estate in lands by expropriation for the public use, unless upon voluntary agreement, or until compensation shall be secured, by some process of law provided for the purpose, such as are the provisions contained in the various Acts of the late Province of Canada, affecting the Board of Works, whereby it was provided that until payment and tender into court of some amount as and for compensation and submission to arbitration, in the absence of a voluntary agreement to determine the amount which should be paid, the owner of the lands required for the public use does not become divested of his estate.

For these considerations, I think the proper construction to be put upon the act, notwithstanding the words of the 3rd section, is that the original owner, at the time of the lands being first set out and ascertained by survey on the ground, and his heirs, do not become divested of their estate in the land, at least until after the expiration of the period given by the act for the officer in charge to enter into a voluntary agreement with such owner, unless it be in virtue of an agreement being entered into with such owner.

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The provisions of the act, 6 Wm. 4 c. 16, seem to me to confirm this view, for that act contemplates, and makes provision for the case of parties acquiring title to lands taken after the commencement of the works, for in a proviso to the 3rd section of that act it is enacted that in all cases of a sale of property made after the commencement of the works, compensation shall be made, either to the former owner or to the assignee, as it may appear just to the arbitrators under the facts proved to them.

Now the statute 8 Geo. 4 c. 1, was passed on the 17th February, 1827, and Grace McQueen died intestate, as is stated in the special case, upon the 11th of September, 1827, after Colonel By had set out and ascertained, but how is not stated, the 110 acres parcel of the 600 acres of which she was seized in fee. The special case does not allege that when she died the canal had been constructed through her lands. In view of the period which had elapsed since the passing of the act we might safely conclude that it had not, but the special case does not even allege that any part of the works had been commenced when she died. In the view, however, which I take it would make little difference if they had been because, for the reasons which I have already explained, I am of opinion that when she died intestate,

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without any contract having been entered into with her by Colonel By, her heir-at-law, Wm. McQueen, to whom his father only tenant by the courtesy, had released all his right, was the only person with whom a contract could have been entered into by Col. By under the provisions of the act, and it was competent for him to enter into a contract in respect of the 110 acres so taken. In this result, although arrived at in a different way, I entirely concur with the judgment of Sir. W. B. Richards in the case instituted in this court by the heirs of Colonel By against the Crown (1). The cases of *Richards v. The Attorney-General of Jamaica* (2), and *Frewen v. Frewen* (3) do not appear to me to have any bearing upon this case, for the question which arose in those cases was who was entitled to the compensation, into a claim for which what had been real estate was by certain acts of Parliament clearly converted, whereas here there is no question as to the person entitled to receive compensation for the land taken; but the question is, whether the heir-at-law of a former owner is entitled to have vested in him land taken from his ancestors upon the ground of its ceasing to be used for the purpose for which it was taken. Moreover, for the reasons I have given, I am of opinion that no conversion of realty into personalty was effected by 8 Geo. IV, c. 1, at least not during the period therein mentioned within which voluntary agreements might be entered into, nor until the arrival of the time when, by the act, the right was vested in the proprietors of lands taken of proceeding to obtain compensation for the lands taken by compulsory process, in case a voluntary contract should not be entered into before the arrival of that

(1) *Tylee v. The Queen* 7 Can. S. C. R. 651.

(2) 6 Moore P.C. 381.

(3) 10 Ch. App. 610.

time. Neither have the cases as to the right to money agreed to be paid for the purchase of lands not yet conveyed when the vendor dies, passing to his personal representative, any bearing upon this case, because then the amount of the purchase money has been ascertained by the contract of the parties enforceable in equity, and they proceed upon the principle that equity regards as done, what has been validly agreed to be done. And, moreover, there is no question here as to any right to compensation, or as to who was the party entitled thereto. William McQueen, then, being competent to contract in respect of the 110 acres, appears to have entered into a contract with Col. By for the sale of all his estate and interest therein for the consideration of two hundred and twenty pounds provincial currency paid to him, for this I take to be the conclusion to be arrived at upon the true interpretation of the transaction expressed by the indenture of the 6th February, 1832.

From the memorial of that indenture which has been produced and has been agreed to be taken as evidence of the contents of the indenture itself, it appears that thereby William McQueen, described as heir-at-law of Grace McQueen, in consideration of twelve hundred pounds of lawful money of the Province of Upper Canada, to him paid, the receipt whereof is thereby acknowledged, did give, grant, bargain, sell, assign, release, transfer, convey and confirm with covenants of seizin, right to transfer, freedom from incumbrances, quiet enjoyment and general warranty unto the said John By, *habendum*, to him and his heirs forever, the 600 acres granted to Grace McQueen by the precise description covering the whole 100 acres, as contained in letters patent of the 20th of May and the 10th of June, 1801.

Now, whether the money so paid to William McQueen was or was not the money of His then Majesty is a

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matter with which neither William McQueen nor any person claiming under him can have anything to do. Whether it was in whole or in part Col. By's money, or money belonging to the crown over which he had control, was a matter in which Col. By and the crown were the sole parties concerned and if Col. By chose to apply his own money in satisfying William McQueen to the full value of the lands taken from him for the purpose of the canal, all claims of William McQueen or of any person claiming under him to have any compensation for the lands so taken would be satisfied and discharged equally as if the money applied in paying him had been the monies of His Majesty or public monies under the control of Col. By. Whether Col. By in such a case could or could not procure reimbursement from the crown for monies so advanced by him out of his own pocket would be a matter wholly between himself and the crown, and after the payments so made to William McQueen the latter could not ever after, nor could his heirs-at-law, be heard to assert, under any circumstances whatever, a right to have any part of the land so paid for re-conveyed to him or them founded upon the assertion that the land had not been paid for.

Whether an estate did or did not pass by the deed executed by William McQueen would be a matter of no importance, for the deed still stands as a conclusive acknowledgement that it was as and for the purchase money for the whole 600 acres that the £1,200 was paid, and if no estate in the 110 acres passed, still the fact remains that William McQueen got paid the full value of these 110 acres upon the faith that, upon the execution of the deed, whatever estate, right, title or interest he had therein was divested out of him and his heirs for ever, and in fact and in law all title and interest of him and his heirs therein became thereby forever extinguished; but as it appears to me, the estate o

William McQueen in the hundred and ten acres equally as in the residue of the 600 acres did at law pass by the deed, notwithstanding at least anything contained in the statute of 32 Henry 8 ch. 9, which, in my opinion, has no bearing upon the case. That act was passed to make void all deeds executed to the prejudice of persons in possession by persons out of possession to persons out of possession, under the circumstances stated in the act.

If A, by the command of and as the agent and servant of B, disseised C, and some years afterwards A, being still in possession as the agent and servant of and upon behalf of B took a conveyance identical in terms with that of the deed of the 6th February, 1832, from the heir-at-law of C, or from C himself, without any re-entry having been made by him, such a conveyance was never supposed to be within the act. The transaction would not be within the mischief pointed at by the act, and so would not be within the operation of it; the conveyance would at law operate as a release and the legal estate of the heir of B or of C, as the case might be, could undoubtedly in law become released to and vested in A whatever right in equity B might be able to enforce against him. Now that is the case here: Col. By as the agent of His Majesty, who could never be himself in actual possession, entered upon and took actual possession of the 110 acres in the lifetime of Grace McQueen; while in such actual possession as the servant of and in behalf of His Majesty, he takes the conveyance from William McQueen heir-at-law of Grace while he is out of possession. Such a conveyance is a good conveyance at law by way of release unaffected by the statute of Henry the eighth equally as the conveyance to A by the heir-at-law of C in the case above put; and His Majesty would have equal equity to enforce his rights against his agent and ser-

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vant Col. By as, in the case put, B would have against A. The person out of possession executing such a deed to the person in actual possession could not, nor could his heir-at-law, ever after be heard to base a claim to any part of the land comprised in the conveyance founded on the contention that the conveyance was void within the statute of Henry the eighth.

The deed then of the 6th February, 1832, not having been avoided in law as to the hundred and ten acres in question by reason of anything contained in the statute of Henry the eighth, the effect of that deed as to those 110 acres was, in my opinion, to make it operate as a contract or agreement made with Col. By as agent of His Majesty within the provisions of 2nd section of 8 Geo. 4 ch. 1, and so by force of that statute to vest those 110 acres absolutely in His then Majesty, His heirs and successors, free and absolutely released and forever discharged from all claims whatsoever of the said William McQueen and his heirs, whose title thereto became utterly extinguished, leaving Col. By, if the monies paid by him to William McQueen in respect of the hundred and ten acres were his own, to claim indemnity therefor as best he could from the crown. Had he presented his claim in the shape of a purchase made by him on behalf of His Majesty, at the rate of two pounds per acre, possibly his claim might have been recognized; but he does not appear to have done so, but on the contrary, as in paragraph 20 of the special case is stated, he, some time after the execution of the conveyance of the sixth day of February, 1832, took proceedings under the act 8 Geo. 4 ch. 1, to obtain by arbitration compensation or damages from His Majesty in respect of the lands comprised in the said indenture of the 6th February, 1832, and therein he claimed compensation for the lands now in question, and thereupon, as in paragraph 21 of the special case is stated,

an award was made in writing in the cause of the said arbitration proceeding, whereby it was awarded and determined that by reason of the enhancement of the value of the other land, which at the time of her death belonged to the said Grace McQueen, and of the benefits and the advantages that accrued to her and those claiming under her from the construction of the canal, as provided in the ninth section of the said act, His Majesty was not liable to make any compensation for the lands in question in the matter taken under the act, and as is stated in paragraph 22 of the special case. Afterwards Colonel By, being dissatisfied with the said award, duly caused a jury to be summoned under the provisions of the said act to assess the said damages and compensation claimed by him, and the jury delivered their verdict to the same effect as the said award.

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By paragraph 23 of the special case it is agreed that the documents relating to the said arbitration and assessment proceedings in the three preceding paragraphs mentioned are to be treated as part of the special case.

I have repeatedly tried to get these arbitration papers which are so made part of the special case and have deferred giving judgment in the case for a long time in the hope of getting them, but either for the reason that they have been mislaid and cannot be found, or for some other reason, they have not been furnished to me. I was particularly anxious to see them, as I think that if produced they would probably remove what I cannot but think is an error in the admission in the special case, where it is said that it was Col. By himself who took the proceedings in arbitration.

He could not have done so while he was the officer in charge of the canal representing the crown and in

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*re Holmes* (1) cited in the argument it appears that the arbitration took place in 1840 in consequence of a claim for compensation having been made by the trustees of the will of Col. By, who, as also appears in that case, died upon the 1st February, 1836.

When it is said in the special case that the arbitration took place at the instance of Col. By as claimant we must assume it to have taken place after he ceased to be the officer in charge of the canal upon behalf of the reigning Sovereign and when some other person as officer in charge represented the Sovereign.

Now Col. By having purchased the lands described in the conveyance of the 6th February, 1832, and having procured those lands to be, by that indenture, conveyed to himself, could not, it may be admitted, as against the crown, have asserted an interest in the 110 acres set apart for the use of the canal, although the effect of persons in a position of trust purchasing in their own name lands required for the purposes of their trust was not at that early period very well understood in Upper Canada; however, it was the crown alone who could object and it was competent for the Sovereign to waive his strict rights and as an act of grace to recognise Col. By as the proprietor of the land in question and so recognising him to enter into an arbitration with him as with any other proprietor of land taken for the purposes of the canal under the provisions of the act 8 Geo. 4 ch. 1. It was only in the character of proprietor of the land that Col. By could have claimed to have an arbitration under the act, and the special case admits that the arbitrators appointed and the jury summoned to assess the amount of compensation if any to be paid to Col. By for the hundred and ten acres, were so appointed and summoned respectively under the provisions of the act, and that they adjudged and determined that

(1) 2 J. & H. 527.

under the provisions of the act he was not entitled to the payment of any sum of money by way of compensation, for that the enhanced value attached by the construction of the canal to the residue of the land, not taken, was sufficient and complete compensation for the value of the land taken.

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We have seen that if any pecuniary payment by way of compensation had been awarded it was competent for the arbitrators and jury to say whether it was, under the particular circumstances of the case, to be paid to the claimant Col. By as assignee of the former owner, or to the former owner; and as Col. By paid William McQueen at the rate of two pounds per acre for the land taken for the canal, there can be no doubt, in justice, if any sum had been awarded it would have been made payable to Col. By and not to William McQueen or any person representing him. The arbitrators and jury having adjudged and determined that no sum was payable under the provisions of the act for the reasons above given, Col. By, who had paid William McQueen two pounds per acre for the land, was compelled to be content with the benefit received by him in the enhanced value attached by the work to the residue of the land which he bought from William McQueen.

Under the circumstances I am unable to see upon what principle of law or equity any claim in favor of the heir-at-law of William McQueen can be asserted as founded upon the allegation that "no pecuniary compensation was paid by the crown to Grace McQueen or to William McQueen, or to any person claiming under them," as admitted in the special case and asserted in the petition of right filed in this case. It would be difficult to reconcile with any principle of law or equity the recognition of such a claim founded upon the fact that the crown *ex gratiâ* abstained from

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insisting, as against Col. By, upon rights which it might have insisted upon and granted him an arbitration under the act, treating him as being, as the indenture executed by William McQueen represented him to be, the proprietor, as purchaser for full value from William McQueen, of all the land in question.

But it is said that the law does not permit more land to be taken from any person by process of expropriation for a public purpose than is necessary for the purpose, and that if more be taken than is necessary for the purpose for which it is taken the part not used reverts upon the non-user or cesser of use at common law to the former owner, although at the time of expropriation the full fee simple value of the land taken may have been paid to the former owner from whom it was taken.

Upon this assertion of right is founded the claim made in this case, that 90 acres of the 110 taken not being used, as is said, directly or indirectly, for the purposes of the canal have reverted to the heir-at-law of Grace McQueen, although it appears in the case Col. By paid to him the full value of the whole 110 acres, under the belief that the legal estate therein, as well as in the residue of the lands granted to Grace McQueen by the letters patent of the 20th of May and the 10th of June, 1801, had passed to Col. By in virtue of the indenture of the 6th February, 1832, executed by William McQueen. That the land of a private person cannot legally be expropriated for a public purpose to any greater extent than is necessary for the purpose for which it is expropriated may be admitted, but it is plain that the right to restrain expropriation beyond what is necessary for the purpose of the expropriation must be exercised at the time of the expropriation.

There must be some mode of determining then what

is necessary; and with respect to the expropriation for the purposes of this canal, the mode of determining what was necessary is in express terms provided by the act 8 Geo. 4 ch. 1; but when the land required for the particular purpose is ascertained and determined by the means provided by the Legislature for that purpose, and the estate of the former owner in the land has been by like authority divested out of him and vested in the crown, or in some persons or body authorized by the legislature to hold the expropriated land for the public purpose, if the estate of which the former owner is so divested be the fee simple, there is no reversion nor anything in the nature of a reversionary right left in him in virtue of which he can at any subsequent time claim upon any principle of the common law to have any portion of the land of which he was so divested to be re-vested in him, by reason of its ceasing to be used for the purpose for which it was expropriated. With respect to the particular act in question here. the late learned Chief Justice Sir John Robinson in the Court of Queen's Bench for Upper Canada, in *Doe. Mallock v. H. M. Ordnance* (1) thus expresses himself :

The Legislature passed in 1827, the act 8 Geo. 4, ch. 1, for granting certain facilities to the government for the construction of the Rideau Canal. They recite in it that "the work would tend most essentially to the security of the province by facilitating measures for its defence as well as promote greatly its agricultural and commercial interests" and when this double public advantage is considered we cannot doubt that the Legislature intended that the discretionary powers which they were about conferring upon the military officers to be intrusted by His Majesty with the superintendence and charge of the canal should be such as would enable them to carry out the design on what they might consider an efficient and proper scale with reference to the protection and security of the work in war as well as in peace. I have so held on several occasions when it was made a question before me at *nisi prius* whether the lands which the military engineers had taken were in fact necessary.

(1) 3 U. C. Q. B. 388.

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Although there might possibly be such an evident abuse of the powers given by the statute as would make it right to hold that what was pretended to be done under its provisions was not in fact done with a view to execute its powers but only under colour and pretence of its authority, yet it has always appeared to me that wherever there could be said to be any room for question as to the necessity, it ought to be assumed that the public officers had used their discretion fairly and in good faith, in which case the question of the land being necessary or not necessary must be governed by their judgment and not by the judgment of any court or the opinion of any other person public or private, and this appears to me to be not only legal but highly reasonable when we consider the great public interests involved on the one hand, and on the other the care taken to secure to every individual whose property may be taken possession of a just compensation for its value.

A passage from Mills on Eminent Domain (2 Ed.) was cited on the argument in support of the claim which is asserted as a common law right upon the part of the suppliant as heir-at-law of William McQueen, but that passage refers to a case where the estate or interest expropriated is an use or easement : when the fee simple is the estate expropriated that author expounds clearly what is the language also of the common law.

At section 50 he says :—

It is the exclusive privilege of the Legislature to determine the degree and quality of interest which may be taken from an individual as well as the necessity of taking it. An easement or usufruct may be taken or the entire property may be taken so as to be vested absolutely, without reversion to the original owner in case of a change in the use. In such case the owner is paid the entire value of the land and should have no reversion. When only an easement is taken it is presumed that the full value is not given and that the owner receives a lesser amount when there is reserved to him the chance of reversion on a discontinuance of the public user. \* \* \* When the full value has been paid the land with all the materials thereon belongs to the public, there is no right of easement remaining in the owner and the lands so taken may be sold for other purposes. Land taken originally for an almshouse or hospital may, after years of increase in the population of a city, become unsuitable for such purposes and may be sold by the public. Otherwise the owner having received the full value of his land might either compel the public to

continue a public institution in an unsuitable place or receive in addition to the value of his land the erections made on it.\*\*\* When the state takes land for its own purposes it is presumed to take the fee.

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Now if the arbitration which took place with Col. By in respect of the land in question, instead of having been had with him, as the special case states, had taken place with William McQueen, and the arbitrators and jury had adjudged and determined, as they did upon the arbitration with Col. By, that the enhancement in value put upon the adjoining lands of William McQueen not taken (by the construction of the canal) gave to him full value for the land taken, such an award having been authorised by the act, when the fee in the lands taken became as it did by force and operation of the statute vested in the crown to the same extent as if a money value had been paid by the crown directly to William McQueen, the fact that any part of the lands taken under the act ceased to be used for the purposes of the canal, could not have the effect of revesting in William McQueen or his heirs the land taken, and which had ceased to be used for the purposes for which it was taken. Nothing short of another act of parliament could divest the crown of the fee which was vested in it by the act 8 Geo. 4 ch. 1, or authorize the appropriation of the lands so vested in the crown to any other purpose than stated in the act. A case of *Mulliner v. Midland Ry. Co.* (1) was relied upon by the learned counsel for the suppliant, but that was a decision rendered upon 127th sec. of the Imperial Statute 8 and 9 Vic., ch. 18, usually called the Land Clauses Consolidation Act, a section which directs a much more natural and equitable appropriation of land not required for the purpose for which it was acquired than to give it back to the original owner who was already paid for it and who might no longer have any interest in any adjoining land, which is the unnatural

(1) 11 Ch. D. 617.

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and inequitable appropriation which in such a case is by the learned counsel for the suppliant attributed to the common law. That section enacts as follows :—

And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special act or any act incorporated therewith, but which shall not be required for the purposes thereof be it enacted as follows: Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands and apply the purchase money arising from such sales to the purposes of the special act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the land adjoining thereto in proportion to the extent of their lands respectively adjoining the same.

Then the 128 sec. enacted that before the promoters of the undertaking should dispose of any such superfluous lands they should, unless such lands be situate within a town, or be lands built upon or used for building purposes, first offer to sell the same to the person then entitled to the lands, if any, from which the same were originally taken, or if such person refuse to purchase the same or cannot after diligent enquiry be found, then that the like offer should be made to the person or to the several persons whose lands should immediately adjoin the lands so proposed to be sold.

I have hitherto treated the case as if Grace McQueen had died seized in fee of the land in question, and that, having died intestate, as is admitted in the case, the lands descended to William McQueen who, by force of the contract made with him by Col. By, received full value for the lands taken, and that his estate therein by force of such contract, for giving effect to which the deed of the 6th February, 1832, was executed, and by force of the statute operating upon the contract made with Col. By, the crown's agent in the matter, for the sale of the land to him, became vested

in His then Majesty, his heirs and successors forever, under the provisions of the statute in that behalf. But assuming Grace McQueen to have become during her lifetime divested of her estate in the lands, and that therefore upon her death intestate those lands did not descend to her heir-at-law William McQueen, (it is unnecessary to notice the interest of her husband as tenant by the curtesy), still the claim which is asserted upon the petition of right on behalf of the suppliant would not be a whit advanced.

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If Grace McQueen was not seized of the land in question at the time of her death it must have been solely because the statute 8 Geo. 4 ch. 1 had already operated in her lifetime to divest her of her estate and to vest the lands in fee in his then Majesty, his heirs and successors forever, for the purposes of the act. I have already referred to the difficulty which, as it appears to me, such a construction of the act would create as to the awarding compensation if none had been agreed upon between Grace McQueen and Col. By in her lifetime and I do not propose to refer to it again, but shall assume, as has been argued in the suppliant's interest, that she had by the operation of the act become divested of her estate in the land in her lifetime and that her rights had become converted into one merely of a right to compensation which upon her death passed as personalty.

Assuming it to have so passed, it would have been a right enforceable at the suit or demand of a personal representative. Although beneficially it would have belonged to the next of kin, if when her heir-at-law William McQueen in this character of assumed owner of the land in question received, as he did receive from Col. By, the price agreed upon between them as the full value of the land taken, he at least could have no pretence of claim in his character of next of kin to

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any further compensation ; but assuming for the sake of the argument that there were other persons who as next of kin of Grace McQueen would have had an interest in regarding her claim as a mere personal demand and who would not have been prejudiced in the assertion of their demand by reason of William McQueen having wrongfully received, if it was wrongful in him to receive, the full value of the land taken, such a claim could only have been asserted, if at all, under the act.

And whether it could have been enforced under the act or not, either before or after the time limited in that behalf by the statute 2nd Vic. ch. 19, matters not, for it is obvious that a claim which a personal representative of Grace McQueen could have asserted in the interest of her next of kin and which never was asserted, could never be made the foundation of a claim at the suit of an heir-at-law of William McQueen, who either rightfully or wrongfully received payment of the full value of the land taken and covenanted to warrant and defend his vendee in the enjoyment of the estate, which in consideration of such payment he purported to convey, to have re-vested in such heir-at-law the fee simple estate in the lands purported to be sold by his ancestor, upon the ground of the land sold ceasing to be used for the purpose for which it was acquired. The non-payment of any demand, if any, which a personal representative of Grace McQueen might have had could never be made the basis or support of a demand at the suit of the heir-at-law of William McQueen to have re-vested in him any portion of the lands described in the indenture of the 6th February, 1832, after the execution of that indenture by William McQueen, whether that indenture was effectual or not for passing the estate which it professed to pass.

If, then, the suppliant is not, upon principles of the common law, entitled as heir-at-law of William McQueen to the relief claimed in her petition of right filed in this case, and for the reasons already given I am of opinion that she is not, she cannot have acquired any title to such relief unless it be by force of some act of the legislature.

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It is, however, contended that the proviso set out in the suppliant's petition of right as being contained in the 29th section of the act of the Parliament of Canada, 7 Vic. ch. 11, has the effect of conferring upon the suppliant the right asserted by her in her petition of right.

That act recited among other things that divers lands and real property being within the province of Canada had been at various times set apart from the crown reserves or from the clergy reserves, and had been placed under the charge and control of the officers of Her Majesty's Ordinance or of the Commander of the Forces for purposes connected with the defence of the province and the service of the said department, and that divers other lands and real property had been at divers times purchased for like purposes, and conveyed or surrendered to, or in trust for Her Majesty or Her royal predecessors, or had been taken for like purposes under the authority of some act or acts of the legislature of the late province of Lower Canada or of the late province of Upper Canada, and are by the provisions of such acts vested in Her Majesty, and the price or compensation of and for the same hath been paid out of the funds provided for that purpose by the parliament of the United Kingdom, and that it might be expedient that such parts of the said lands as might not be wanted for the service of the said department or for the military defence of the province should, from time to time, be sold or disposed of.

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And it was therefore enacted that all lands covered with water, canals, &c., within the province of Canada, and at the time of the passing of the act vested in Her Majesty or in any person or persons, officer or officers, in trust for Her Majesty and set apart and occupied for purposes connected with the military defence of the province, or placed under the charge and control of the officers of the said Ordinance Department or of the commander of Her Majesty forces, or other military officer or officers, whether the same have become vested in Her Majesty or her royal predecessors for such purpose by the cession of this province, or have been by her or them set apart or transferred from the lands of the crown or from the clergy reserves, or have been purchased for such purpose by any person or officer and paid for out of the funds provided for that purpose by the parliament of the United Kingdom, and surrendered or conveyed to Her Majesty or her royal predecessors, or to some person in trust for her or them, or have been set apart or transferred, or have been taken for any such purpose under the authority of any act, or law in force in this province or in any part thereof by whatsoever mode of conveyance the same shall have been purchased or taken, and whether in fee or absolute property, or for any life or lives or, term or terms of years, or for any lesser interest or a *titre de cens*, and more especially the lands and other real property mentioned and described in the schedule annexed to the act, shall be and the same are hereby vested in the principal officers of Her Majesty's Ordinance in Great Britain, and their successors in the said office according to their respective nature and quality, and the several estates and interests therein subject to the provisions of this act, and in trust for Her Majesty, her heirs and successors, for the service of the said department, or for such other services as Her Majesty,

her heirs or successors, or the said principal officers, shall from time to time direct.

In the schedule above referred to, is particularly, described the Rideau Canal and the lands purchased taken or set out and ascertained as necessary for the purposes of the said canal, and marked and described as necessary for such purpose on a certain plan lodged by the late Lieut.-Col. By, of the Royal Engineers, the officer then employed in superintending the construction of the said canal, in the office of the Surveyor General of the late province (of Upper Canada), and signed by the said Lieut.-Col. By, and now filed in the office of Her Majesty's Surveyor-General for this province, and all the works belonging to the said canal or lying or being on the said lands.

Then the 12th section of the act authorized the principal officers to sell or exchange or to let and demise the lands so vested in them, and the 13th section enacted that the monies to arise from such sales, demises, &c., should be applied to such purposes as Her Majesty, heirs or successors, should direct.

The act also authorized the principal officers in their discretion to acquire other lands, &c., for the service of the department or for the defence of the province, and made provision for the mode of acquiring such lands.

The act also contained clauses having peculiar relation to lands acquired in that part of the province formerly constituting Lower Canada and placed under the control of the principal officers. The 9th section in which the proviso relied upon by the suppliant is found in one of those sections—it enacts—that it :

Shall be lawful for the said principal officers to grant any *censitaire* holding lands or other real property, within the censive of any seigniory vested in them under the provisions of this act, a commu-

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How this proviso, the operation of which, if given effect to, would be so wholly at variance with the objects for which, as appears by the preamble and the first enacting clause the act was passed, came to be inserted in this section, which relates to a subject having no connection whatever with the subject to which the proviso relates, seems very singular. It presents to my mind, if such a thing were possible, the appearance of having been thus introduced by some person interested upon behalf of some private person, and that the proviso and its effect must have altogether escaped notice when the bill was passing through the legislature and until after the royal assent had been given to it. No motive for the insertion of such a clause is suggested in the act or can well be conceived. It seems to be impossible to conceive that the legislature could have contemplated that lands taken under the Rideau Canal Act for a work which the military authorities considered to be necessary for the defence of the province, and which lands had been purchased and paid for by His then Majesty with funds provided for the purpose by the Imperial Government, should be restored to the parties from whom they had so purchased, without any considera-

tion whatever being given therefor by the persons to whom they should be so restored, and that the sole reason for such restoration should be that they had not been used for canal purposes, although for military purposes of defence they might perhaps be very necessary; but necessary or not necessary for military purposes, what motive could induce the Imperial authorities, whose assent to such a proviso would be necessary, to consent that any lands which had been purchased and paid for out of funds supplied by the Imperial Government, which had been at the sole cost of constructing the canal, should be restored, without any consideration whatever, to the persons who had received full value therefor, is neither suggested nor is to my mind at all conceivable.

If indeed there had been a case of lands having been taken, for which the private owner from whom they had been taken had neglected to take measures to enforce payment of compensation by arbitration under the act within the time limited by 2nd Vic. ch. 19, and that any of such lands were not required for the purposes of the canal, a motive of justice might be suggested for provision being made for restoration of such land to the owner from whom it had been so taken without any consideration given therefor or arbitration had, but the proviso as introduced into the act is not framed so as to be limited to such a case; and yet, as appears by the subsequent act passed for the express purpose of explaining what was meant by the proviso, that seems to have been the only reason which could be suggested as explanatory of its object.

The act 9 Vic. ch. 4, which was passed for the express purpose of explaining this proviso so inserted in the 29th sec. of 7 Vic. ch. 11, recites the proviso and that doubts had arisen as to the true intent and meaning of the same, and as to the land to which it was intended

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to apply, and that proceedings at law and in equity which had arisen out of such doubts had been commenced and were still pending and that during the last session of the Legislature a bill had been passed by the Legislative Council and Legislative Assembly of the province for the purpose of explaining and amending the said act, as far as regards the effect of the said proviso and of setting such doubts at rest, but that the bill having been reserved for the signification of Her Majesty's pleasure thereon had not received the Royal Assent, and that the principal officers of Her Majesty's Ordinance, as well as the private parties interested, were desirous that the doubts aforesaid should be removed, and that all matters in difference between them should be fairly and amicably settled, and it was therefore enacted, that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks, Esquire, under the provisions of the act 8 Geo. 4 ch. 1, except so much thereof as is actually occupied as the site of the Rideau Canal, as originally excavated at the Sappers' Bridge, and of the basin and by-ward as they stood at the passing of the Ordinance Vesting Act, and excepting also a track of 200 feet in breadth to on each side of the said canal, the portion of the said land so excepted having been freely granted by the said Nicholas Spark to the late Col. By of the Royal Engineers for the purposes of the canal, and excepting also a tract of 60 feet round the said basin and By-wash (wherever the present ordinance boundary stones stand beyond that distance from the said basin and by-wash, but where they stand within that distance, then they shall bound the tract so excepted), which is freely granted by the said Nicholas Sparks to the said principal officers for the purposes of the said canal, provided there be no buildings thereon, and that notwithstanding anything in the act last cited

(8 Geo. 4 ch. 1) or in the act passed in the second year of Her Majesty's reign intituled : An act to limit the period for owners of land making claims for damages already occasioned by the construction of the Rideau canal, and for other purposes therein mentioned or any judgment, decree, verdict or decision of or in any court of law or equity, all the lands to which the said proviso is applicable as aforesaid shall, if retained by the principal officers of Her Majesty's Ordinance under the provisions of this act, be paid for by them in the manner provided by this act and any parts thereof which shall not be so retained and paid for shall be and the same are hereby declared to be absolutely re-vested in the said Nicholas Sparks, or the other parties, respectively, to whom the same may have been conveyed by him before the 10th day of May, 1846, to his and their own proper use forever; and such conveyances shall not then be invalidated by any want of possession in the said Nicholas Sparks, or adverse possession by the said principal officers at the time they were respectively made.

The 2nd sec. of the act enacts that the principal officer should, within one month after the passing of the act, obtain a certificate from the officers commanding Her Majesty's forces in the province, setting forth what parts of the lands to which the proviso is applicable it is necessary to retain for the service of the ordnance department for military purposes, and that such parts should be retained by and should remain vested in the said principal officers in trust for Her Majesty, and that the remainder, if any, should be immediately thereafter absolutely vested in the said Nicholas Sparks, or the party or parties claiming under him, to his and their own proper use forever, any law to the contrary notwithstanding. The fourth section makes provisions for the purpose of ascertaining the sum to be paid for

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the parts of the said land so retained as aforesaid by three arbitrators, namely, one James Sutton Elliott, or in case of his death, inability to act or absence from the Province for more than one month, such other persons as the said principal officers shall appoint, and Stewart Derbyshire, or in case of his death, inability to act or absence from the province for more than one month, such other person as the said Nicholas Sparks, his heirs, executors, administrators or assigns should appoint, and John Alexander McDonald, Esq., or in case of his death or refusal or inability to act, such other as the other two arbitrators should agree upon.

Then by the seventh section it was among other things enacted that the sum awarded should be respectively paid to the parties entitled to the same within three months after making the award, and that if any sum awarded should not be so paid within three months, as aforesaid, then that the land for which the same should have been awarded should be forthwith, after the expiration of the said period, restored to the said Nicholas Sparks, or the parties claiming under him as aforesaid, and should be, and was thereby, vested in him or them by the mere fact of such non payment within said period, and further, that if the said principal officers should fail to obtain the certificate of the officers commanding His Majesty's forces in this province, within the time limited in the act for that purpose, or should negligently fail to comply with any of the other requirements of the act, or if through non-attendance or other wilful neglect of the said James Sutton Elliot, or other persons appointed in his stead by the said principal officers, the other arbitrators should be prevented from proceeding, and such wilful default or neglect should continue for three months, then at the expiration of the said period the land to which the said proviso is hereby made applicable should be absolutely

re-vested in the said Nicholas Sparks or those claiming under him as aforesaid by the mere fact of the expiration of such period.

Now, from this act, the object of passing which, was to explain the true intent and meaning of the above proviso so singularly inserted in the 29th section of 7 Vic. c. 11. and to remove difficulties attending giving effect to that proviso, it is apparent that its intent was not to divest the principal officers of so much of the land vested in them by the first enacting clause of 7 Vic. c. 11, as had not been used for the purposes of the canal as the proviso literally imported. On the contrary the intent was to leave still vested in them under 8 Geo. 4 c. 1 and 7 Vic. c. 11, all the lands to which the proviso was applicable, or so much thereof as the commanding officer of Her Majesty's forces in the province should certify to be necessary to be retained not merely for the use of the canal, but for the service of the ordnance department for military or canal purposes, subject however to the condition that the lands so retained, (notwithstanding anything in 2 Vic. ch. 19) should be paid for at their value, to be ascertained by arbitration had between the principal officers of the one part and Nicholas Sparks of the other part in the manner provided in the act, and that payment of such value, when so ascertained, should be paid to Nicholas Sparks, or the persons claiming under him, and that the residue of the land, not so certified to be necessary and therefore not so arbitrated upon, should be and was thereby re-vested in Nicholas Sparks, or those claiming under him.

In addition to the reasons given in the judgment rendered by the late Chief Justice Sir W. B. Richards in the case above alluded to for holding that the proviso must be construed as being limited in its application to the lands of Nicholas Sparks, it appears to me

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that the plain object of the act and of the proviso whose intent is explained by the act 9 Vic. c. 42, was to prevent the principal officers taking advantage of 2nd Vic. ch. 19, for the purpose of retaining without payment of compensation certain lands which had been set apart and taken under 8 Geo. 4 c. 1 and which had not been conveyed by voluntary grant or surrender to Her Majesty, Her Royal predecessors or to Col. By for the purpose of the canal or to any one in trust for His late Majesty or arbitrated upon under the provisions of 8 Geo. 4 c. 1, and as all the land to which the statutes declare the proviso is applicable, if retained by the officer commanding Her Majesty's forces, was to be paid for at a value to be ascertained upon an arbitration with Nicholas Sparks, and to Nicholas Sparks or those claiming under him, and the balance not so paid for was declared to be restored to and vested absolutely in Nicholas Sparks, and those claiming under him, it appears to me to be plain that all the lands to which the proviso applied were lands which were originally the property of Nicholas Sparks, and not conveyed or surrendered by voluntary grant executed by him, and for which no consideration or compensation had been given to him. He, most possibly, was the only person who, not having been agreed with as to price by the officer in charge, had not availed himself of the compulsory process supplied by 8 Geo. 4 c. 1, within the time limited by 2 Vic. c. 19, and was therefore the only person whose lands were intended to be affected by the proviso.

The whole frame of the explanatory act shows that there never was entertained such an intention as that lands, for which the owners had received full value, as William McQueen had for the land in question here from Col. By, who was the officer in charge acting on behalf of and representing His Majesty, should

become re-vested in the said William McQueen, who had already received full value therefor, or in his heirs-at-law in which character the suppliant claims the right asserted in the petition of right in this case.

The reason why a portion of the excepted land is said to be retained without having to be arbitrated upon to ascertain a value to be paid by the principal officers, namely, "The portion of the said land so excepted having been freely granted by the said Nicholas Sparks to the late Col. By of the Royal Engineers for the purposes of the canal," shows that the proviso was only intended to apply to lands not granted and not arbitrated upon, and the reason so given so exactly corresponds with the mode adopted in taking title from William McQueen that it appears very plain I think that if there was any lands formerly belonging to William McQueen which were in the same position as the land of Nicholas Sparks as to which provision for future arbitration was made, the 110 acres mentioned in the deed of the 6th February, 1832, must have been and would have been excepted for precisely the same reason as the above excepted part of the lands of Nicholas Sparks, which were retained vested in the principal officers without any arbitration being had in respect thereof under the provisions of the act 9 Vic. c. 42.

Then it is clear that, and indeed it is admitted that (notwithstanding anything contained in 7 Vic. c. 11.) the lands in question here were by 19 Vic. c. 54 vested in Her Majesty for the public uses of the late Province of Canada and that while still so vested they were by the B. N. A. Act placed under the exclusive control of the Dominion Parliament. So that even if there were such principle of the common law as that contended for by the suppliant (although no such principle is recognized by the common law) still it

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would not be applicable to the present case, for by the force and effect of acts of the legislature these lands are placed under the exclusive control of the Dominion Parliament, which therefore is the sole power capable of giving to the suppliant any estate or interest whatever in the lands in question.

As to the contention that Her Majesty is a trustee of the lands in question in trust for the suppliant there is no foundation for such a contention ; Her Majesty never could be placed in such a position unless by the express provisions of an act of Parliament to which she was herself an assenting party and the existence of such an act of Parliament is not suggested.

When, therefore, the 8th, 10th and 11th questions submitted in the special case are answered, as for the reason above given they must be, in the negative the whole case made by the suppliant's petition of right is disposed of.

In the view which I have taken, although my opinion as to the points suggested in the 1st, 2nd and 3rd questions sufficiently appears in the judgment I have delivered, still the questions there put are quite immaterial if, as I am of opinion, in answer to the 8th question, the suppliant is not entitled to recover the lands in question or any part thereof under the facts and circumstances stated in the case, so neither, for the like reason, is it material to determine whether, if she ever had a right to recover any part of the lands in question, such right would or not be now barred by the statute of limitations.

For the like reason, and for the further reason that the 5th question puts a merely hypothetical case relating to a subject, namely a claim for compensation for the land, a matter which forms no part of the case set up or the relief prayed by the petition of right, that question is quite immaterial in this case, and I

decline to express any opinion upon a purely hypothetical case and which if given would amount to no more than an *obiter dictum* as the point in respect of which the question is put has no bearing whatever upon the case made and the relief prayed by the suppliant.

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The 7th question, for the like reason that it purely relates to a hypothetical case not set up in the petition of right, and having no relation to the case thereby made and the relief thereby prayed, is also quite immaterial to the decision of this case.

The 9th question is also immaterial as the suppliant has not in her petition of right made any claim, if she had any, for compensation for the land taken.

In fact, as I have already said, the whole case is answered when I answer as I do the 8th, 10th and 11th questions in the negative, and say that the suppliant is not entitled to any relief upon the claim and case asserted in her petition of right under the facts and circumstances appearing in this case.

Her petition of right, therefore, must be dismissed with costs.

On appeal to the Supreme Court.

McDougall Q. C. and Gormully appeared on behalf of the appellant and Lash Q. C. on behalf of the respondent.

SIR W. J. RITCHIE C. J.—I think the appeal in this case should be dismissed. Without going over all the points raised, and on which a great deal may be said, there are two very simple grounds which I think fatal to the suppliant's right to recover, and first, it appears that by memorial of a deed of bargain and sale dated the 8th of February, 1832, William McQueen (under whom the suppliant claims) heir-at-law of Grace McQueen of the one part, and Col. By of the other part in considera-

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tion of the sum of £1200 sold, &c., certain tracts of land therein particularly described "to have and to hold the said granted premises, with all the privileges and appurtenances thereof to him the said John By, his heirs and assigns, to their own use for ever, with covenants of seizin, right to transfer, freedom from incumbrances, quiet enjoyment, and general warranty; subject, however, to the reservation and conditions contained in the original grant thereof from the crown," which deed was registered the 6th June, 1862. Several questions have been raised as to the legal effect of this deed, whether it passed the title to Col. By, or whether John By purchased the property on his own behalf or for the crown whose servant he was at the time. But these questions appear to me wholly immaterial because, whether the deed transferred the property to John By or whether he purchased on behalf of himself or the crown, if William McQueen had a right to make this deed which, as at present advised, I think he had, and that the deed took effect from its date as a good valid transfer of his interest in the lands mentioned therein to John By, the title forever passed out of William McQueen; but assuming it did not then I am of opinion William McQueen was estopped by his own act and could not, during his lifetime, have impugned or disputed the validity and general effect of his own deed: so neither can the suppliant who claims under him, she being in like manner estopped.

The crown has also invoked the benefit of the statute of limitations which, in my opinion, is a clear answer to this claim, if the crown can raise such a defence, and that it can do so is not, in my opinion, open to doubt or controversy. The seventh section of 39 Vic. c. 28, declares what defences may be raised. The statute is as follows:—

7. The statement in defence or demurrer may raise, besides any

legal or equitable defence in fact or in law available under this act, any legal or equitable defence which would have been available had the proceeding been a suit or action in a competent court between subject and subject, and any grounds of defence which would be sufficient on behalf of Her Majesty may be alleged on behalf of any such person as aforesaid.

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I am, therefore, of opinion that by virtue of the effect of the said deed as well as of the statute of limitations, the claimant is barred and the appeal must be dismissed.

STRONG, J.—The lands which the appelland seeks to recover by this petition of right are part of a larger tract originally granted by the crown to Grace McQueen in 1801.

Grace McQueen died intestate on the 18th of September, 1827, leaving William McQueen her eldest son and heir-at-law; her husband Alexander McQueen also survived her.

By deed poll dated the 31st of January, 1832, Alexander McQueen released all his title and interest as tenant by the curtesy to William McQueen.

By indenture dated the 6th of February, 1832, and made between William McQueen of the first part and John By, a Lieutenant Colonel in the Royal Engineers of the second part, William McQueen purported to convey the whole of the lands originally granted to Grace McQueen to Colonel By in fee for the valuable consideration of £1,200. On the 17th February, 1827, the act 8 Geo. 4 ch. 1, commonly called the "Rideau Canal Act," was passed by the legislature of the then existing Province of Upper Canada, whereby the construction by the crown of a canal connecting the waters of the River Ottawa with those of Lake Ontario was authorised, and certain powers and authorities incidental to and necessary for the performance of the undertaking were conferred upon the crown. By the first section of this act it was enacted (amongst other things) that—

The officer employed by His Majesty to superintend the said

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works should have full power and authority to explore the country lying between Lake Ontario and the waters leading therefrom and the River Ottawa, and to enter into and upon the lands or grounds of, or belonging to, any person or persons, bodies politic or corporate, and to survey and take levels of the same, or any part thereof, and set out and ascertain such parts thereof as he shall think necessary and proper for making the said canal locks, aqueducts, tunnels and all such other improvements, matters and conveniences as he shall consider proper and necessary for making, effecting, preserving, improving, completing and using in the said navigation.

By the 2nd section it is enacted :—

That after any lands or grounds shall be set out and ascertained to be necessary for making and completing the said canal and other purposes and conveniences hereinbefore mentioned the officer aforesaid is hereby empowered to contract, compound, compromise and agree with all bodies politic, communities, corporations aggregate or sole, guardians and all other persons or persons for themselves or as trustees not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent whether infants, lunatics, idiots, femmes covert, or other person or persons who shall occupy, be possessed of or interested in any lands or grounds which shall be set out or ascertained as aforesaid for the absolute surrender to his Majesty, his heirs and successors, of so much of the said land as shall be required, or for the damages which he, she or they may reasonably claim in consequence of the said intended canal, locks, towing paths, railways and other constructions and erections being cut and constructed in and upon his or their respective lands, and that all such contracts, agreements and surrenders shall be valid and effectual in law, to all intents and purposes whatsoever any law statute or usage to the contrary notwithstanding.

The 3rd section enacted :—

That such parts and portions of land or lands covered with water as may be so ascertained and set out by the officers employed by His Majesty as necessary to be occupied for the purposes of the said canal, and also such parts and portions as may, upon any alteration or deviation from the line originally laid out for the said canal, be ascertained and set out as necessary for the purposes thereof, shall be forever thereafter vested in His Majesty, his heirs and successors.

The 4th section provided for a mode of fixing and assessing compensation, in the first instance by arbitrators, and secondly by a jury, in cases where no volun-

tary agreement as to it was arrived at before the completion of the canal ; it directed that in such cases one arbitrator should be appointed by the land owner, one by the officer superintending the works, and a third by the two arbitrators so firstly appointed, and that these three arbitrators should, after hearing evidence upon oath, award the amount of compensation to be paid to the claimant. The 5th sec. provided that if either the officer superintending the work or the claimant should be dissatisfied with the award, they might decline to abide by it, and have the amount of compensation assessed by a jury, upon giving notice to that effect within ten days after the award. And the following sections prescribed the mode in which the jury should be summoned, and the procedure to be followed before it.

Section 9, which is of especial importance here, was as follows :—

In estimating the claim of any individual for property taken or for damage done under the authority of this act, the arbitrators or juries assessing such damages shall take into their consideration the benefit likely to accrue to such individual from the construction of the said canal by its enhancing the value of his property or producing other advantages ; provided always, nevertheless, that it shall not be competent to any arbitrators or jury to direct any individual claiming as aforesaid to pay a sum in consideration of such advantages over and above the amount at which the damages of such individual shall be estimated.

In 1836 an amending act was passed (6 Wm. 4 ch. 16), but in my opinion it contains nothing material to the present case, being confined exclusively to cases of claims by land owners for lands damaged by reason of stone, earth, timber or other materials having been taken therefrom and to injuries caused by diversion of water-courses and the overflowing of lands, and not applying to the case of lands taken for the purposes of the canal.

In 1839 an act (2 Vic. ch. 19) was passed whereby all claims not prosecuted before the 1st of April, 1841, were to be absolutely barred.

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In 1843 an act known as the Ordinance Vesting Act (7 Vic. ch. 11) was passed whereby the Rideau Canal and the lands and works thereto belonging were vested in the principal officers of Her Majesty's Ordinance in Great Britain. The 29th section of this act, which forms the basis of the claim asserted by the suppliant in this petition of right, is in the following words:—

That all lands taken from private parties at Bytown under the authority of the Rideau Canal Act, for the uses of the canal, which have not been used for that purpose be restored to the party or parties from whom the same were taken.

In 1846 the act 9 Vic. ch. 42 was passed whereby it was declared that the provision contained in the 29th section of the act of 1843 should be applicable to lands at Bytown taken from Nicholas Sparks. It has been suggested rather than argued, on behalf of the crown, that this latter act of 1846 had the effect of restricting the operation of the re-vesting clause of the 7 Vic. ch. 11, to the lands of Nicholas Sparks. I may say at once that this objection is wholly unsustainable; the whole scope of the latter act shows that the object of this provision was to clear up doubts as to the case of Nicholas Sparks and not to deprive other parties originally coming within the 29th section of the act of 1843 of the benefit of that enactment. This is so clear that it does not call for further discussion, and 9 Vic. ch. 42 may therefore be dismissed from further consideration.

In the 4th paragraph of the special case agreed on between the crown and the suppliant upon which the cause was heard in the court below, it is stated as follows:—

Prior to the death of Grace McQueen Col. By, the then officer in charge of the Rideau Canal and works, acting under the provisions of the said Rideau Canal Act for His then Majesty for the uses and purposes of the said canal, had from the parcels of lands patented as aforesaid ascertained, set out and taken possession of 110 acres thereof which he thought necessary and proper for the purposes of the said canal, and the officers of Her Majesty or the purchasers from Her Majesty have held possession ever since.

The 18th paragraph of the case is as follows :—

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Out of the 110 acres or thereabouts of the lands and premises so set out, ascertained and taken possession of as aforesaid only about 20 acres thereof have been actually used for canal purposes.

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The case also contains the following statements and admissions of facts :—

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20. Some time after obtaining the conveyance of the 6th day of February, 1832, Col. By took proceedings under the said act (8 Geo. 4 ch. 1) to obtain by arbitration compensation or damage from Her Majesty in respect to the lands comprised in the said conveyance of the 6th February, 1832, and that therein he claimed compensation or damages for the lands now in question.

21. An award was made in writing in the cause of the said arbitration proceedings, whereby it was awarded and determined that by reason of the enhancement of the value of the other land which at the time of her death belonged to the said Grace McQueen, and of other benefits and advantages that accrued to her and those claiming under her, from construction of the canal as provided in the 9th section of the said act, His Majesty was not liable to make compensation for the lands in question in this matter taken under the said act.

22. Afterwards Col. By, being dissatisfied with the said award, duly caused a jury to be summoned under the provisions of the said act to assess the said damages and compensation claimed by him, and the jury duly delivered their verdict to the same effect as the said award.

23. The documents relating to the said arbitration and assessment proceedings in the three preceding paragraphs mentioned are treated as part of this special case.

The title of the lands in question having been, by legislation set out in the case and which need not be further referred to here, transferred from the principal officers to the crown, the greater part of the lands have been sold by the latter to purchasers for valuable consideration. William McQueen, the heir-at-law of Grace McQueen, died intestate in 1845, leaving the suppliant Lucy McQueen, his only child and heir-at-law, who now presents her petition of right seeking to recover from the crown the ninety acres of land originally taken by Col. By, but not used for the purposes of the canal, or such portion thereof as still remains in the

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hands of the crown, and an indemnity for the value of such portions of these ninety acres as have been sold by the crown. And the questions thus raised for decision on the facts stated and admitted in the special case and the statutory enactments already mentioned, having been decided against the suppliant upon the hearing of the cause in the Exchequer Court she now appeals to this court.

I have no doubt that a petition of right is an appropriate remedy available to the suppliant for the assertion of any title she may have to relief under the 29th section of the act of 1843, directing lands not used for the canal to be restored to the parties from whom the same were taken. In the case of *Re Holmes* (1) (which was a proceeding by way of petition of right in the English Court of Chancery respecting these same lands) Vice Chancellor Sir W. P. Wood suggested that the remedy might be by *mandamus*, but the late case of *Re Nathan* (2) shows conclusively that where it is within the power of a party having a claim against the crown, of such a nature as the present, to resort to a petition of right a *mandamus* will not lie; and further that a *mandamus* will never under any circumstances be granted where direct relief is sought against the crown.

In order to consider what are the substantial rights of the suppliant upon the admitted facts it is necessary first to determine the construction of the provisions of the Rideau Canal Act (8 George 4 ch. 1) as to the effect of the powers to take lands therein contained, and also the exact meaning of the 29th section of the act of 1843 (7 Vic. ch. 11), the latter enactment being the foundation of the suppliant's title to relief, if any she has.

A question has been raised in relation to the time at which lands taken for the purposes of the canal by the officer appointed to superintend its construction

(1) 2 J. & H. 527.

(2) 12 Q. B. D. 461.

vested in the crown, whether the title to such land vested immediately on its being, in the words of the 2nd section of the 8 Geo. 4 ch. 1, "set out and ascertained to be necessary for making and completing the canal," or whether it did not vest until the price of the land should be fixed and a surrender agreed to between the commanding officer and the land owner under the terms of the 2nd section, or if there was no such voluntary agreement until the compensation was fixed according to the fourth and following sections, which latter proceeding could, by the express words of the statute, only be taken after the completion of the canal. I am of opinion that by the express terms of the 3rd section the title to lands taken for the purposes of the canal vested absolutely in the crown so soon as the same were, pursuant to the act, set out and ascertained as necessary for the purposes of the canal.

The third section applies alike to land and land covered with water, and it expressly declares that lands ascertained and set out as provided for in the 1st section shall be "forever thereafter vested in His Majesty, His heirs and successors." This, it is true, was not in accordance with the course generally followed in later statutes authorizing expropriation for the purpose of works of public utility, but it is to be remembered that here the expropriation was not in favor of a corporation empowered to execute the work with a view to private gain, but was in favor of the crown directly, for the purpose of a great public work designed for the purposes of military defence as well as for commercial transit and which was considered as of inestimable value to the new and sparsely inhabited country through which it was to be constructed. It was no doubt further considered that the crown being bound to indemnify owners whose lands were taken, the security they had in this liability of the crown to pay the compensation did not require the

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addition of a retention of the title until payment, or a lien upon the land themselves. It could hardly be supposed that the title to lands actually appropriated to the line of the canal itself was to remain in the original owner after its completion until compensation was actually paid, and until the canal was completed the amount of compensation could not, according to the specific terms of the act, be ascertained, and that for the manifest reason that in ascertaining the amount of compensation regard was to be had to the benefit which the land owner might be considered to derive from the enhancement in value of his other lands caused by the construction of the canal. It seems therefore scarcely open to argument that the lands vested in the crown immediately upon their being set out and ascertained. This is the construction which seems always to have been adopted by the Upper Canada courts, and which the Court of Queen's Bench considered correct in the case of *Doe Malloch v. The Principal Officers* (1). It is sufficient, however, to say that it is a construction which the literal terms of the 3rd section makes so imperative that no other can possibly be admitted.

Such then being the proper construction of this 3rd section, all that Grace McQueen could have been entitled to at the time of her death was the compensation for the lands so taken provided by the act, and to be ascertained in the manner therein prescribed; and the right to receive and recover the sum of money at which this compensation should be assessed either by arbitrators or by a jury, must have vested, on the death of Grace McQueen, not in her heir-at-law William McQueen, but in her personal representative as forming part of her personal estate. If the statute had contained any provision for re-conversion, similar to that found in the English Lands Clauses Consolidation Act,

(1) 3 U. C. Q. B. 487.

which provides for the re-investment in land of money paid as compensation for the lands of a *feme covert* taken by railway companies, the case would have been different, for in that case the heir-at-law would have been entitled to the money, but no provision of this kind is to be found in any of the statutes relating to the Rideau Canal. The conversion was therefore absolute (1), and at the time of her death Grace McQueen was entitled to a compensation in money which vested in her personal representative and to nothing else.

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It is therefore clear that so far as the 110 acres originally "set out and ascertained" for the purposes of the canal in the lifetime of Grace McQueen are concerned, nothing passed by the conveyance of February, 1832, from William McQueen to Col. By. No interest in the land, for William McQueen had acquired no title to this 110 acres, the statute having previously to Grace McQueen's death vested the fee in the crown absolutely, and no right to the compensation could have been acquired by Col. By, even if William McQueen had assumed to assign it, for William McQueen as heir-at-law had no title to that, which was personal estate and had, therefore, vested in the personal representative of Grace McQueen. The arbitration proceedings mentioned in the special case as having been had between the crown and Col. By were all void and ineffectual so far as the present suppliant is concerned, Col. By having no title to claim compensation and not being within the provisions of the statute in that respect. Therefore, up to the date of the statute 7 Vic. ch. 11 no compensation had ever been paid by the crown, nor had there ever been any decision as to compensation binding on the representative of Grace McQueen under the statute or otherwise. Then by

(1) See *Steed v. Preece* L. R. 18 Eq. 192; *Ex parte Flamank* 1 Sim. N.S. 260.

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the 29th section of this last mentioned statute passed on the 29th December, 1843, it was enacted:—

That all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal, which have not been used for that purpose be restored to the party or parties from whom the same were taken.

The 90 acres of land which the suppliant now seeks to recover by this petition of right seem to be within all the conditions required by this section. The lands were situate at Bytown; they had been taken from a private owner under the authority of the Rideau Canal Act for the uses of the canal, and had not been used for the purposes for which they had been taken. Had Grace McQueen been then alive, and had there been no sale or attempted sale and conveyance of the lands by her, it cannot, in my opinion, be doubtful that immediately on the passing of the act these 90 acres of land would have become re-vested in her—for I construe the act as by implication vesting the title in lands to be “restored”—the latter word (certainly a most inartificial and inappropriate expression) applying, in my opinion, as well to the title as to the possession, in such a way that the land owner entitled to the benefit of it was by force of the statute itself, and without the necessity of a grant by the crown, re-instated in his former title in the lands, the possession of which the crown was bound also to restore to him. This 29th section is in other respects very generally and loosely worded, inasmuch as it leaves it open as a matter of doubt whether, under the description of “lands taken,” lands taken and paid for by the crown, or for which compensation under the statute had been awarded to the land owner and paid by the crown are included. I should think it plain, however, that lands acquired by voluntary purchase, as well as lands originally taken under powers conferred by the act, but for which compensation had been awarded and paid by the crown, were not within this re-vesting clause. In either of such cases the title of

the crown would be referable to purchase and would not be solely dependent on the expropriation clause of the act. This consideration is, however, not pertinent to the present case for there is nothing to show that any price or compensation was ever paid or even fixed or determined either by agreement or otherwise between the crown and Grace McQueen, or her personal representative to whom, after her death, such compensation belonged. This section is further loose, ambiguous and incomplete in not making any express provision in terms for the very likely case of the death of the original owner by directing to which set of representatives, the personal or the real, the lands should be restored. I think, however, from the nature of the property, "land," from the word used by the legislature, "restored," implying a reinstatement in title, and from the absence of any adequate reason for preferring the personal representatives to the heir, that it was intended that the statute should have, and that it had, the effect of revesting the original estate in the heir-at-law of the owner from whom the land was taken. Therefore *prima facie*, and subject to the effect upon his title of the sale and deed of 1832, purporting to sell and convey these lands to Col. By, the statute of 1843 did vest the title in fee, in these 90 acres of land in William McQueen as the heir-at-law of his mother, or at least did give him a statutory right to call upon the crown for a conveyance and for delivery of possession; and that subject, to the same exception, upon the death of William McQueen in 1845 the same estate and right vested in the suppliant as his heir-at-law.

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We have next to consider whether the deed of February, 1832, whereby William McQueen purported to convey the lands in question to Col. By, had any and what effect upon the title or rights acquired by the former under the statute. In considering this question it is to be borne in mind that on this record all equitable

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defences are open to the crown. The Petition of Rights Act of 1876 is express on this point. Now, I have already pointed out that this deed of the 6th of February, 1832, could have had no operation as a conveyance by which any estate passed at the time. The deed itself is not before us. All we have is a copy of the memorial of its registration. From this it does not appear that the deed contained any recitals, though certain covenants for title by the vendor are stated to have been comprised in it, namely, covenants of siesin, right to transfer, freedom from encumbrances, quiet enjoyment and general warranty. In the absence of recitals it is impossible that this deed, one of bargain and sale, the common assurance then in use in the country operating under the statute of uses, worked any estoppel in favour of Col. By which would be fed by the statute, (7 Vic.ch. 11 sec. 29) vesting the legal estate in William McQueen. The covenants for title, according to a recent English authority, *The General Finance Co. v. Liberator Building Society* (1) do not by themselves create any estoppel, and although this is certainly contrary to a former decision of the Court of Queen's Bench of Upper Canada (2) the reasons given for the decision by Jessell, M. R. seem to be conclusive. It is, therefore, clear that there was no legal estoppel which could have effected the estate when it revested in William McQueen. It is, however, a well established principle of the law of real property that if a vendor having, no title to an estate, undertakes to sell and convey it for valuable consideration his deed, though having no present operation either at law or in equity, will bind any interest which the vendor may afterwards acquire even by purchase for value in the same property, and in respect of such after acquired interest he will be considered by a court of equity to be a trustee for the original purchaser and he or his heir-at-law will be compelled to convey to such

(1) 10 Ch. Div. 23.

(2) *Doe Irvine v. Webster*, 2 U.C.Q.B. 224.

purchaser accordingly. In other words the interest so subsequently acquired will be considered as "feeding" the claim of the purchaser arising under the original contract of sale, and the vendor will not be entitled to retain it for his own use. This doctrine is not to be confounded with that of estoppel at common law, nor with that relating to specific performance of the usual vendor's covenant for further assurance. It is purely equitable and applies altogether irrespective of express covenant, being founded on the right of a purchaser for valuable consideration to call upon his vendor to carry out his contract whenever he becomes in a position to do so, even though at the date of the agreement to sell he had no interest in the subject of the sale.

Instead of entering into any lengthened discussion of the cases which might be cited in support of this principle of equity, I extract a passage from a text writer of high repute, not as by itself an authority but as conveniently stating the rule, which will be found amply supported by the decisions referred to by the learned author in support of his text. Mr. Dart in his "Vendors and Purchasers," 5th edition, (1) says:—

So also the purchaser may in equity, under the covenant for further assurance although not running with the land, require the vendor to perfect a defective title even by conveying any interest in the estate which he may have subsequently acquired for valuable consideration, and this right seems to exist independently of such a covenant, and may be enforced against the vendor's representatives and parties claiming under him for valuable consideration with notice. And the rule seems to be the same even where he has no estate in the land at the date of the conveyance. It was, however, decided in an old case that such an equity could not be enforced against the heir, but there seems to be no good ground for such a distinction, and it has been judicially disapproved of by Lord St. Leonards.

Further, the same conclusion may be reached by regarding the covenant of warranty, which the memorial shows the deed to have contained, though it does not appear to have contained the usual covenant for

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further assurance, as one susceptible of specific performance, just as the latter covenant would have been. From this it follows that if we were to give the suppliant the relief she asks by this petition of right the land and money recovered by her would, in equity, be bound by a trust for, and in short would belong to, the heirs of Col. By, and might be immediately reclaimed by them, and we should thus be, indirectly and through the intervention of a trustee giving to the same person, who in the case of *Tylee v. The Queen* (1) sought relief against the crown in respect of this same land just what the Exchequer Court in that case conclusively adjudged they were not entitled to recover. The judgment in this case of *Tylee v. The Queen* (1) is not, it is true, mentioned in the printed case or in the pleadings, but it was referred to in argument at the bar in such a way as to involve the admission that we may safely refer to the statement of it contained in the report already cited.

There is, however, still another consideration why, upon an application of the equitable doctrine already referred to, it would be impossible without injustice to the crown to adjudge these ninety acres of land or their value to the present suppliant. I have already said, and I only repeat it to adhere to it, that I cannot hold that Col. By intended in fact to acquire the 110 acres parcel of the 600 acres purchased by him from William McQueen for the use of the crown or otherwise than as his own private property. It is true that he acquired no estate in this portion of his purchase as the title had already vested in the crown, but whether advised as to the legal rights of the crown or not, I am satisfied that Col. By in his dealing with William McQueen was acting in his own interest and not in that of the crown. The 110 acres, were part of the tract of 600 acres included in the purchase deed; the

(1) 7 Can. S. C. R. 651.

residue beyond the 110 acres, it is not and could not be disputed Col. By acquired for his own behoof and held and dealt with as his own private property. The price for the whole six hundred acres was £1,200. It is not proved or even suggested that this purchase money was paid out of the monies of the crown or otherwise than out of Col. By's own private funds, nor is it even pretended that he had public monies in his hands wherewith to make the purchase. Moreover we find Col. By, by taking the abortive arbitration proceedings before referred to to enforce the payment of compensation by the crown, most distinctly asserting his claim to be as between himself and the crown the beneficial owner of this land, and thus repudiating any intention of having acted as a trustee for the crown in the matter of the purchase. I could not come to any other conclusion on the facts admitted without assuming to draw inferences and make presumption which would be directly contrary to those which the actual circumstances warrant. Further I cannot see any principle on which we should be justified in holding, as a matter of legal presumption, that contrary to the fact the purchase of this land would, if it had been effectual, by reason of the official relationship in which Col. By stood towards the crown have enured for the benefit of the crown in such a way as to vest the legal title in the latter. I think, however, that upon another and that an equitable not a legal principle the crown would, if Col. By had made an effectual purchase of these lands now in dispute, have been entitled to say that, standing as he did in the peculiar and quasi fiduciary position as regarded the crown of the commanding officer having on behalf of the crown the whole charge, control and management of the Rideau Canal and the works connected with it, any purchase which he might make of lands already set apart as required for the use of the canal

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must have been deemed to have been made as a trustee for the crown, and that a constructive trust would have arisen respecting any such property so acquired by Col. By, which trust a court of equity would, almost as a matter of course, enforce against him or those claiming under him as volunteers or as purchasers with notice.

It may, however, be said that inasmuch as according to the construction I have put upon the 3rd sec. of 8 George 4, ch. 1, the title to this land vested in the crown so soon as the 110 acres were "set out and ascertained" to be necessary for the use of the canal, the conveyance to Col. By was as regards the land in question wholly ineffectual and inoperative, William McQueen having had nothing to sell or convey, and that consequently any claim which the heirs of Col. By could now set up would arise from the statute of 1843, which was entirely matter *ex post facto*, and that therefore the doctrine of equity applicable to purchases by fiduciary agents can have no application. To this objection it must, in my opinion, be answered that as between the heiress-at-law of William McQueen, the present suppliant, and the heirs or devisees of Col. By, this land is in equity the property of the latter; the suppliant's ancestor having sold it to Col. By and having been by him paid the agreed price for it. That the very foundation of this equitable title of the representatives of Col. By is the contract of purchase and the deed of February, 1832, and that although this purchase, at the time it was entered into, had no present effect as regards an actual title to the land in question, it was just as much in contravention of the rule of equity which disables a person from purchasing property, in respect of which he has fiduciary duties to perform, as it would have been if the legal estate had passed under the conveyance. The principle on which this salutary rule of equity is founded is, as is well known,

the honesty, justice and good policy of incapacitating one who has undertaken the performance of services or duties towards others requiring that trust and confidence should be reposed, from placing himself in a position in which his interest would conflict with his duty. To apply this to the present case, it was the obvious duty of Col. By, even as regards lands already set out and ascertained, and the title to which, as I hold, had therefore absolutely vested in the crown, to abstain from purchasing or trafficking for his own private gain in the claims or supposed rights of the owners of such lands, for the reasons that, there must have existed a hope or expectation that if not of right, yet from the justice, grace and favor of the crown, lands which should, after the construction of the canal was completed, prove not to be required for the work, but to be superfluous for any of its purposes, would not be retained by the crown, but would be returned to the owners from whom such lands had been compulsorily taken, or those to whom they might have assigned their claims. With a view to making profit out of purchases and dealings in the claims of land owners, it would be the direct interest of a commanding officer, who had so far forgotten his duty as to indulge in such speculations, to sacrifice the interests of the crown, by making it appear that lands really required for the canal were in fact superfluous and might be dealt with as the crown would probably be disposed to deal with such lands by returning them to the original owners or their assigns, which, as we have seen, was in fact ultimately done by the statute of 1843. The inevitable tendency of such dealings would therefore be most prejudicial to the rights and interests of the crown. That Col. By himself considered his purchase had placed him in a position antagonistic to the crown, is shown by his own conduct in claiming compensation and by the grossly

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irregular and abortive arbitration proceedings which he entered upon. It is clear, therefore, that although nothing passed under the deed of February, 1832, yet the suppliant could not withhold from the heirs or representatives of Col. By anything she might recover from the crown under the 29th section of the act of 1843, but it is equally plain that these same heirs or representatives of Col. By would in turn become constructive trustees for the crown of what they might so recover, by force of the rule of equity forbidding purchases by fiduciary agents for their own benefit.

The estate sought to be recovered is therefore, to use the technical expression of conveyancers, "at home" in the hands of the crown and upon the plainest principles of equity and in order to avoid circuitry we are required to do justice to the crown by dismissing the suppliant's petition of right.

In the argument before this court the learned counsel for the suppliant dwelt with much force on the point that the deed of February, 1832, was void for maintenance either at common law or under the Statute 32 Hy. 8 cap. 9 relating to the sale of pretended titles, for the reason that William McQueen had been out of possession for more than a year when he executed it. I hold this deed to have been inoperative as a conveyance upon another ground, viz., that William McQueen had, irrespective of being out of possession, no title whatever remaining in him to sell or convey; but I give effect to the deed as being in equity constructively a contract by William McQueen to sell and convey any interest in the land which he or his heirs might afterwards acquire. There is nothing in the statute of Henry 8th or in the rules of the common law avoiding contracts savoring of maintenance conflicting with this use of the deed, according to the ordinary every day principles of equity as shown by the passage I have quoted from

the work of Mr. Dart. Courts of equity constantly administer this relief and no judge or text writer has ever suggested that such an equity in any way conflicts with the law as to maintenance, and I never heard of such a point being even argued before. In requiring a vendor who had nothing vested in him when he executed the conveyance to convey an after-acquired interest the court treats the conveyance as a contract to convey such after-acquired interest, and for the reason that an expressed contract to convey an after-acquired interest would be perfectly free from the objection in question I fail to see why an implied agreement to the same effect should be open to it, more especially as this whole doctrine of maintenance has now, since the passing of the statute which permits the assignment of rights of entry, become almost entirely obsolete. I should say it was principally in a view of the case different from that which I take, viz., that which regards the Rideau Canal Act as not vesting the title to lands taken until after payment of compensation, that this objection of maintenance was argued. It was said that in that case the crown had been in possession for more than a year when the deed of 1832 was made, and that although the title was then in William McQueen it did not pass as the deed was void for maintenance. As I construe 8 Geo. 4 cap. 1, this point does not arise and I express no opinion on it. I understood, however, that the same objection of illegality for maintenance was raised to the validity of the deed in the other aspect of the case which, following the old Upper Canada decisions, I do take, viz., that lands vested as soon as they were set out and ascertained, and it is from this standpoint that I have addressed myself to the objection, and to my own satisfaction sufficiently answered it.

Reverting for a moment to the construction of the

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29th section of the act of 1843, I would say that if I have missed the true construction of that section by holding that restoration of the lands was to be made to the heirs and real representatives, and not to the personal representatives of the original owner the suppliant would still fail inasmuch as she is not the personal representative of Grace McQueen, and no such person is a party to the petition.

Further, the statute of limitations which has been pleaded by the crown is, as it appears to me, a defence to this claim, as it was also held by Richards C.J. to be to that put forward by the devisees of Col. By in *Tylee v. The Queen* (1).

The Petition of Rights Act of 1876 contains a clause—the 7th—which seems to authorize this defence, even if the case of *Rustomjee v. The Queen* (2) is to be taken as a sufficient authority to show that such a defence would not be available to the crown under the English Petition of Right Act. This 7th section authorizes the crown to raise “any legal or equitable defences “which would have been available had the proceeding “been a suit or action in a competent court between “subject and subject.”

By the 4th section of the statute of limitations, Rev. Stats. Ontario, ch. 108, no action is to be brought to recover land but within ten years after the right first accrued. As is well known the following sections of the statute prescribing the time when the right to recover shall be deemed to have accrued in the several cases provided for are not exclusive. In the somewhat unusual case of a title to land being conferred by statute as in the present case, the right to recover must be deemed to have accrued so soon as the statute conferring the title began to operate. The statute 7 Vic. ch. 11, not being limited to come into operation at a time subsequent to the date at which it

(1) 7 Can. S.R.C. 651.

(2) 1 Q. B. D. 487.

received the royal assent, took effect at the latter date, viz., the 29th December, 1843, at which time, if this were an action between subject and subject, the suppliant's right would be held to have accrued. Therefore the twenty years, which formerly constituted the statutory bar, elapsed on the 30th December, 1863, when not only the remedy of the suppliant, but by the express provision of the 15th section of the act (which is identical in terms with section 34 of the English act (3-4 W. 4 ch. 27), her right and title to the lands in question also, became extinguished. I fail to see that any answer can be suggested to this defence of the statute. I have considered the case of *Rustomjee v. The Queen* (1), holding that the statute of limitations of James 1st was not a defence which the crown could set up to a petition of right. That case is, however, clearly distinguishable from the present in these important respects. The English Petition of Right Act, 1860, which applied in the case of *Rustomjee v. The Queen* (1) contains no provisions similar to the 7th section of the Canadian act just set out. Further it appears to me to be questionable whether the decision in *Rustomjee v. The Queen*, (1) which related to a quasi personal demand against the crown, the remedy for which, not the right itself, would be alone barred by the statute of limitations applicable to it in the case of a subject would apply at all to a claim to recover land where not merely the remedy but by the express words of the act, the "right and title" of the claimant, that is his right and title against all the world, became extinguished at the expiration of the statutory period. I should have thought that in such a case if the crown were in possession the right and title would become barred in its favor as well as in favor of all other persons. So far has this view prevailed, indeed,

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that it was even held by a great authority on such questions—Lord St. Leonards—that although the statute in its terms only purported to extinguish the title of the claimant out of possession that it did this so effectually, that in a case where no disabilities could be shown to exist it operated by way of positive prescription and conferred such a perfect title on the party in possession that a court of equity would treat it as marketable and force it on a purchaser (1). I am content, however, to rest this defence of the statute of limitations on the 7th section of the Canadian Petition of Right Act, 1876, as a defence which would have been available if this had been an action between subject and subject; and so considered to hold that the title asserted by the suppliants has long since been barred and extinguished.

It is no answer to this defence of the statute of limitations to say that there was no statutory provision regulating the procedure by petition of right before 1875 when the first Petition of Right Act, 38 Vic. ch. 12, was passed. It does not follow that there was no remedy against the crown either by mandamus or some other proceeding prior to the statute which only prescribed the practice to be applied in such cases and did not originate the remedy. It is said to be a constitutional obligation binding on the advisers of the crown to put in a course of judicial enquiry any reasonable claim on the part of a subject to recover his property in the hands of the crown, and this obligation existed before as well as since the statute of 1875.

Moreover, the statute began to run in 1843 in favor of the body incorporated under the title of the "Principal Officers of Ordnance," in whom the possession of the land remained until it was handed over to the crown as representing the province in 1856.

(1) *Scott v. Nixon*, 3 Dr. & War. 388.

That corporation was capable of suing and being sued by the express terms of the act incorporating it. Then nothing can be better established as a universal rule of English law, applying to all statutes of limitations from the statute of fines down to the statutes passed in the 3-4 W. 4, whatever may be their character, whether operating by way of extinguishment of the right or bar to the remedy, that when the statute once begins to run no disability afterwards supervening will stop the running; it continues to run, notwithstanding any subsequent disabilities even though. as Sir William Grant says in *Beckford v. Wade* (1), it should be one actually excluding the possibility of obtaining relief, as by the closing of the courts during war or rebellion. The authorities on this head are too numerous and conclusive to leave the least doubt on the point (2).

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It is plain therefore that the well known rule of Roman and French law *contra non valentem agere nulla currit præscriptio*, does not in its entirety hold good in English law.

Then to apply the above rule to the present case and to consider its effect when taken in connection with the 7th section of the Petition of Rights Act of 1876, it is manifest that if the crown, after having held the possession of the land from the date of the transfer to the province in 1856, had sold it to a subject, and the purchaser, after the lapse of the statutory period of 20 years dating from 1843, that is for a period making up 20 years when added to the time of possession by the principal officers (namely, the 13 years between 1843 to 1856) but before he had himself held

(1) 17 Ves. 97.

13 Q. B. 509; *Rhodes v. Smelhurst*,

(2) *Doe Durore v. Jones*, 4 6 M. & W. 351; *Skeffington v. T. R.* 300; *Cotterell v. Dutton*, 4 *Whitehurst*, 3 Y. & C. 1; *Taun.* 826; *Homfray v. Scroope*, *Beckford v. Wade*, 17 Ves. 97.

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it for 20 years, had been sued by the suppliant for the recovery of the land, such a purchaser could undoubtedly have successfully pleaded the statute. And if so the crown is enabled by the 7th section of the Petition of Rights Act to do the same, since it is by the express terms of that enactment authorized to set up all defences which would have been available in the case of a subject.

Further, independently of the 7th section of the Petition of Rights Act it would appear clear that the crown acquiring lands from persons in favor of whom the statute of limitations had begun to run before the possession was transferred to the crown would, on the principle of the authorities before referred to, be entitled to the benefit of the statute. Granting that the statute would not begin to run whilst the lands were in the hands of the crown by reason of the claimant being disabled from maintaining an action for the recovery of the land, yet when the statute began to run whilst the land was in the possession of subjects, as were the Principal Officers of Ordnance, it would seem the subsequent disability arising from the possession vesting in the crown ought not to have any other or different effect from that caused by other supervening disabilities such as infancy or coverture.

I am of opinion that the appeal should be dismissed with costs.

FOURNIER, J :—Le présent appel est d'un jugement rendu par la cour d'Echiquier, le 19 novembre 1883, renvoyant la pétition de droit de l'appelante avec dépens.

Les faits de la cause sont longuement exposés dans la pétition de l'appelante et dans le cas spécial soumis de consentement par les deux parties.

L'aïeule de l'appelante Grace McQueen était incon-

testablement propriétaire en vertu de lettres patentes émises sous le grand sceau, le 20 mai et le 10 juin 1801, d'une grande étendue de terrain dont celui réclamé en cette cause faisait partie. Ce terrain serait plus tard passé en la possession de la Couronne, dans les circonstances suivantes, conformément à l'admission des parties.

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40. Prior to the death of Grace McQueen, Colonel By, the then officer in charge of the Rideau Canal and works, acting under the provisions of the said Rideau Canal Act for His then Majesty, for the uses and purposes of the said Canal, had from the parcels of land patented as aforesaid, ascertained set out and taken possession of one hundred and ten acres thereof, which he thought necessary and proper for the purposes of said Canal, and the officers of Her Majesty or the purchasers from Her Majesty, hereinafter mentioned have held possession of the same from thence hitherto.

La 2e section de l'acte du canal, 8 Geo. 4, ch. 1, donnant à l'officier en charge de la construction du canal le pouvoir d'expropriation pour les fins du canal, est conçu en ces termes (1) :

Les sections 4, 5, 6, 7 et 8 du même acte pourvoient au mode de procédure à suivre pour l'évaluation des dommages.

Grace McQueen est décédée *ab intestate* le 11 septembre 1827, laissant comme son héritier légal, Wm McQueen.

Des 110 acres pris pour les fins du canal il n'en a jamais été employés que vingt, le surplus, 90 acres, quoique n'ayant jamais été considéré comme nécessaire pour cette fin, est cependant resté en la possession de la Couronne.

Parmi les moyens de défense invoqués est le suivant :

13. I submit that by reason of the enhancement of the value of other lands of the said Grace McQueen, and of the other benefits and advantages which accrued to her and those representing her,

(1) See p. 62.

1887 the crown never became liable to make compensation for the lands in question in this matter.

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La vérité de cet étrange moyen de défense est constatée de la manière la plus positive dans les termes suivants de l'article 25 du *special case*, où il est dit :

25o. No payment or compensation in money has ever been made by the crown to Grace McQueen or to William McQueen or to the suppliant or to any person claiming under them for the 20 acres actually used for canal purposes or for the residue of the hundred and ten acres set out, ascertained and taken possession of as aforesaid but not so used.

Il n'est ni admis ni prouvé que Grace McQueen ait jamais consenti en faveur de la Couronne un contrat ou titre quelconque pour transférer à cette dernière le *fee simple* qui lui appartenait dans le terrain en question.

Toutefois il est évident d'après les plaidoiries et les admissions de faits des parties qu'il n'en existe pas et qu'il n'y en a jamais eu. L'article 4 des admissions, constate que c'est avant la mort de Grace McQueen que le colonel By,

Has ascertained, set out and taken possession of one hundred and ten acres.

Il est donc certain qu'il y a eu prise de possession sans titre à moins que le *setting out* ne soit lui-même un titre, comme on le prétend. D'après la 2e section de 8 G. 4 ch. 1, (*Canal Act*) ce n'est qu'après le procédé préliminaire de détermination du terrain nécessaire pour le canal que l'officier en charge

is empowered to contract, compromise and agree with all persons who should occupy, be possessed of or interested in any lands or grounds which should be set out or ascertained as aforesaid, for the absolute surrender, etc.

L'interprétation de cette clause a donné lieu à la question de savoir à quelle époque Grace McQueen s'est trouvée expropriée et dépossédée de sa propriété, si toutefois elle l'a été, et quand la Couronne en a été investie. La simple prise de possession pour les fins

du canal suffisait-elle pour cela, où bien ne fallait-il pas après la détermination du terrain requis *a contract, compromise or agreement* auxquels la même section donne les effets légaux en ces termes :

And all such contracts, agreements and surrenders should be valid and effectual in law, to all intents and purposes whatsoever.

Les opinions se sont partagées à ce sujet. Sir William Richards, dans la cause de *Tylée v. La Reine* (1) où les représentants du colonel By réclamaient comme sa propriété le terrain en question en cette cause, a décidé que le seul procédé de détermination (*setting out and ascertaining*) avait été suffisant pour investir légalement Sa Majesté de cette même propriété. Dans son jugement de la présente cause, au sujet de la même propriété réclamée maintenant par les représentants de Grace McQueen, l'honorable juge Gwynne, après une longue et savante dissertation sur cette question, en est venu à la conclusion que Grace McQueen étant décédée sans avoir fait aucun contrat avec le colonel By, elle a laissé la propriété en question à William McQueen, son héritier légal. Son argumentation sur ce point me paraît concluante ; comme la citation en serait trop longue, je réfère à son jugement dans cette cause, sur cette question.

D'après l'honorable juge, un titre de Grace McQueen ou de ses représentants était nécessaire pour investir Sa Majesté de la propriété en question. D'après l'opinion de Sir William Richards, le *setting out* et la prise de possession par le colonel By étaient suffisants pour donner un titre à la Couronne. Je suis d'avis avec l'honorable juge Gwynne qu'un titre était nécessaire, mais je ne crois pas comme lui que le *deed* du 6 février 1832 par William McQueen au colonel By, qu'il suppose avoir agi dans cette transaction comme *trustee* de la Couronne, soit un titre suffisant pour avoir investi la Couronne. J'en donnerai les raisons ci-après.

(1) 7 Can. S. C. R. 651.

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L'opinion de l'honorable juge Gwynne sur la nécessité d'un titre a été partagée par Sir Hugh Cairns, alors solliciteur général et plaidant comme tel pour Sa Majesté dans la cause *re Holmes*, (1) où les mêmes questions, au sujet du même terrain ont été soumises à la cour de Chancellerie, en Angleterre, en vertu d'une pétition de droit contre Sa Majesté. Les représentants du colonel By fondaient leur réclamation sur l'acte que lui avait consenti William McQueen, le 5 février 1832; l'honorable solliciteur général dit à ce sujet :

Moreover the suppliants have shown no title, which, if in any one, is in the representative of Grace McQueen.

Le jugement qui renvoya cette pétition est fondé sur le seul motif d'absence de pouvoir dans la cour de Chancellerie en Angleterre pour disposer d'une propriété immobilière en dehors des limites de sa juridiction. Mais on trouve dans l'opinion du solliciteur général une réfutation complète des prétentions du colonel By. Dans une autre partie de son argumentation, après l'exposé des objections à la juridiction de la cour, il exprime l'opinion que c'est aux héritiers de William McQueen qu'appartient cette propriété :

If all these difficulties [*au sujet de la juridiction*] were got over, the persons entitled to claim the restoration would be the representatives of William McQueen, and not those who claim under colonel By. The conveyance of 1832 passed all the interest which William McQueen had in the land, but it would not pass an interest which was only enacted by a long subsequent act of parliament in favour of "the party or parties from whom the land was taken." The suppliants are not such parties.

En effet lorsque la vente à By a été faite par William McQueen, le 6 février 1832, la Couronne était déjà en possession depuis au-delà de cinq ans, c'est-à-dire depuis au moins le 11 septembre 1827, date du décès de Grace McQueen, de sorte que William McQueen

(1) 2 J. & H. p. 540.

n'avait pu transférer à By des droits à une propriété dont il n'était pas en possession et qui avait depuis longtemps auparavant été enlevés à sa mère au nom de la Couronne qui en était alors en possession.

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De plus, cet acte du 6 février 1832, fait onze ans avant la passation de la 7 Vict., ch. 11, sec. 29 (*Vesting Ordinance Act*), ne pouvait transférer au colonel By des droits qui n'ont pu appartenir à William McQueen que onze ans plus tard, en vertu du proviso de la section 29. Ceci devrait être concluant si ce n'était à cause du caractère de *trustee* que l'honorable juge Gwynne attribue au colonel By dans cette transaction du 6 février 1832.

Il n'est pas douteux que lorsque le colonel By exerçait ses attributions dans les limites de la loi 8 Geo. 4, ch. 1, et prenait possession de terrains nécessaires pour les fins du canal, il devait être regardé comme un *trustee* pour Sa Majesté. Mais peut-on lui prêter cette qualité lorsqu'il agit dans une transaction tout à fait en dehors des pouvoirs qui lui sont conférés par le statut, pour l'acquisition d'un terrain qui n'était pas nécessaire pour le canal—à une époque (le 6 février 1832) où le canal était construit, puisqu'il fut ouvert au trafic deux mois après—et pour un terrain qu'il n'a cessé de réclamer comme sa propriété personnelle, comme le démontrent les faits admis et prouvés. Il a protesté bien des fois et de la manière la plus formelle contre cette qualité de *trustee* de la Couronne qu'on lui a prêtée dans la transaction du 6 février 1832. Loin de là, il a mainte fois réclamé en justice et autrement cette propriété comme ayant été acquise par lui et pour son bénéfice personnel, et à défaut de la propriété, une compensation. Une première fois il a obtenu une référence à arbitres, qui ont refusé de lui accorder des dommages à raison de cette propriété. Cette même réclamation a été plus tard référée à un jury, qui a

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décidé comme les arbitres l'avaient déjà fait. Il ne s'est pas contenté de protester personnellement contre cette qualité de *trustee*, ses héritiers et représentants ont soutenu comme lui qu'il n'avait pas cette qualité—et l'un d'eux, C. W. By, a réclamé cette propriété, en juillet 1856, par une demande adressée au gouverneur en conseil, réclamation qui a été repoussée par la Couronne. Les *trustees* de la succession du colonel By ont même réclamé cette propriété, en Angleterre, par une pétition de droit devant la cour de Chancellerie—*in re Holmes* (1). Cette réclamation était encore une répudiation de la qualité de *trustee*. En dernier lieu la même propriété a encore été réclamée par ses héritiers et représentants devant la cour d'Echiquier du Canada, dans la cause de *Tylee v. La Reine* (2), où des efforts considérables ont été faits pour faire déclarer que cette propriété appartenait à ses héritiers. Cette procédure ne reposait que sur sa prétention qu'il n'avait pas agi comme *trustee*, mais pour lui-même. Non seulement le colonel By et ses représentants ont nié cette qualité de *trustee*, mais la couronne elle-même se trouve en avoir fait une répudiation solennelle par l'acte 7 Vic. ch. 11, section 29, en déclarant que les propriétés non employées pour l'usage du canal seraient rendues à ceux de qui ils avaient été prises. C'était dire clairement que n'étant pas nécessaires pour le canal, elles avaient été prises illégalement par le colonel By, et répudier sa prétendue qualité de *trustee*. En face de cette répudiation de la part des deux parties intéressées peut-on se fonder sur cette prétendue qualité de *trustee* pour lui faire produire l'effet d'une vente valide et légale. Sans l'attribut de cette qualité au colonel By, l'honorable juge Gwynne aurait été forcé d'admettre que la Couronne n'avait pas de titre, et la conséquence inévitable eut été un jugement en faveur de l'appelante.

(1) 2 J. &amp; H. 527.

(2) 7 Can. S. C. R. 651.

Il me semble que cela suffit pour faire voir que le titre de propriété appartenant à Grace McQueen, en vertu des lettres patentes du mois de mai et juin 1801, n'a jamais été aliéné ni en faveur du colonel By personnellement, ni par son entremise comme *trustee*, en faveur de la couronne. Ce titre existe encore de droit dans la personne des représentants de Grace McQueen.

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Indépendamment de ce titre l'appelante peut encore en invoquer un autre, reposant sur un texte de loi. C'est celui qui résulte du proviso suivant de la section 29 de la 7 Vic. ch. 11, conçu en ces termes :

Provided always and be it enacted, that all lands taken from private owners at Bytown, under authority of the Rideau Canal Act, for the use of the Canal, which have not been used for that purpose be restored to the party or parties from whom the same were taken.

Ainsi que je crois l'avoir établi plus haut le titre de Grace McQueen n'ayant jamais été aliéné, il ne reste donc à sa représentante, l'appelante, qu'à faire voir qu'elle est encore dans les conditions de pouvoir invoquer le bénéfice de ce proviso. Je ne crois pas devoir m'arrêter aux considérations qui ont été faites sur l'endroit qu'occupe cette disposition dans la section 29, comme n'ayant pas de connexion avec les autres parties de cette section où l'on dit qu'elle se trouve isolée et hors de place. Ce ne sont nullement des raisons pour ne pas lui donner son plein et entier effet, si elle est d'ailleurs claire et précise. En outre, elle me semble là à sa place, aussi bien que dans aucune autre partie de l'acte. Il s'agit, il est vrai, de la manière de donner des titres par les officiers de l'ordonnance, dans des seigneuries du Bas-Canada,—mais comme il n'y en avait pas à donner à ceux dont on avait illégalement pris les propriétés sous prétexte qu'elles étaient nécessaires à la construction du canal, il n'y avait qu'en ordonner la restitution. Et il était d'autant plus nécessaire de le faire que la 1<sup>ère</sup> clause de cette loi

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mettant au nombre des propriétés transférées aux principaux officiers de l'ordonnance, le canal Rideau, *canal and works, lands, &c.*, les dits officiers auraient pu croire que les terrains auxquels le proviso fait allusion leur étaient aussi transférés. Dans le but d'éviter des difficultés, il est évident que la loi ne leur a imposé à cet égard qu'un devoir bien simple et bien facile à remplir, celui de remettre les propriétés prises mais non employées à l'usage du canal, aux personnes de qui elles avaient été prises. Il n'y avait pour cela qu'à en abandonner la possession dont se démettait le Couronne sans en investir les officiers de l'ordonnance comme le fait voir la cédule à la fin de l'acte, transférant le canal et les terrains *lawfully purchased and taken, &c., as necessary for the purposes of the canal*. Ceux qui n'avaient pas été employés pour l'usage du canal n'étaient donc pas mis sous leur contrôle. Les propriétés par l'opération de la loi étaient rendues aux propriétaires. Les officiers de l'ordonnance n'avaient qu'un devoir de constatation de l'identité de ces propriétés à remplir pour mettre ce proviso à exécution.

Quoi qu'il en soit, ce proviso, fait pour réparer de graves injustices commises dans la construction du canal, avait sa place dans cet acte et doit être d'autant plus respecté qu'il n'offre pas un doute possible sur sa portée et sa signification.

Maintenant à quelles conditions sont soumises les personnes désignées dans ce proviso? Il faut—  
 1o Qu'elles établissent que les propriétés ont été prises sous l'autorisation du *Rideau Canal Act* pour l'usage du canal; 2o. Que ces mêmes propriétés n'ont pas été employées pour les fins du canal. Voilà les seules conditions imposées. L'admission de faits constate que la propriété réclamée a été prise pour les fins du canal, art. 4, p. 21 du dossier—et l'art. 25 reconnaît qu'elle n'a pas été employée à cette fin. La

preuve de l'appelante étant complète et son droit clairement établi par le proviso, rien ne devrait donc plus faire obstacle à la remise de sa propriété.

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Mais pour éviter de donner effet à une disposition légale aussi claire que celle dont il s'agit, on refuse de lui reconnaître le caractère général et absolu que lui donne les termes dans lesquels elle est conçue, pour en restreindre l'application au bénéfice d'un seul individu, Nicholas Sparks.

Cette prétention est appuyée sur la 9e Victoria, ch. 42, dont on trouve une analyse dans le jugement de l'honorable juge Gwynne qui, comme Sir William Richards dans la cause de *Tylee v. La Reine*, exprime l'opinion que ce statut n'a été passé que pour venir au secours de Nicholas Sparks.

Il est certain que ce statut déclare que le proviso de la 29e clause de la 7e Vict., ch. 11, *shall be construed to apply to all land at Bytown set out and ascertained and taken from Nicholas Sparks* en vertu de l'acte du canal Rideau, 8 Geo. 4, ch. 1,—et il est pourvu à un mode de procédure pour le faire rentrer en possession. Du fait que Sparks seul est mentionné dans cet acte, on n'en peut conclure autre chose si ce n'est qu'il est un de ceux auxquels il était applicable, il n'est pas déclaré être le seul ayant le droit d'invoquer le bénéfice de la loi, il est seulement dit que le proviso sera interprété comme le comprenant. Nulle expression comporte l'idée qu'il ne s'applique à aucune autre personne et aucune expression dans l'acte n'en comporte la révocation. Comme ces dispositions législatives ne sont pas en contradiction les unes avec les autres, elles peuvent et doivent également subsister, comme indépendantes les unes des autres. On a donné aussi, suivant moi, à la 9e Vic., ch. 42, un effet restrictif que ne comporte pas la teneur de ses dispositions. Cet acte ne

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me paraît aucunement affecter les droits de l'appelante en vertu du proviso.

Une autre objection est que par l'acte 19 Vic. ch. 54, la Couronne a été investie du terrain réclamé. L'honorable juge Gwynne s'exprime ainsi au sujet de cette proposition :

Then it is clear that, and indeed it is admitted that (notwithstanding anything contained in 7th Vic. c. 11,) the lands in question here were by 19 Vic. c. 54 vested in her Majesty for the public uses of the late Province of Canada, and that while still so vested they were by the B. N. A. Act placed under the exclusive control of the Dominion Parliament.

Malgré tout le respect que j'ai pour l'opinion de l'honorable juge, je suis forcé de différer avec lui sur cette question. Il me semble, au contraire que cet acte, dont le but était de transporter à l'un des principaux secrétaires d'Etat pour le département de la guerre les terrains qui étaient en vertu de la 7e Vic. ch. 11 sous le contrôle des principaux officiers de l'ordonnance, a soigneusement évité de faire aucune mention du terrain réclamé, et que les expressions employées font voir qu'il est resté dans la position qui lui a été faite par le proviso de la section 29.

Les propriétés mentionnées dans cet acte ont été divisées en deux classes énumérées dans la première et la deuxième cédules annexées au dit acte. Celles de la première cédule consistant en constructions et travaux militaires, sont transportées au principal Secrétaire d'Etat pour la guerre. Celles de la deuxième cédule sont déclarées retourner à Sa Majesté pour l'avantage de la province. Au nombre de ces propriétés se trouve le Canal Rideau dans le paragraphe ainsi conçu :

Rideau and Ottawa Canals, City of Ottawa Barracks, Block houses and adjuncts of the Canal.

A moins de prétendre que les 90 acres des terrains réclamés se trouvent compris dans le terme "adjunct,"

il est évident qu'ils en sont exclus. Le mot *adjunct* qui est défini en anglais "*something added to another but not essentially a part of it,*" ne peut s'appliquer qu'aux choses nécessaires et actuellement employées à l'exploitation du canal. Les 90 acres en question n'ont jamais fait partie et n'ont jamais été employés à l'usage du canal, comme le fait est reconnu et admis, et ne peuvent être par conséquent considérés comme un "adjunct" du canal.

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Ce statut loin d'avoir investi la Couronne de la propriété en question pour le bénéfice de la province en révoquant le proviso, a au contraire réservé les droits de tous ceux qui avaient des réclamations au sujet des terrains, bâtisses ou autres propriétés mentionnées dans la section 7 précédente. Cette section est celle opérant le transport des propriétés de la cédule 2e.

La section 9 va encore plus loin en limitant la révocation de l'acte 7 Vict., ch. 11, aux seules propriétés mentionnées dans la 2e cédule, elle laisse évidemment subsister le proviso de la section 29. De sorte que ce statut n'affecte en aucune manière le droit de l'appelante.

Il y a le même argument à faire contre la prétention que le terrain en question a passé au gouvernement fédéral par l'acte de confédération. La section 108 lui transporte les propriétés mentionnées dans la 3e cédule, article 1er: "*Canals, with lands and water powers connected therewith.*" Cet article comprend certainement le canal Rideau, et les mots "*with lands connected therewith,*" comprennent bien certainement aussi les terrains nécessaires et employés à l'usage du canal, mais ne comprennent pas les 90 acres qui sont admis n'avoir jamais été employés à l'usage du canal.

Après avoir attentivement examiné les divers statuts qui concernent le sujet en question, j'en suis venu à la conclusion qu'aucun d'eux n'a eu l'effet de révoquer le proviso de la section 29, et qu'il doit encore avoir son

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plein et entier effet et qu'il forme un titre légal en faveur de l'appelante. Pour conclure je citerai les paroles de Sir Hugh Cairns *in re Holmes* (1) qui, suivant moi, sont parfaitement applicables à cette cause :

There has been no conveyance to vest the legal estate in the Crown or previously in the ordinance officers, and the enactment that the lands be restored is not a direction that they shall be reconveyed, nothing being necessary except the surrender of possession.

Il est vrai que les opinions exprimées par Sir Hugh Cairns dans cette cause, *re Holmes* (1), n'ont pas reçu la sanction judiciaire, parce que la cour de Chancellerie se déclarant incompétente à statuer sur les droits de propriété d'immeubles situés en dehors des limites de de sa juridiction, ne rendit en conséquence aucune décision sur les autres questions débattues.

Mais ces opinions de Sir Hugh Cairns n'en sont pas moins de la plus haute importance et ne méritent pas moins la plus grande considération, non seulement à cause de la science profonde de cet éminent jurisconsulte, mais aussi par le fait que dans cette cause il parlait officiellement comme Solliciteur-général, au nom de Sa Majesté, et que sa haute fonction que l'on peut assimiler à une magistrature, l'obligeait dans ce débat entre Sa Majesté d'un côté et des sujets de l'autre, à dire de quel côté se trouvait la loi et la justice. Il s'est formellement déclaré contre les prétentions des héritiers By, déclarant que la loi avait ordonnée de rendre la propriété en question aux héritiers de Grace McQueen.

Ces opinions me paraissent non seulement justifier les droits de l'appelante, mais en être en même temps une admission solennelle devant Sa Majesté.

La Couronne oppose encore deux autres moyens de défense, le premier fondé sur la prescription introduite par la septième clause de l'acte des pétitions de droit de 1876, et la deuxième, un *estoppel*, fondé sur l'acte de vente du 6 février 1832, au colonel By, par William

(1) 2 J. & H. 535.

McQueen, dont l'appelante est héritière en loi et comme telle garante de l'exécution des dits actes.

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La 7e section de l'acte des Pétitions de droit est en ces termes :

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The statement in defence or demurrer may raise beside any legal or equitable defences in fact or in law available under this Act, any legal or equitable defence which would have been available had the proceedings been a suit or action in a competent court between subject and subject, and any grounds of defence which would be sufficient on behalf of Her Majesty may be alleged on behalf of any such person aforesaid.

La Couronne par cette section se trouve avoir maintenant le droit qu'elle ne possédait pas avant ce statut, dans Ontario, et qu'elle ne possède pas encore actuellement en Angleterre, d'invoquer les statuts de *limitation*. Ce droit ne lui est pas conféré d'une manière directe, il est une conséquence du privilège accordé à Sa Majesté de plaider tous moyens de droit ou d'équité qui pourraient l'être, comme dans une poursuite entre particuliers. Les statuts de limitation ou de prescription étant un moyen de défense à la disposition des particuliers; l'effet de cette section est de permettre à la Couronne de s'en prévaloir.

L'acte des pétitions de droit a été passé pour combler une lacune considérable dans notre législation qui ne permettait pas de mettre la Couronne en cause pour le règlement des difficultés résultant de ses nombreux contrats pour travaux publics, réclamation de propriété, etc., etc. Il y avait urgence à cet égard et pour remédier à ces graves inconvénients, il ne fallait qu'un simple acte accordant la faculté de poursuivre la Couronne, et réglant le mode de procéder. Aucune législation nouvelle sur le droit civil n'était nécessaire pour cela. Les droits d'action sont réglés par le droit civil de chaque province et doivent être jugés et décidés d'après ce même droit.

La Couronne n'ayant pas avant cet acte le droit de

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plaider prescription, on a donc en lui accordant le privilège apporté une modification importante au droit civil des provinces dans lesquelles ce droit n'existait pas avant d'avoir été introduit par cette loi. Cette modification est d'autant plus importante que Sir W. Richards dans son jugement de la cause de *Tylee v. La Reine* (1) a donné à cette loi un effet rétroactif, et déclar prescrits et éteints les droits qui ne l'auraient pas été sans cela. En supposant qu'il n'y aurait eu que ce seul moyen de défense, Tylee aurait donc vu ses droits éteints et prescrits au moment où entraînait en force une loi qui en lui ouvrant la port des tribunaux, lui enlevait en même temps son droit d'action. Tylee n'est pas un cas isolé, l'appelante n'est pas non plus seule dans cette position anormale. Cette proscription, car c'en est une, et des plus injuste, fait main basse sur les droits acquis de nombreux sujets qui sachant que la Couronne ne prescrivait pas contre eux, ne se sont guère hâtés de faire valoir leurs réclamations contre elle. Il est de toute évidence que cette loi viole des droits acquis et que son approbation sera dans bien des cas une véritable spoliation consommée au nom de la loi. Peut-on dire que la loi avait en vue un pareil résultat? Certainement non, car rien dans son texte n'indique une semblable intention. Les criantes injustices qu'elle causerait si elle était appliquée aux transactions passées sont de puissantes raisons en loi pour refuser de lui donner un effet rétroactif. Le sujet qui fait la matière de cette législation était tout-à-fait nouveau, et, comme toute loi nouvelle, elle ne doit avoir d'application que pour le passé. Cette loi pouvant causer des injustices aussi graves que celles auxquelles je viens de faire allusion, ne peut donc avoir d'effet rétroactif à moins d'une disposition formelle à cet effet qui n'existe pas. Il n'est guère nécessaire de référer aux autorités sur la rétroactivité des lois. Elles

(1) 7 Can. S. C. R. 651.

sont très connues et on en trouvera une longue liste dans la cause de *Taylor v. La Reine*, (1).

Pour arriver à admettre la rétroactivité de cette loi, Sir W. Richards s'est sans doute appuyé sur cette considération, qu'en général, la présomption de non rétroactivité des lois ne s'applique pas à celles qui ne concernent que la procédure et la pratique des cours. Ceci est sans doute vrai pour ce qui concerne la procédure et la pratique, mais non pas lorsqu'il s'agit comme ici d'un principe du droit civil : la prescription. Mais même en fait de procédure, il y a des exceptions dans les cas où la nouvelle procédure préjudicierait aux droits établis sous l'ancienne, ou porterait préjudice à la bonne foi des parties (2).

But the new procedure would be presumably inapplicable where its application would prejudice rights established under the old or would involve a breach of faith between parties.

Le même auteur page 271 dit :

The general principle, indeed, seems to be that alterations in procedure are always retrospective, unless there be some good reason against it (3).

Puisque d'après l'autorité ci-dessus, il y a lieu de faire exception à l'application de ce principe lorsqu'il y a de bonne raison, l'exception doit être appliquée dans le cas actuel, car je ne pense pas qu'il puisse s'en trouver un seul dans lesquels il y ait de meilleurs et plus justes raisons pour ne pas donner d'effet rétroactif à la loi. J'ai déjà signalé plus haut les graves injustices qui résulteront de la rétroactivité de cette loi. Elle détruit certainement le droit de propriété de l'appelante. Et dans quelles circonstances ? C'est lorsque la Couronne admet qu'elle n'a jamais payé à l'appelante le prix de sa propriété, ni à ses auteurs, ni à qui que ce soit pour elle, lorsqu'un texte de loi

(1) 1 Can. S. C. R. 65.

(2) Maxwell p. 273.

(3) See per Lord Blackburn in

*Gardner v. Lucas*, 3 App. Cas.

603; and *Kimbray v. Draper*, L.

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non révoqué, le proviso de la section 29, reconnaissait ses droits et qu'aucune prescription ne les affectait. Par cette rétroactivité on lui enlève sa propriété pour l'attribuer contre toute justice à Sa Majesté, qui a déclaré en vertu d'une loi que cette propriété devait être rendue à l'appelante. Et encore on ne peut arriver à ce déplorable résultant qu'en donnant à la disposition 7 de l'acte des Pétitions de droit un effet qui dépasse la limite des pouvoirs du gouvernement fédéral. Cette disposition, si elle a l'effet d'introduire une prescription qui n'existait pas, est évidemment inconstitutionnelle comme enfreignant les droits des législatures provinciales—tout autant qu'un statut du parlement fédéral qui aurait déclaré à cette époque que Sa Majesté avait eu et aurait à l'avenir le droit d'invoquer les limitations et prescriptions.—Un semblable statut eût attiré l'attention et n'aurait sans doute pas été adopté parcequ'il eût été considéré comme une invasion des droits des provinces—mais dans la forme adoptée, on ne s'est pas aperçu qu'on donnait simplement à la Couronne le droit de faire les mêmes défenses que dans les causes entre particuliers, on lui accordait un droit dont l'application pour le passé causerait de graves injustices. Je crois que, comme loi de procédure, il y a lieu de faire ici l'exception dont parle Maxwell. De plus, je considère cette disposition contraire aux droits des provinces, comme inconstitutionnelle. J'en conclus, pour ces deux motifs, qu'on ne peut opposer à l'appelante la prescription fondée sur la 7e section de l'acte des Pétitions de droit, etc.

Quant à l'*estoppel* fondé sur l'acte de vente du 6 février 1832 par William McQueen au colonel By, il est clair qu'il ne peut être opposé à l'appelante, d'abord parce qu'elle n'était pas partie à cet acte, et ensuite parce que cet acte pour la partie concernant les 110

acres était nul pour les raisons que j'ai données plus haut, et enfin parceque le titre de l'appelante est établi par la loi, le proviso de la section 29. De plus, d'après les autorités suivantes, on ne peut se prévaloir de l'*estoppel* contre un acte du parlement :

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Everest and Strode Law of Estoppel (1).

It is, perhaps, owing to the above rule, viz: that an Act of Parliament is a record to which every one is privy, that the doctrine of estoppel has been considered to have no application so as to permit parties to a contract to estop themselves in face of an Act of Parliament. However, whatever its origin, such a rule has been laid down (c) in *re Stapleford Colliery Co.*, Barrow's case (2).

Bacon V. C. dans la cause *in re* Barrow, dit (2) :

But the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract *inter partes*, and it is not competent to parties to a contract to estop themselves or any body else in the face of an Act of Parliament.

Pour tous ces motifs j'en suis venu aux conclusions suivantes : 1o. Que les droits de propriété appartenant à Grace McQueen en vertu des lettres patentes du mois de mai et juin 1801, n'ont jamais été légalement aliénés ; 2o. Que la partie de sa propriété prise sous prétexte qu'elle était nécessaire à la construction du canal, n'ayant jamais été employée à cet usage, le proviso de la section 29 de 7 Vic., ch. 11, en ordonne la restitution. 3o ; Qu'aucune prescription ne peut lui être opposée. 4o ; Qu'il n'y a pas lieu non plus d'invoquer un *estoppel* fondé sur l'acte du 6 février 1832.

Je suis d'avis que l'appel devrait être alloué.

HENRY J.—This is an action brought by petition of right and involves the title to a large and very valuable property, consisting of about ninety acres in the City of Ottawa, part of which is known as Cartier Square. It originally formed a part of patents to one Grace McQueen, dated 10th May, 1801, and 10th June,

(1) P. 40.

(2) 14 Ch. D. at p. 441.

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1801, containing about 600 acres. Under a statute of Upper Canada, passed in 1827, (8 Geo. 4, ch. 1) commonly called the Rideau Canal Act, His then Majesty was invested with certain powers and authorities necessary to the making, maintaining and using the canal intended to be completed under His Majesty's direction for connecting the waters of Lake Ontario with the River Ottawa, and for other purposes therein mentioned. Lieut. Col. John By, of the Royal Engineers, was the officer employed by His Majesty to superintend the work of making the canal, and it is admitted that he some time before the passage of the act, and before the death of Grace McQueen, measured and made a plan of about 110 acres out of the lands granted or conveyed by the patents before mentioned to her, and took possession thereof for His Majesty, and it is alleged that such possession has been continued up to the time of the bringing of this suit, which was on the 1st of February, 1879. The canal was finished and opened in May, 1832. Grace McQueen died intestate on the 18th September, 1827, a few months after the passing of the act, leaving William McQueen, the father of the suppliant, her sole heir-at-law. He died intestate on the 20th October, 1845, leaving the suppliant his sole heiress at law. That in the ordinary course would have established the title to the lands in question in the suppliant. How then has she been divested of that title?

It is said in the first place that she was divested of the title to the 110 acres by the act of Col. By as before stated. I cannot arrive at that conclusion for the statute provides that the laying off of the land and the filing of the plan made of itself no expropriation, and provided that the engineer in question was authorized to arrange for payment for it with the owner and obtain a surrender of title to His Majesty.

Such was not done in the lifetime of Grace McQueen, nor afterwards, and it does not appear that she had any knowledge of the laying out of the 110 acres or of the filing of the plan. She never was paid anything for the land so set apart and I have no hesitation in declaring that the title to it was in her at the time of her death, and that title descended to William McQueen her son and only heir. In *Re Holmes*, (2); Sir Hugh Cairns, Solicitor General, on the part of the Crown, referring to the circumstances of this case, said:

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There has been no conveyance to test the legal estate in the Crown, or previously in the ordnance officers; and the enactment that the lands be restored is not a direction that they shall be re-conveyed, nothing being necessary except the surrender of possession.

Again, on page 536 he says:—

If all these difficulties were got over the persons entitled to claim restoration would be the representatives of William McQueen, and not those who claim under Col. By. The conveyance of 1832 passed all the interest which Wm. McQueen had in the land, but it could not pass an interest which was only created by a long subsequent act of Parliament in favor of "the party or parties from whom the land was taken." The suppliants are not such parties.

The positions so taken by the learned solicitor were combatted by counsel on the other side, and did not form any part of the judgment in the case. Independently, then, of the dicta just quoted, we must consider the effect of the deed from William McQueen to By on the 6th February, 1832. At that time the canal was about finished, and it was opened for traffic in May following. The 110 acres were then in the possession of the crown, and not in possession of either McQueen or By. I am, therefore, of opinion there was no legal conveyance of the 110 acres to By. The title was after that either in the crown or in McQueen. If McQueen held the title, but even out of possession, the

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law denied him the power or right to transfer it ; if he did not transfer it it remained in him. If he should subsequently obtain the possession either by a suit at law or otherwise he would then be in a position to make a legal transfer, and if seeking to recover the possession from a wrongful holder by a suit at law the defendant could not prevent his recovery by setting up the inoperative conveyance. We are not now trying the question as to which party to the conveyance the recovery would finally benefit. The case before us is between the party who made the inoperative conveyance, who was no doubt the titled owner, and one who claims that the title was divested before the conveyance. If that position is established the right of the claimant never existed.

It is admitted on all sides that but 20 out of the 110 acres were required for the canal purposes, and that no part of the remaining 90 acres was ever used or considered necessary for the use of the canal. The possession of it was, however, as I think wrongfully withheld at all events since the passage on the 9th of December, 1843, commonly called "The Ordnance Vesting Act." That act vested by general terms certain public lands, &c., including the Rideau Canal, and the lands and works belonging thereto in the principal officers of Her Majesty's Ordnance in Great Britain, and their successors in office, subject to the provisions of the said act. Now one important provision of that act in the 29th sec. is as follows:—

Provided always, and be it enacted that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal which have not been used for that purpose be restored to the party or parties from whom they were taken.

Now the 90 acres in question in this suit were taken as the proviso states but not used—all lands similarly placed became subject to the enactment—no matter

from how many parties they had been taken. They were to be "restored" not reconveyed. It may be fairly argued that if the legislature or party or the parties who framed the act considered the parties wholly divested of the title to the lands in question we would have found the word re-conveyed instead of the word restored, and directions given and authority enacted for the party or parties to make the conveyances. If that is not the true construction then a most inapt word was used to provide for a conveyance. I entirely agree with Sir Hugh Cairns that no conveyance was considered necessary and that none is provided for. It is a legislative intimation to the parties in effect saying—The crown has taken more of your land than was necessary for the canal, the title of what was necessary for the canal and which has been used for that purpose, with other public properties of various kinds, has been handed over to the principal officers of Her Majesty's Ordnance, but they are not to have anything to do with the lands taken but not used for canal purposes. The enactment in the proviso not only proclaims that the principal officers of the ordnance shall have no title in or control over the now used lands, but actually conveys them to the parties from whom they were taken. The act is a general and most comprehensive one and intended to cover all the lands and property held by the crown and containing the declaration that the crown should no longer exercise any right to or have any interest in the lands referred to.

In 1856 an act was passed by the legislature of the late Province of Canada, intituled:

An act for transferring to one of Her Majesty's Principal Secretaries of State the powers and estates and property therein described now vested in the principal officers of the Ordnance and for vesting other parts of the Ordnance's estate and property therein

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described in Her Majesty the Queen for the benefit, use and purpose of this Province.

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Section 9 of that act is as follows :

With respect to all lands and other real property comprised in the second schedule to this act annexed, which by this act shall be vested in Her Majesty the Queen for the benefit, use and purposes of this Province in the said recited act of the seventh year of the reign of Her present Majesty, and every clause, matter and thing therein contained, shall from and immediately after the passing of this act be repealed, and the same is and are hereby repealed accordingly.

On reading the second schedule referred to it will be found that a great many lots of land and other property are described and included. The only reference to the Rideau Canal is in the last line of the schedule and in these words : "Rideau and Ottawa Canals;" and under the descriptive heading there are the words, "City of Ottawa, Barracks, Block-houses and adjuncts of the Canals."

What, then, is meant by the words adjuncts to the canals? Surely they cannot be intended to apply to the 90 acres which, since the opening of the canal in 1832—24 years before—had not only never been used in connection with the canal, but which was considered by the government agents as not required for the working or maintenance of it, and which must have been within the knowledge of the legislature which passed and those who prepared the proviso in the act 7 Vic. ch. 11. The evidence furnished by the case clearly shows that for 24 years previous to 1856 the 90 acres in question formed no part of the adjuncts of the canal. If not sec. 9 above quoted not only does not repeal the proviso in question so as to affect the 90 acres, but virtually re-enacts it. It is to that extent a legislative declaration that that proviso was in force in 1856 and should have subsequent operation.

The transfer to Her Majesty made by sec. 6 of the act of 1856 were stated to be :

All and every the lands and other real property in this province comprised in the second schedule to the act annexed, being a portion of the messuages, lands, tenements, estates and hereditaments, comprised within the provisions and meaning of the said in part recited act of the 7th year of the reign of Her present Majesty, which prior to the passing of this act were by the said recited act or otherwise vested in the said principal officers of Her Majesty's ordnance, and their successors in the said office and which have been used or occupied for the service of the ordnance department or for military defence, &c.

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Now, to include lands in that referential description it must be shown first that such lands were at the passing of the act vested in the principal officers of the ordnance department, for the statute only refers to lands previously so vested. I have already shown that the 90 acres in question were never so vested, and that the title of Grace McQueen and her heirs remained undivested, notwithstanding the laying off of the 110 acres and the filing of the plan. The further proof necessary would be to show that the lands to be vested in Her Majesty for the use of the Province had been used or occupied either for the service of the ordnance department, which is not pretended, or for military defence, and which is also not pretended. In fact, the evidence afforded by the case shows that the 90 acres in question was not used; if used at all it was not for the service of the ordnance department or for military defence. The lands held and used for military purposes are designated in the first schedule, and if the lands in question had been so used they would have been therein included. For these reasons then, I conclude that the 90 acres in question were not included in the section in question.

The next section (the 7th) contains this enactment:

Provided always, and be it further enacted, that nothing herein contained shall be taken to affect the rights of any parties claiming any of the lands, buildings, or other property referred to in the next preceding section, and in the said second schedule.

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If then the suppliant was entitled to claim the land in question at the passing of that act her rights are reserved to her thereby.

This statute is re-enacted *verbatim* in the Consolidated Statutes of Canada (1859) at page 292.

It is contended that the act 9 Vic. chap. 4, which passed at the instance of Nicholas Sparks, excluded all other persons in whose favor the proviso in the act 7th Vic. chap. 11, was enacted, but I cannot bring myself to the conclusion that it had any such legal result. If the suppliant had the legal estate in the 90 acres in question either at common law or by the operation of the statute 32 Henry VIII, the enactment contained in the proviso did not add to her title, but if she had not then I am of the opinion she got such a title as would convey to her the fee simple, and that title could only be divested by direct legislation. It was well known when that proviso was enacted that 90 out of the 110 acres had never been used for canal purposes and it being contrary to all law relative to the expropriation of private lands for public purposes that the 90 acres being such a large excess should, in the first place, have been marked off and, a greater wrong still, retained—it is but right to conclude that the 90 acres should be restored. Neither Grace McQueen nor her heirs got any payment whatever for the 110 acres, but it is argued that because an award was made at the instance of Col. By deciding that the property unexpropriated was increased in value to the extent of the 110 acres, her son was paid for them. My objection to that contention is that he was in no way a party to the reference and his interests were not affected by the award. In the next place neither of the reference papers were produced nor was the award, and it is therefore impossible to say whether the reference for the valuation was for the 110 acres or

for but the twenty then being used. From the fact that it was then known\* that the ninety acres were not then required or used, I think the proper conclusion, in the absence of proof to the contrary, is that the arbitration only had reference to the 20 acres then being used and, further, it is not easy to believe that it would be a necessary sacrifice of more than one sixth of the whole of the 600 acres or that any arbitrators would have so awarded. It appears from the case that Nicholas Sparks had made a surrender of his title to certain parts of land to Col. By for canal purposes and thereby divested himself of all claim thereto. He parted with such parts by a surrender and it was not taken by expropriation proceedings. When therefore the act 7th Vic. chap. 11, was passed he occupied a position in respect to the lands surrendered wholly different from that of Grace McQueen's heirs. It was considered, therefore, that as respects his interests in the whole of his lands taken further legislation might be necessary. To make title in him as to the lands surrendered it was necessary not merely to restore the possession but to give him a title, either by express legislation or by a re-conveyance, to be authorized by an act. In the view of Lord Cairns, when arguing the case of *re Holmes* (1), before mentioned, and which I have adopted, no conveyance to the heir of Grace McQueen was necessary. The act of 1846 (the Sparks act) was considered necessary to provide for such re-conveyance, and it was done by duly reciting that doubts existed as to the construction of the proviso in the act 7 Vic. chap. 11, and it was enacted that portions of the land should be conveyed to him; but the legislature then and for the first time excepted such lands as might be desirable to retain for the service of the Ordnance Department for military purposes.

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(1) J. & H. 527.

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The legislature, therefore, as far as the canal purposes were concerned by that act gave effect to the terms of the proviso, but as some of the land might be required for military purposes, for which purposes Sparks had made no surrender, it enacted virtually an expropriation to obtain them under the common and usual terms by valuation of and payment to be made therefor. That was substantially, as far as Sparks was concerned, a re-enactment of the terms of the proviso. The legislature then speaking by the act, said to Sparks: We will carry out the terms of the proviso and convey all the unused land to you, but some of the land may be required for military purposes. We will except such in case it may be required, and if required, will pay you for it. If then Sparks was entitled to the substantial restoration of it by the necessary legal means, why should not other parties still more favorably situated be equally so? The difficulty in Sparks' case may have been considered to have arisen from the surrender he made by which his title to parts of the land was divested, but had he occupied the position of William McQueen I am of opinion no act would have been necessary to explain the terms of proviso. There may too have been other reasons why doubts were entertained as to the proviso. Independently, then, of the legislation as to the lands of Sparks by the act of 1846, the reason for the doubts, as to the true intent and meaning of the same referred to in the act, and as to the land to which it was intended to apply, are not recited or explained. I have already referred to the doubts as to the position of Sparks, after his surrender of parts of his land for canal purposes, but there must have been doubts also as to the extent to which the proviso operated as far as he was alone concerned, for I find the act declares :

That the proviso should be construed to apply to all the land at Bytown set out and ascertained, and taken from Nicholas Sparks, Esq., under the provisions of the act 8 Geo. 4 ch. 1, excepting such

parts as were actually occupied as a part of the canal, and some other exceptions defining what was to be retained.

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The section in which this provision appears shows that under the circumstances it might been considered necessary in Sparks' case to define particularly the land to which the proviso was intended to apply, and therefore the reason is shown why the words referring to the same in the enactment were used. The matter was therefore one between Sparks alone and the public, and whatever way the matter was compromised or settled should not affect the rights of others. The application to the legislature was no doubt intended only to settle such doubts and difficulties as existed between those interested parties, and was never intended, I take it, to affect the rights of others. Sparks wanted a declaration as to the meaning of the proviso, and the extent to which his interests were affected as regards the quantity of his land to be restored and I conclude that the legislature meant nothing further. The act recited "that proceedings at law and equity which had arisen out of such doubts had been commenced and were still pending." In 1846 suits at law and in equity were pending. In such suits, from the references to them, we must conclude Sparks alone was interested and the legislature was appealed to for aid to settle the matter in difference. This was done by the act giving Sparks a construction of the proviso, which gave him substantially the same as the proviso. That construction is in favor of the claimant's case. At all events she is unaffected by the act as the declaration in favor of Sparks does not directly or even indirectly limit the terms of the proviso to the lands of Sparks but leaves it as to others in full force. It was in my opinion but an explanatory act applicable solely to the claims of Sparks and so intended. It could only have affected the interests of others by

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an express and direct application to them and not by speculative inferences liable to error and the working of injustice.

To the petition of right in this case title to the land in question herein is pleaded to be in Her Majesty for the benefit and use of Canada. I have carefully examined and considered the provincial statutes and have shown that the land was not included in any of them having for their object the transfer of title or interest in the public lands and property from the trust held, as to them, by the principal officers of Her Majesty's Ordnance Department, and I have shown also that it was not included in the trust previously created in those officers. I will next refer to the Imperial Confederation Act of 1867. The 108th section—the only one necessary to be looked at—is as follows:—

The public works and property of each Province enumerated in the third schedule to this act shall be the property of Canada.

The third schedule referred to in the section just recited is headed :

Provincial public works and property to be the property of Canada.

The only items of the schedule affecting the question are the 1st, 9th and 10th—the 1st is :

Canals, with lands and water powers connected therewith.

For thirty-five years previous to the passing of that act the 90 acres in question had not been connected with the canal, and if considered to have been so connected the connection, such as it had been, was severed by the act of 1843.

The 9th item is as follows :

Property transferred by the Imperial Government and known as Ordnance property.

That item certainly does not include the 90 acres in question.

The 10th item :

Armories, drill sheds, military clothing and munitions of war, and lands set apart for general public purposes.

That item does not include the 90 acres in question, for it never was set apart for "general public purposes or, indeed, for any special public purpose.

If the title to the 90 acres was never vested in the principal officers of Her Majesty's Ordnance or the Secretary for War it certainly never passed to Her Majesty for the benefit or use of Canada and it did not pass to Canada by the Imperial Confederation Act.

I am, therefore, of the opinion that the defence set up on that ground must fail. If since the Confederation Act was passed the possession of the 90 acres has been held by some parties connected with the Dominion Government claiming under that act, it is my opinion that such holding was unauthorized.

I have thus shown my opinion to be that the suppliant, after at all events the passing of the act of 1843, was legally entitled, at least, to the 90 acres in question. It is, however, contended that her claim was barred by the statute of limitations and I will proceed to consider that question.

Up to the time of the passing of the act of Canada passed on the 12th of April, 1876, entitled: "An act to make further provision for the institution of suits against the Crown by petition of right," the defence of the statute of limitations could not be pleaded by the sovereign.

By section 7 of that act: "Any legal or equitable defences which would have been available had the proceedings been a suit or action in a competent court between subject and subject will be available to the crown."

The provision is comprehensive enough to include the defence of the statute of limitations, and we are not to inquire whether or not the legislature meant to

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enable the sovereign to set up that defence. Whether such a defence can be admitted under the circumstances in this case is a matter calling for consideration. To answer such an inquiry it is necessary to consider the circumstances under which the legislation in question took place and the legislature had no doubt in providing a new jurisdiction the right to prescribe how it should be exercised. Sir Peter Maxwell, in his work on "The Interpretation of Statutes," at page 257, says:—

Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. *Nova constitutio futuris formam imponere debet non praeteritis*. They are construed as operating only on cases or facts which come into existence after the statutes were passed, unless a retrospective effect be clearly intended. It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed out of respect to the legislature to be intended not to have a retrospective operation.

See *Williams v. Smith* (1); *Jackson v. Woolley* (2); *Re Suche & Co.* (3); *Re Cochran's Estate* (4); and *Young v. Hughes* (5).

At page 273 the same author says:—

But the new procedure would be presumably inapplicable where its application would prejudice rights established under the old, or would involve a breach of faith between the parties.

In *Re Phoenix Bessemer Steel Co.*, (6) Jessel M. R. as to a question whether an act had a retrospective effect says:—

The general principle upon which alterations of the law are made is not to interfere with rights and interests that are already ascertained and determined. Nothing is more reprehensible in legisla-

(1) 4 H. & N. 559.

(2) 8 E. & B. 778.

(3) 1 Ch. D. 48.

(4) L. R. 5 Eq. 209.

(5) 4 H. & N. 76.

(6) 45 L. J. Eq. 11.

tion than to deprive people of their rights without compensation.  
 \* \* \* If the act is to have the effect contended for (a retrospective one) the result will be to deprive these creditors of an ascertained right. I am of opinion that cannot be done without express words.

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In *re Joseph Suche Co.*, (1) the same learned judge referring to his previous judgment just cited and quoted from, after saying he might decide the case on other grounds, says :—

However, I have since consulted other judges, and I prefer on the present occasion to rest my decision on the general ground, that the section was not intended to apply to any winding up that had been commenced before the act came into operation. I so decide because it is a general rule that when the legislature alters the rights of parties by taking away from them, or conferring upon them, any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them at all. It was said that there is one exception to this rule, namely, that where the enactment merely affects procedure and does not extend to rights of action in those cases enactments have been held to apply to existing rights, and it is suggested that the alteration made by section 10 comes within this exception. I am of opinion it does not. It is not merely an alteration in procedure. It is an alteration in the right to prove for a debt.

The learned judge then referring to the alterations of the law by the enactment under consideration, says :  
 “That is not procedure.”

In *Wright v. Greenwood* (2), which was an action to recover a medical bill, the defence was that under the provisions of sec. 32 of 21-22 Vic. ch. 90, the plaintiff not being a registered practitioner could not recover. The section provided that no person should be entitled to recover in such a case “unless he shall prove upon the trial that he is registered under this act.” The court, however, held that provision inapplicable to cases where the services were performed before the passing of the act. The act provided that no person could re-

(1) 45 L. J. Eq., at p. 13; 1 Ch. D. 48. (2) 1 B. & S. 758.

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cover, but because it interfered with a vested right it could not be declared to have a retrospective operation. That is a much stronger case than that now under consideration.

See also *Hughes & others v. Lumley & others* (1) and *Vansittart v Taylor* (2) where the same principle was declared.

See again *Dash v. Van Kleeck* (3) wherein Chief Justice Kent in an exhaustive judgment decides a case in the same way. It is laid down in the head note:

It is a principle of universal jurisprudence that laws civil and criminal must be prospective and cannot have a retroactive effect.

In *Society, &c. v. Wheeler* (4) Judge Story says:

Upon principle every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past must be deemed retrospective and this doctrine seems fully supported by authorities.

In *Caldier v. Bull* (5) Chase, Justice, afterwards Chief Justice, delivering the judgment of the Supreme Court of the United States says

Every law that takes away or impairs rights vested agreeably to existing laws is retrospective and is generally unjust and may be oppressive and it is a good general rule that a law should have no retrospect.

Again:

Every law that is to have an operation before the making thereof as to commence at an antecedent time or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed and the like, is retrospective.

The governing authorities, as I read them, announce the law to be that where vested rights are concerned statutes shall not have reference to retrospective effect unless made expressly to have it and that such statutes are not to be considered as affecting procedure only.

(1) 4 E. & B. 358.

(3) 7 Johns. 477.

(2) 4 E. & B. 910.

(4) 2 Gallison at p. 139.

(5) 3 Dallas 386.

For the reasons stated I am of opinion the appeal should be allowed and judgment entered for the suppliant with costs.

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TASCHEREAU J.—I am of opinion that the suppliant's claim is not barred by the statute of limitations.

It appears from the facts admitted that some time prior to the 18th September, 1827, Col. By, the officer in charge of the Rideau Canal works, had set out, ascertained and taken possession of for His Majesty King George IV. the 110 acres of land in question in this suit. It also appears that in February, 1832, the canal was almost completed. These 110 acres were then consequently vested in the crown. It follows, in my opinion, that the sale by William McQueen to Col. By of these 110 acres was void and of no effect. How could Col. By, holding, as he did, this land as trustee for the crown, buy it for himself? How could he get a title from McQueen, when, to his, Col. By's own knowledge, the title was in the crown? None of this land passed to Col. By, by that deed of sale. Then, subsequently by the 7 Vic. ch. 11, it was enacted that "all lands taken from private owners at Bytown under the authority of the Rideau Canal Act, for the uses of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken." Now, it was only in 1869 that it was declared by the crown that 90 acres out of the 110 acres taken from McQueen were not wanted for the canal.

I would hold that up to then the crown could not prescribe against 7 Vic. ch. 11, and that since then she holds these 90 acres as trustee.

I would allow the appeal and hold that the suppliant is entitled to these 90 acres. As the judgment of the court will dismiss the appeal it is, however,

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useless for me to inquire what would be, in my opinion, the extent or nature of the remedy the suppliant would be entitled to had the judgment been in her favor upon the question of the statute of limitations.

GWYNNE J. adhered to his judgment in the Exchequer Court, adding, that on the question of the statute of limitations he concurred with the Chief Justice and Strong J.

*Appeal dismissed, but without costs.*

Solicitors for appellant: *Belcourt & MacCracken.*

Solicitors for respondent: *O'Connor and Hogg.*

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