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Jan. 19.

THE CITY OF QUEBEC.....SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of Right—Demurrer—Injury to property resulting from negligence of Crown's servants on public work—Crown's liability therefor—50-51 Vic. c. 16, s. 16 (c)—Interpretation.

On the 19th of September, 1889, a large portion of rock fell from a part of the cliff, alleged to be the property of the Crown, under the citadel at Quebec, blocking up a public thoroughfare in that city known as Champlain Street to such an extent that communication was rendered impossible between the two ends thereof.

By their petition of right the suppliants charged that this accident was caused by the execution of works by the Crown which had the effect of breaking the flank side of the cliff, by the daily firing of guns from the citadel, and the fact that no precautions had been taken by the Crown to prevent the occurrence of such an accident. The Crown demurred to the petition on the ground, *inter alia*, that no action will lie to enforce a claim founded on the negligence, carelessness or misconduct of the Crown or its servants or officers.

Held:—(1). There being no allegation in the petition that the property mentioned was a work of defence or other public work, or part of a public work, and it not appearing therein that any officer or servant of the Crown had any duty or employment in connection with the property mentioned, or that the acts complained of were committed by such officers while acting within the scope of their duties or employment, no case was shown by the suppliants in respect of which the court had jurisdiction under *The Exchequer Court Act*, 50-51 Vic. c. 16 s. 16 (c).

(2). Under section 16 (c) of the said Act, the Crown is liable in damages for any death or injury to the person or to property on any public work resulting from the negligence of any officer, or servant of the Crown while acting within the scope of his duties or employment.

(3). The Crown's immunity from liability for personal negligence is in no way altered by section 16 (c) of the said Act.

DEMURRER to a petition of right.

The petition prayed for damages for the obstruction

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of a street in the city of Quebec, alleged to have been caused by the nonfeasance and misfeasance of the Crown and its officers.

The pleadings are sufficiently stated in the judgment.

Argument of Counsel.

November 13th, 1890.

Irvine, Q.C. in support of demurrer:

It will, no doubt, be contended that the remedy against the Crown in such a case as this is created by *The Exchequer Court Act* (1). But that Act only extends the jurisdiction of the court, and does not pretend to enlarge the liability of the Crown in any way,—which, under the provisions of *The Interpretation Act* (2) can only be done by express terms. Now, I submit that it would be a reasonable construction of sub-section (*c*) of section 16 of *The Exchequer Court Act* to say that it was merely intended to give the court jurisdiction to hear and determine cases wherein, by express enactment, the Crown is made liable for the negligence of its officers or servants,—such as, for instance, cases arising under the clauses of this nature to be found in *The Government Railways Act* (3) and *The Public Works Act*, as amended by 41 Vic. c. 8 s. 3.

Again, assuming that the officers or servants of the Crown did, by their acts of omission or commission, contribute to the accident, and that the Crown would be liable therefor in the event of a proper case being substantiated, the citadel at Quebec is not a public work within the meaning of the sub-section in question. It is not within the control of the Public Works Department in any way, but that control is exercised by the Militia Department. (Cites *R.S.C.* c. 41, ss. 4, 6, 7, 8 and 9.)

(1) 50-51 Vic. c. 16 s. 16 sub-sec. (*c*).

(2) R.S.C., c. 1. s. 7, sub-sec. 46.

(3) R.S.C. c. 38, ss. 16, 17, 22, 23 and 36.

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Argument of Counsel.

Hogg, Q.C. on the same side: This case differs very little in principle from the case on demurrer of *Brady* v *The Queen* (1), which I argued a few days ago in this court. Assuming, for the purposes of argument, that there is a liability created against the Crown by subsection (*c*) of section 16 of *The Exchequer Court Act*, the suppliants' petition here does not allege that the citadel is a public work, and on the face of the petition the court has plainly no jurisdiction. The Crown cannot be guilty of a breach of duty where no duty exists. Prior to the passing of *The Exchequer Court Act* no such action as this would lie against the Crown, and it cannot be shown that the Act provides a remedy in such a case. (Cites *Farnell* v. *Bowman* (2); and *Attorney General* v. *Wemyss* (3), and points out the differences between the enactments under which these cases arose and the subsection of *The Exchequer Court Act* under discussion.)

Belcourt, *contra*: The petition is well founded outside of the statute. At common law a petition would lie where the Crown had taken possession of a street as in this case, and the same right exists under the civil law. The refusal to remove the obstruction from the street is a withholding of possession by the Crown. (Cites *Feather* v. *The Queen* (4).)

Again, this is a public work within the meaning of *R.S.C.* c. 36 ss. 2 and 7; and by ss. 7 and 9 of that chapter the Minister of Public Works is charged with the duty of keeping the work in good repair. Then again, by *R.S.C.* c. 41 ss. 4, 6, 7, 8 and 9 the Minister of Militia and Defence is charged with the duty of maintaining and keeping in repair all forts and fortifications in Canada. Both Ministers of the Crown have failed to do their duty in this regard, and an action will lie therefor. Again, the petition is well founded under

(1) Reported *post*.
(2) 12 App. Cas. 643.
(3) 13 App. Cas. 192.
(4) 6 B. & S. 257.

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Argument of Counsel.

The Petition of Right Act (*R.S.C.* c. 136 s. 13). A remedy is also afforded by *The Expropriation Act* (52 Vic. c. 13). This is nothing more or less than an expropriation of the street by the Crown. The Crown can acquire title by prescription, and under art. 2211 of the *Civil Code* the subject has a right to interrupt such prescription by a petition of right. (Cites *Laporte* v. *The Principal Officers of Artillery, &c.* (1); *The Exchequer Court Act* s. 18; *C.C.L.C.* art. 400.) The action will lie under 50-51 Vic. c. 16, s. 15. (Cites *Redpath* v. *Giddings* (2); Fournier and Henry, JJ. in *The Queen* v. *McLeod* (3).)

Under art. 1057 *C.C.L.C.*, a contract is implied on the part of an owner so to use his property as not to injure his neighbor. The *Civil Code* is binding on the Crown (4). The case is clearly within section 16 (*c*) of 50-51 Vic. c. 16, and it is also within the meaning of section 16 (*d*), because it arises upon a breach of a statutory duty. By repealing section 21 of *The Petition of Right Act*, Parliament has shown an intention to increase the liability of the Crown. (Cites *The Queen* v. *Williams* (5), *Théberge* v. *Landry* (6).) The Crown's liability in a case of this kind existed before *The Exchequer Court Act*, but a remedy was lacking. Now by the use of the words "hear and determine" in section 16 of such Act, both the remedy and a jurisdiction to give effect to it are created. (Cites *Broom's Legal Maxims* (7), *Todd's Parliamentary Government* (8) *Chitty's Prerogatives* (9), *The Queen* v. *McLeod* (10), *Endlich on Statutes* (11).)

Hogg, Q.C. in reply: So far as the common law goes, supposing, for the sake of argument, that the citadel is a public work, and the accident was attributable to

(1) 7 L.C.R. 486.
(2) 9 L.C.J. 225.
(3) 8 Can. S.C.R. 1.
(4) *Exchange Bank* v. *The Queen*, 11 App. Cas. 157.
(5) 9 App. Cas. 418.
(6) 2 App. Cas. 102.
(7) 4 ed. 53.
(8) Vol. 1. p. 2.
(9) P. 339.
(10) 8 Can. S. C. R. at p. 30.
(11) §§. 107, 166, 167, 168, 419, 430.

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failure of duty on the part of those in charge, the doctrine of *respondeat superior* does not apply to the Crown. (Cites *Tobin* v. *The Queen* (1).

Reasons for Judgment.

BURBIDGE, J. now (January 19th, 1891) delivered judgment.

The facts admitted by the demurrer, and material for its consideration, are set out in the first seven paragraphs of the petition of right, as follows :—

1. That for a number of years past, Your Majesty has been and still is proprietor in possession of the lots of land known by the Nos. 2263, 2304, 2305, 2306, 2307, 2308, 2312, 2313, 2314, 2315, 2316, 2320, 2321, 2322, 2323, and 2327 on the official cadastre for Champlain ward of the said city of Quebec.

2. That the said lots form a high, steep, and rocky cliff, extending from the place commonly called Dufferin Terrace, southward to opposite the Citadel, with a short slope at the foot thereof, along a street called Champlain street.

3. That the said Champlain street has been opened there and used by the public for over a century.

4. That during the last ten years, Your Majesty has done and caused to be done to the said cliff, works which have had the effect of breaking the flank side thereof.

5. That the daily firing of guns from the Citadel over the said cliff has also contributed to the splitting of the rocky surface.

6. That during the last ten years, Your Majesty has totally failed to do to its said property the proper, convenient and necessary works to prevent its becoming dangerous, and also to prevent accidents from the sliding of pieces of rock.

7. That owing to the carelessness, want of precautions and gross negligence of Your Majesty, and of Your Majesty's officers, in doing there works which ought not to have been done, and in not doing what was necessary to be done to prevent the said property from becoming dangerous, it is now averred that on or about the 19th day of the month of September last (1889), a very large portion of rock fell from the flank side of the said cliff or cape, and breaking into pieces, formed an enormous heap which totally blockaded the said Champlain street on a considerable length, and rendered almost impossible the communication between the southerly and the northerly portions of the said street.

(1) 16 C. B. (N. S.) at p. 349.

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The following are the grounds of the demurrer:—

1. Because the said petition discloses no claim against Her Majesty capable of enforcement by the petition of right.

2. Because the said petition does not disclose any contract or statutory liability on the part of Her Majesty in respect of the matters complained of in the said petition of right.

3. Because there was, and is, no legal duty incumbent upon Her Majesty to do any works, or take any steps, to prevent rocks on the lands mentioned in the first paragraph of the said petition from sliding upon the lands at the foot of the cliff referred to.

4. Because the claims and causes of action of the suppliants are founded in tort and are not enforceable by petition of right.

5. Because the alleged claims and causes of action set out in the petition of right are based upon the gross negligence and want of precautions and carelessness of Her Majesty and Her Majesty's servants in connection with the lands therein mentioned; and no action will lie against Her Majesty to enforce a claim founded on the negligence, carelessness or misconduct of Her Majesty or Her Majesty's servants or officers.

It is admitted that prior to June 23rd, 1887, when the Act of the Parliament of Canada 50-51 Vic. c. 16 was passed, the subject had, in respect of a tort, no remedy against the Crown by petition of right. (1).

It was contended, however, that the reason was to be found in the absence of any means to enforce the subject's right, and not in the Crown's immunity from liability; and that as the court was, by 50-51 Vic. c. 16 s. 16 (*c*), given jurisdiction in respect of torts, the petition would lie. The first part of that contention cannot, I think, be maintained. While no doubt there are frequent references in the authorities to the absence of remedy, the reason of the decisions will be found to go beyond that, and to rest primarily upon the principle that in such cases no liability exists. In *The Queen* v. *McFarlane* (2), Sir William Ritchie, C.J. says that the doctrine of *respondeat superior* has no application to the Crown, and he re-affirms the principle in *The Queen* v.

(1) The Queen v. McFarlane, 7 Can. S.C.R. 216; The Queen v. McLeod 8 Can. S.C.R. 1.

(2) P. 239.

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McLeod (1), where he states that the maxim *respondeat superior* does not apply in the case of the Crown; that the Sovereign is not liable for personal negligence, and, therefore, the principle *qui facit per alium facit per se*, which is applied to render the master liable for the negligence of his servant, because this has arisen from his own negligence or imprudence in selecting or retaining a careless servant, is not applicable to the Sovereign to whom negligence or misconduct cannot be imputed, and for which, if it occurs in fact, the law affords no remedy.

Mr. Justice Strong in the same cases gave expression to the same view. In the *Queen* v. *McFarlane* (2), he said that the well known case of *Lord Canterbury* v. *The Queen* (3) established that the Crown is not liable for injuries occasioned by the negligence of its servants or officers, and that the rule *respondeat superior* does not apply in respect of the wrongful or negligent acts of those engaged in the public service.

In the case mentioned of *Lord Canterbury* v. *The Queen* Lord Lyndhurst, L. C., at p. 288, says:

> Indeed, if the Crown cannot be guilty of negligence or personal misconduct, and is not responsible for the negligence or personal misconduct of its servants, it follows, of course, that in those cases there can be no such remedy. And, on the other hand, the absence of all trace of the remedy would of itself form a strong argument against the liability.

In *Tobin* v. *The Queen* (4) will be found in the judgment of the court, delivered by Erle, C.J., the following: —

> For the purpose of showing that a petition of right cannot be maintained for this complaint, we propose to refer, first to the principle that the Sovereign cannot be guilty of a wrong, and so cannot be made liable to pay damages for a wrong of which he cannot be guilty.

And in *Feather* v. *The Queen* (5), Cockburn, C.J., de-

(1) 8 Can. S.C.R. at p. 24.
(2) 7 Can. S.C.R. at p. 240.
(3) 12 L. J. Ch. 281.
(4) 16 C. B., N.S. 353.
(5) 6 B. & S. 295.

livering the judgment of the court, states the same principle with great fulness and clearness: —

Not only is there no precedent for a petition of right being entertained in respect of a wrong in the legal sense of the term, but, if the matter is considered with reference to principle, it becomes apparent that the proceeding by petition of right cannot be resorted to by the subject in the case of a tort. For it must be borne in mind that the petition of right, unlike a petition addressed to the grace and favour of the Sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. The petition must therefore show on the face of it some ground of complaint which, but for the inability of the subject to sue the Sovereign, might be made the subject of a judicial proceeding. Now, apart altogether from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done. It follows that the petition of right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground. Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a Minister of the Crown is without a remedy. As the Sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown.

It is further contended that the Act 50-51 Vic. c. 16 has not only provided a remedy by petition of right for an injury occasioned by the negligence of an officer or servant of the Crown, but that apart from the question of procedure it has created, or at least recognized, the existence of a right on the part of the subject to recover damages from the Crown for any such injury.

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By the 23rd section of the Act it is provided that any claim against the Crown may be prosecuted by petition of right or may be referred to the court by the Head of the Department in connection with the administration of which such claim arises. By section 58 the 21st section of *The Petition of Right Act* (*R.S.C.* c. 136) was repealed, the provisions of which were as follows:—

Nothing in this Act contained shall,—

1. Prejudice or limit, otherwise than is herein provided, the rights, privileges or prerogatives of Her Majesty or Her successors; or—

2. Prevent any suppliant from proceeding as before the passing of this Act; or—

3. Give to the subject any remedy against the Crown,—

(*a.*) In any case in which he would not have been entitled to such remedy in England under similar circumstances, by the laws in force there, prior to the passing of an Act of the Parliament of the United Kingdom, passed in the session held in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter thirty-four, intituled "*An Act to amend the law relating to petitions of right, to simplify the proceedings and to make provisions for the costs thereof;*" or—

(*b.*) In any case in which, either before or within two months after the presentation of the petition, the claim is, under the Statutes in that behalf, referred to arbitration by the head of the proper Department, who is hereby authorized, with the approval of the Governor-in-Council, to make such reference upon any petition of right.

Sections 15 and 16 of 50-51 Vic. c. 16 deal with the exclusive original jurisdiction of the court, and are as follows:—

15. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

16. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*a.*) Every claim against the Crown for property taken for any public purpose;

(*b.*) Every claim against the Crown for damage to property, injuriously affected by the construction of any public work;

(*c.*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

(*d.*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor-in-Council;

(*e.*) Every set-off, counter claim, claim for damages, whether liquidated or unliquidated, or other demand whatsover, on the part of the Crown against any person making claim against the Crown.

By comparing section 15 with *R. S. C. c.* 135, s. 75 (2), it will be seen that the jurisdiction which the court had formerly exercised in respect of any matters that might have been the subject of a petition of right is continued, with a general definition of the cases in which such petitions will lie. By section 16 (*a.*) and (*b.*) the court is given the jurisdiction formerly exercisible by the Official Arbitrators in respect to claims for compensation for lands taken for, or injuriously affected by, the construction of public works (1); by section 16 (*c.*) the jurisdiction formerly vested in such Official Arbitrators with respect to claims arising out of any death or injury to the person or property on any public work, with a limitation to which I shall have occasion to refer (2); and by section 16 (*d.*) and (*e.*) a jurisdiction similar to that vested in the Court of Claims by the *Revised Statutes of the United States*, section 1059.

The Official Arbitrators were first given jurisdiction in respect of claims arising out of any death or any injury to person or property on any railway, canal or public work under the control and management of the Government of Canada by the Act 33 Vic. c. 23, by which it was provided that the head of a Department

(1) 31 Vic. c. 12 s. 34; 44 Vic. c. 25 s. 27 (1); and R.S.C. c. 40 s. 6.

(2) 33 Vic. c. 23; R.S.C. c. 40 s. 6.

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being instructed so to do by the Governor-in-Council might refer any such claim (among others) to the Official Arbitrators, if such claim were made within three months after the passing of the Act, or within six months after the occurrence of the accident or the doing or not doing of the act upon which the claim was founded. On any such reference the Official Arbitrators had authority to hear and award upon the claim.

By 41 Vic. c. 8 s. 3, the Minister of Public Works was given power to refer to the Official Arbitrators, for report only, certain claims, including supposed "claims "arising out of any death or any injury to person or "property on any railway, canal or public work under "the control and management of the Department of "Public Works;" but in such cases the duty of the Arbitrators was confined to reporting their findings upon "the questions of fact and upon the amount of "damages, if any, sustained, and the principles upon "which such amount had been computed."

The same difference in respect of references to the Official Arbitrators for award and for report only is preserved in 44 Vic. c. 25 s. 27 (1) and (3).

By chapter 40 of *The Revised Statutes* we find that the authority of the Minister to refer for report only is continued (s. 11), and that he is also given power to refer to the Arbitrators, for hearing and award, claims arising out of the wrongs mentioned (s. 6); and the latter, with certain limitations, is the jurisdiction vested in the court by section 16 (*c.*) of 50-51 Vic. c. 16.

Now for the Crown it was said that at the time of the passing of the Act 50-51 Vic. c. 16 there were cases in which the Crown was by statute liable for the negligence of its officers and servants, as, for instance, the liability under certain circumstances to damages

for cattle killed on Government railways, or for damages sustained by reason of the neglect of the engineer or driver on a Government railway to ring the bell of the locomotive in the cases in which it was his duty so to do (1), and that clause (*c.*) of section 16, under discussion, should be limited to such cases. The argument would not be without weight if it did not happen that such cases are covered by clause (*d.*) of section 16, which gives the court jurisdiction in respect of "every claim against the "Crown arising under any law of Canada.," and that, in the view for which counsel for the Crown contended, clause (*c.*) would be wholly unnecessary and superfluous.

By section 37 of the *Crown Suits Act*, 1881, (New Zealand) it was, among other things, in effect enacted that no claim or demand should be made against Her Majesty, under that part of the Act, unless the same were founded upon a breach of contract or a wrong or damage independent of contract done or suffered in connection with a public work, as therein defined, and for which an action would lie against a subject. In an action by petition of right under this statute for damages to a vessel caused by striking upon a snag near a Government wharf, of which the Executive Government of New Zealand had notice but of which they gave no warning, it was held that the Crown was liable (2).

After the conquest of Ceylon a practice of suing the Crown sprang up, there having been no authority for any such practice by the Roman-Dutch law of Holland in force there before the conquest. This practice was recognized by section 117 of Ordinance No. 11, 1868, in terms wide enough to include actions *ex delicto*, which,

(1) R.S.C. c. 38, ss. 16; 17, 22, 23 and 36.

(2) *The Queen* v. *Williams*, 9 App. Cas. 418.

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it was admitted, could not be brought against the Crown. The words used in the Ordinance were: "All suits instituted by any private party against the "Queen's Advocate shall," in the cases mentioned, "be "instituted and prosecuted in the District Court, * * * "and the said District Court shall have cognizance of "and power to hear and determine such suits as if the "cause of action had arisen within the district." This Ordinance was held to make the practice referred to part of the law of Ceylon. In *Hettihewage Siman Appu* v. *The Queen's Advocate* (1), Sir Arthur Hobhouse, delivering the judgment of their lordships, says:(p.586.)

But it does not follow that, because the words are wide enough to include actions *ex delicto*, they must do so. They are not words adapted to confer a new right or to establish a new kind of suit. They are only regulative of rights and proceedings already known, and they must be construed according to the state of things to which they clearly refer. They can, therefore, receive a full and sufficient meaning without extending them to actions *ex delicto*, but they cannot receive a full and sufficient meaning, indeed, it is difficult to assign them any substantial operation at all unless they embrace actions *ex contractu*.

At the time of the passing of the Act of the Legislature of New South Wales, 39 Vic. No. 38, there were in existence in that colony two methods of proceeding against the Crown,—one by petition of right under 24 Vic. No. 27, by the 7th section of which it was provided that nothing in the Act should give to the subject any remedy against the Crown in any case in which he would not have had a remedy before the passing of the Act, and the other under 20 Vic. No.15 whereby it was provided that any case of dispute or difference touching any claim between a subject and the Colonial Government might, by the Governor with the advice of his council, be referred to the Supreme Court of the Colony for trial by jury or otherwise as such court should, after such reference, direct. Both

(1) 9 App. Cas. 571.

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statutes were repealed by 39 Vic. c. 38, by which it was in effect enacted that any just claim or demand whatever against the Government of the Colony might be tried out in an action against a nominal defendant (for whose appointment provision was made), in which action the proceedings and the rights of the parties should, as nearly as possible, be the same as in an ordinary case between subject and subject. The proper construction of the statute having been brought in question on an appeal to the Lords of the Judicial Committee of the Privy Council, it was held that the words were amply sufficient to include a claim for damages for a tort committed by the local Government by their servants (1).

By the *Crown Suits Ordinance* of 1876, of the Straits Settlement, section 18, sub-section 2, after expressly mentioning claims arising out of contract, and other classes of claims, it was provided that "any claim against the Crown for damages or compensation arising in the Colony shall be a claim cognizable under this Ordinance."

This, it was held, included claims resulting from torts (2).

With reference to the cases before the Judicial Committee of the Privy Council to which I have referred, it may not be uninstructive to notice the standpoint from which their lordships regard the relation of a Colonial Government to the public works of the Colony; for it must, I think, be admitted that conclusions are often affected, if not determined, by the point of view from which a question is regarded.

In *Farnell* v. *Bowman* (1), Sir Barnes Peacock, delivering their lordships' judgment, said (p. 649):—

(1) *Farnell* v. *Bowman*, 12 App. Cas. 648.

(2) *The Attorney-General of the Straits Settlement* v. *Wemyss*, 13 App. Cas. 192.

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It must be borne in mind that the local Governments in the colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that "the King can do no wrong" were applied to Colonial Governments in the way now contended for by the appellants, it would work much greater hardship than it does in England. **** Justice requires that the subject should have relief against the Colonial Governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown. And when it is found that the Act uses words sufficient to embrace new remedies, it is hard to see why full effect should be denied to them.

And in the judgment in the *Attorney-General of the Straits Settlement* v. *Wemyss* (1), delivered by Lord Hobhouse, the following passage occurs (p. 197):

In the case of *Farnell* v. *Bowman* attention was directed by this Committee to the fact that in many colonies the Crown was in the habit of undertaking works which, in England, are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a Colony in such circumstances allows claims against the Crown in words applicable to claims upon torts, it should mean exactly what it expresses.

The majority of the Supreme Court of Canada in *The Queen* v. *McFarlane* (2) and *The Queen* v. *McLeod* (3), took a different view of the relation of the Government of Canada to the public works of the Dominion. Their judgment is founded upon a recognition of the fact that the Government of Canada does not build or operate railways or canals, or construct river or harbor improvements, for purposes of profit as individuals do, but in the public interest and on grounds of public policy similar to those that call for and justify the maintenance of the postal service The following extracts are taken from the judgments of the Chief Justice:

(1) 13 App. Cas. 192. (2) 7 Can. S.C.R. 216.
(3) 8 Can. S.C.R. 1.

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In *The Queen* v. *McFarlane* he said (p. 234) :

There is, in my opinion, no analogy whatever between this case and that of private individuals or corporations owning slides and undertaking by themselves or their agents to take charge of, and to pass, for a consideration, timber through such their private property. In such a case no one can doubt that if such timber was lost or damaged by reason of the unskillful, negligent and improper conduct of the proprietors or their servants in passing such timber through their slides, they would be responsible to the owners thereof for such loss.

But this, in my opinion, is an entirely different case, governed by principles wholly inapplicable to that just suggested. The Queen, not being a private individual, is not subject to the liabilities of private individuals.

The slides, booms and property in question are not private property but public property, created by the expenditure of public money for public purposes and for the public benefit, and vested in Her Majesty, as the learned judge who heard this case justly remarks, not as personal to Her, but in trust for Her Dominion.

The management and control of this public property is through the instrumentality of orders of the Governor-General-in-Council, and the operations in connection therewith are conducted by persons appointed by a high officer of state, the Minister of Public Works, under whose general management the public works of the Dominion are placed. The river in its natural state was evidently unfitted for the transport of the timber in the great lumbering district through which it passed, and "to advance the public good," and to make the river fit for the transportation of timber, so that by its improvement it might be made a great highway for the development of a great Dominion industry, public property and public works, such as these, were required ; and the liability of Her Majesty in reference thereto cannot for a moment be placed on the same footing or governed by the same principles as private property in which private individuals invest their capital for their private gain.

And in *The Queen* v. *McLeod*, (pp. 23, 25 and 26.):

The establishment of the Government railways in the Dominion is, as has been said of the Post Office establishments, and as we thought of the slides in the case of *McFarlane* v. *The Queen*, a branch of the public police, created by statute for purposes of public convenience, and not entered upon or to be treated as private mercantile speculations.

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As to the Intercolonial Railway, it was in no sense in the nature of a private undertaking, constructed for reasons influencing private promoters of similar works, or in the nature of a mercantile speculation—it was constructed as a great public undertaking essential to the consolidation of the union of British North America, and in fulfilment of a duty imposed on the Government and Parliament of Canada by *The British North America Act.*

**** In this respect the law places the Crown in reference to the Post Office, railways, canals, and other public works, and undertakings, and those availing themselves of the convenience and benefit of such institutions, in no better or no worse position than if they were owned by private individuals, who made it an express stipulation that they should not be liable to parties dealing with them for the consequences of the negligence or misconduct, wilful or otherwise, of their agents and servants. This, of course, does not touch or affect the question of the liability, or the personal responsibility to third persons of officers or subordinates for acts and omissions in their official conduct when injuries and losses have been sustained, still less, where they are guilty of direct misfeasances to third persons in the discharge of their official functions.

There is, therefore, nothing unreasonable in limiting the liability of the Crown and freeing it from liability for negligences and laches of its servants ; none of the great public works having been undertaken with a view to mercantile gain, but for the general public good.

The public who use these Government railways must understand what the law is, to what extent the law, on principles of public policy, prevents actions being brought against the Crown for injuries resulting from the nonfeasance or misfeasance of its servants—in other words, parties dealing with the Crown, in reference to these great public undertakings, deal subject to those prerogatival rights of the Crown, and those rules and principles, well known to the law, which, on considerations of public policy, are applicable to transactions between the Crown and a subject, but not between subject and subject.

To say that these great public works are to be treated as the property of private individuals or corporations, and the Queen, as the head of the Government of the country, as a trader or common carrier, and as such chargeable with negligence, and liable therefor, and for all acts of negligence or improper conduct in the employees of the Crown, from the stoker to the Minister of Railways, is simply to ignore all constitutional principles. These prerogatives of the Crown must not be treated as personal to the Sovereign ; they are great constitutional rights, conferred on the Sovereign, upon principles of public policy, for the bene-

fit of the people, and not, as it is said, "for the private gratification of the Sovereign"—they form part of and are generally speaking "as ancient as the law itself."

I take it, however, that whatever opinion may be entertained of the point of view from which this question is to be regarded, it is necessary to give to the words used in clause (*c.*) of 50-51 Vic. c. 16 s. 16 the meaning that expressly or by necessary implication attaches to them; and I do not doubt that they recognize the Crown's liability for certain torts committed by its officers and servants for which a remedy had theretofore been provided by a proceeding on a reference to the Official Arbitrators, and for the redress of which it was for the first time by such Act provided that proceedings might be instituted in this court.

It appears to me, too, that I would fail to give effect to the language of clause (*c.*) if I limited its application to the special cases where a liability for torts is created by statute, to which reference has been made. Such cases of statutory liability, as we have seen, fall within and are provided for by clause (*d.*) of the section under discussion. There is nothing, I think, in the conclusion to which I have come in any way in conflict with the judgments in *McFarlane* v. *The Queen* or *McLeod* v. *The Queen*, which were decided under statutes differing very materially from that now under consideration. On the other hand, it is supported by the judgments of the Judicial Committee of the Privy Council that have been cited.

It will be observed, however, that the liability of the Crown for damages for any death or injury to the person or to property is qualified and limited. The death or injury must happen on or in connection with a public work, and must result from the negligence of an officer or servant of the Crown while acting with-

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in the scope of his duties or employment. While on the one hand there should be no hesitation in giving the words used in clause (*c.*) the meaning which they are adapted to express, that meaning ought not to be extended. The Crown's liability cannot be enlarged except by express words or necessary implication. It therefore appeared to me doubtful as to whether the clause covered a case in which the injury resulted from nonfeasance. That, however, I conclude with some hesitation is the result. See *The Queen* v. *Williams* (1) in which *Jolliffe* v. *Wallasey Local Board* (2) is approved.

Now, with reference to the petition of right in this case, it will be observed that Her Majesty is charged with carelessness, want of precautions and gross negligence in doing, in respect of a property owned by Her in the city of Quebec, works which ought not to have been done, and in not doing in respect thereof what was necessary to be done to prevent the same from becoming dangerous. That literally is a charge of personal negligence that cannot be imputed to the Crown, and for which, if it occurred, the law affords no remedy, for the doctrine of the Crown's immunity from liability for personal negligence is in no way altered by the Act 50–51 Vic. c. 16.

Then as to the allegation that the daily firing of guns from the Citadel over the cliff has contributed to the splitting of the rocky surface, it is not alleged, and it does not appear, that such firing was unlawful or negligently done.

Eliminating from the petition the allegations relative to the Crown's personal negligence, and the firing of the daily gun from the Citadel, the petition shows that Her Majesty was the owner of a property in Champlain ward in the city of Quebec, forming a high, steep and rocky cliff extending from the place commonly called

(1) 9 App. Cas. 433. (2) L. R. 9 C. P. 62.

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"Dufferin Terrace" southward to opposite the Citadel, with a short slope at the foot thereof along Champlain street, which has been opened there and used by the public for over a century, and that owing to the carelessness, want of precautions and gross negligence of Her Majesty's officers in doing to, or at, this property works which ought not to have been done, and in not doing what was necessary to be done to prevent the same from becoming dangerous, a very large portion of rock, on the 19th of September, 1889, fell from the flank side of the said cliff or cape, and breaking into pieces formed an enormous heap which totally blockaded Champlain street for a considerable length and rendered almost impossible the communication between the southerly and northerly portions of the said street.

Now does such a complaint show a case in respect of which the court has jurisdiction under 50–51 Vic. c. 16 s. 16 (*c.*)? I think that it does not. In the first place there is no allegation that the property mentioned was a public work or part of a public work. No doubt "fortifications and other works of defence" are public works within the meaning of the statute (*R.S.C.* c. 39, s. 2 (*d.*), and 53 Vic. c 13 s. 2 (*d.*)), and the inference might perhaps be drawn that the Citadel at Quebec is a fortification or work of defence, but there is no allegation that the property in question formed part thereof, or of any works of defence at Quebec.

Then again, it is not alleged, and it does not appear, that any officer of Her Majesty had any duty or employment in connection with the property mentioned, or that the acts of omission and commission complained of were committed by such officers while acting within the scope of their duties or employment.

There was another contention to which it is necessary very briefly to refer. It was said by counsel for the suppliants that by the falling of a portion of the cliff the

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Crown had taken possession of the street, and that a petition would lie to recover the possession thereof. By the fall of the rock the city has no doubt been deprived of the beneficial use of a part of the street, but the Crown cannot be said to have dispossessed the city. The real fact is that the city is in possession of too much. That is the substantial complaint, and the gist of the action is to secure the removal of the fallen rock, or damages for the injury thereby occasioned.

There will be judgment for the respondent with costs. Leave to amend upon payment of costs of the demurrer is given to suppliants.

Judgment for respondent with costs.

Solicitors for suppliants : *Baillairgé & Pelletier.*

Solicitors for respondent : *O'Connor, Hogg & Balderson.*