

APPENDIX No. I.

THE HALIFAX CITY RAILWAY }
 COMPANY..... } SUPPLIANTS;

1877
 April 23.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Intercolonial Railway—Petition of Right—Tort—Demurrer—Acts authorized by statute—Proper remedy for damages arising therefrom—31 Vic. c. 13 s. 14—Official Arbitrators.

On the 8th November, 1876, the suppliants filed a petition of right claiming redress against the Dominion Government for damages sustained by them by reason of the partial expropriation of their railway tracks, and incidental injury, owing to the extension of the Intercolonial Railway into the City of Halifax. The crown demurred to the petition on the grounds that the acts in respect of which the suppliants complained were authorized by 31 Vic. c. 13 (*The Intercolonial Railway Act*), and that the suppliants had not shown good cause for relief against the crown by petition of right.

Held, that under the 14th section of 31 Vic. c. 13 the only remedy suppliants had was by reference to the Official Arbitrators; and that, apart from this enactment, inasmuch as the claim was founded in tort, no action could be maintained against the crown.

DEMURRER to a petition of right claiming damages against the crown for injury to suppliants' property in Halifax, N.S., caused by the extension into that city of the Intercolonial Railway.

The following are the allegations contained in the petition:—

“On the 29th day of April, A.D. 1863, an Act was passed by the Parliament of Nova Scotia, entitled *An Act to incorporate the Halifax City Railroad Company*, for the purpose of constructing, maintaining, and operating lines of railroad for public use in the conveyance of persons and property, in and through the City of Halifax, for a period of twenty-five years.

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from the passing thereof. The capital stock of the company was limited to \$250,000 to be divided into shares of \$100 each. Exclusive authority, subject to certain regulations, was given to the company to construct and maintain a line of railroad with single or double tracks, extending from the terminus of the railroad at Richmond through Upper Water street, Hollis street, and Pleasant street, to the southern limits of the city, with a branch line through Lower Water street, and through such other streets as the City Council might thereafter approve of on application to them for that purpose by the company, and to run horse-cars thereon for public use and accommodation in the conveyance of persons and property. By the eleventh section of said Act of incorporation it was provided that the Provincial Government might, at any time after three months' notice, become owner of and entitled to take possession of the property and stock of the company, and in such event the company should be entitled to receive from the Provincial Treasury the actual cost of such railroad and works, and if the net profits of the company should not have been equal to interest at the rate of six per centum per annum, then the company should be entitled to receive such an amount as, together with the profits, should amount to six per centum per annum; and should be entitled to receive a bonus of twelve per cent. upon such actual cost."

"On the seventh day of May, A. D. 1866, the said Act was amended by the Nova Scotia Legislature, by which the said eleventh section of the said Act was repealed, and it was further enacted that: "The Governor in Council might at any time thereafter assume the possession and ownership, for the Province, of the City Railroad with its appurtenances; and that so soon as an order-in-council for that purpose should pass, and the railroad and appurtenances should become the

“ property of the Province, upon the making of such order, the Government of the Province should pay to the owners of such railroad the value thereof, to be ascertained by two arbitrators, the one to be chosen by the Government, and the other by the owners of the railroad; and in case of disagreement of the said arbitrators, the value should be ascertained by the said arbitrators, or one of them, with a third person, to be named as hereinafter provided;” and again: “ In case the said arbitrators fail to appoint such third person, he may be appointed by the Custos of the County of Halifax.”

“ When the said Acts were passed, the two lines of railway running east and west through Nova Scotia were constructed, owned and maintained by the Provincial Government. The terminus was, as at present, located at Richmond, a distance of two miles from the business centre of the city, which was found to be both inconvenient to the travelling public and detrimental to the success of the railway policy. The Provincial Government were anxious to induce capitalists to embark in a private enterprise for the purpose of constructing a line of horse railway from Richmond *dépot* to the southern portion of the city, running along the principal business centres. The large outlay which would be required in extending the Provincial Railway into the city, and the financial condition of the Province not warranting the expenditure, the Halifax City Railroad Act was passed, and the clauses relating to the Government taking possession thereof were inserted as a guarantee to the company that their vested rights would be protected whenever circumstances justified the further extension of the Provincial Railway into the city, which would deprive the horse railway of its principal source of revenue, besides the running of horse-cars alongside locomotive cars would

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not only be a ruinous competition for the former, but altogether impracticable and dangerous to life and property."

"The Government Engineer, in 1861, reported to the Provincial Government: "That to make the railways "already built properly available and adapted to the "wants of the public, the extension into the city be- "comes a necessity, the want of this connection not "only subjects all passengers entering and leaving the "city to much delay and inconvenience, but also to "unnecessary expense, &c."

"The suppliants were, by their said charter and the amendments thereof, guaranteed that compensation would be secured to them whenever the Government might possess themselves of the horse railroad, and in the face of such guarantee the suppliants embarked their capital and constructed and fully equipped within the city about nine miles of railroad, commencing at the Richmond *dépot* and running to Fresh Water, the extreme southern portion of the city proper, besides branch lines established in other parts of the city."

"The suppliants' cars commenced running in the month of June, A.D. 1866, and continued in operation until compelled to cease running by the interference of the Government, as hereinafter more particularly set forth."

"Under *The British North America Act* the Provincial railways of Nova Scotia were transferred to and became the property of the Dominion Government. The Acts respecting the incorporation of the Halifax City Railroad Company have never been repealed by Dominion or Provincial legislation, and the charter rights of the said company are in full force and effect."

"The extension of the Intercolonial Railway into the City of Halifax to North Street, which crosses the Hali-

fax City Railroad tracks and appropriates a considerable portion of their double tracks, and from which the suppliants have been driven by force, the running of locomotives on the proposed tracks and alongside of the City Railroad tracks have forced the latter to abandon their line of railway, and have and will entail upon them direct and consequential damages. Direct damages by tearing up the City Railroad tracks, taking forcible possession of the line, and cutting off all communication by rail between the line of the Halifax City Railroad south of the Hospital Gate on Water Street and the company's *dépot*, where their stables, horses and rolling stock are kept; depriving them of the revenue from the conveyance of passengers and goods over the entire line; rendering perfectly valueless to suppliants the lines of railway south of the Hospital Gate; loss sustained in being compelled to sacrifice at auction a large lot of valuable horses; depreciation of the company's bonds, stock, loss of interest, revenue and profits. Indirect, or consequential damages,—loss of chartered privileges, loss of sale of the company's line; loss of rolling stock which was capable of running many years, but which will be of no further use, and which would not find a purchaser if offered for sale; loss by having erected extensive stables, buildings, &c., which are not required any longer; interest, insurance, &c., on same. The suppliants allege the foregoing as among the direct and consequential damages sustained, together with all other necessarily accruing losses occasioned by the acts of the Dominion of Canada, through its Government and officials."

"That the suppliants, foreseeing the damages which would accrue to them by the extension of the Inter-colonial Railroad, notified the Honourable the Minister of Public Works of Canada, as early as the second day of June, A.D. 1875, that the extension would cause

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both direct and consequential damages to suppliants and seriously interfere with their chartered rights; and, afterwards, by letter under date January 13th, 1876, addressed to the Honourable the Minister of Public Works, notified him that the Government Engineer intended to interfere with the tracks of suppliants in the night time, without permission or legal right, and urged the Honourable the Minister of Public Works not to permit such illegal and unjustifiable conduct."

"The suppliants allege that, on the night of the seventeenth day of May last past, the officials under the authority of the Government of Canada, and engaged in constructing the extension of said Intercolonial Railway, took and continue to keep forcible possession of a portion of the tracks of the Halifax City Railroad Company."

"That, on the said night of the seventeenth day of May last past, suppliants were forcibly ejected and expelled from the tracks of the Halifax City Railroad, and from the use of the same, and from thence hitherto have been deprived of the use and enjoyment thereof, as they had a right to under the said hereinbefore in part recited Acts of the Parliament of Nova Scotia."

"That the Government of Canada dedicated and appropriated the said tracks of the Halifax City Railroad Company to the Government, and fenced in and took possession of the same, and still holds exclusive possession thereof against the suppliants, having by their officials and employees forcibly ejected the suppliants and their workmen therefrom."

"The suppliants allege that the Government have taken exclusive possession of portion of the company's tracks, fenced in the same, and commenced and are still carrying on blasting operations therein, to wit: on that portion as set forth and described in the annexed certified copy of dedication and plan, whereby

and by means of the foregoing the company have been forcibly ousted from their user of the said tracks and highway granted them under their charter."

"The suppliants claim they are entitled under the terms of their charter, as amended, to have the damages as therein set forth assessed; and also that they are entitled to damages for the several wrongs hereinbefore set forth."

"The suppliauts allege that no damage or amends, or offer of compensation or amends, have been tendered to them, although the Government of Canada have been requested so to do."

"The suppliants therefore humbly pray that Your Most Gracious Majesty may be pleased to order that the several matters alleged in the foregoing petition may be tried in Her Majesty's Exchequer Court of Canada, to be holden in the City of Halifax, Province of Nova Scotia."

"The suppliants claim the sum of two hundred and sixty thousand dollars in damages and for compensation for the several claims, wrongs and injuries herein set forth."

To this petition the crown demurred as follows:

"1. That no case is shown in the said petition for any relief against Her Majesty."

"2. That a petition of right does not lie for the matters in the said petition complained of."

"3. That the Acts of Parliament relating to the Intercolonial Railway, and referred to in the petition, authorized the Government of Canada to take and hold possession of the parcel of land, in respect of which damages are sought, for the purposes of the said railway."

"4. That it appears in and by the said petition, that the said possession was taken and is held in pursuance

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of the said Acts of Parliament, and for the purposes of the said railway.”

“ 5. That if Her Majesty’s officers and employees did anything illegal and not warranted by the said Act of Parliament, Her Majesty is not responsible.”

“ 6. That Her Majesty is not responsible in a proceeding by petition of right for the damages or injuries mentioned in the said petition or any part thereof.”

Issue joined.

April 16th, 1877.

MacLennan, Q.C. in support of demurrer ;

Cockburn, Q.C. contra.

Sir WILLIAM B. RICHARDS, C.J., now (April 23rd, 1877) delivered judgment.

The statement of the suppliant as to the incorporation of their company and certain rights acquired by the statutes passed by the legislature of the Province of Nova Scotia seems to have been introduced with a view of showing that, as the Local Government was empowered to take possession of their railroad on paying the value thereof, (to be ascertained in the manner pointed out by the statutes referred to) therefore the Dominion Parliament could not pass any law which would interfere with their rights without giving them compensation in the same way. It was also pressed in argument that as the local legislatures had the exclusive right of passing laws affecting property and civil rights, the Dominion Parliament had no right to pass a statute authorizing the interference complained of with their property and franchises.

The various statutes relating to the Intercolonial Railway were referred to in the argument. In the 13th section of the petition of the suppliant they allege that the Government had taken exclusive possession of

a portion of the company's tracks, fenced in the same, and commenced and are now carrying on blasting operations on that portion set forth and described in the certified copy of the description and plan annexed to the petition, whereby the company had been forcibly ousted from the use of the said track and highway granted them under their charter.

The certificate referred to contained the description and plan required to be deposited of record in the office of the Registrar of Deeds, under the 7th sec. of 31 Vic. c. 13, for the construction of the Intercolonial Railway. It was deposited on the 11th of May in the office of the Registrar of Deeds for Halifax, and, under the same section of the statute, it was provided that such deposit shall operate as a dedication to the public of the lands taken which shall thereupon be vested in the crown. Under section 14 of the statute, in case of disagreement as to the value or price of lands or other property necessary for the construction or use of the railway, the claim for the same shall, on the request of the claimant, be referred to the award of the Official Arbitrators to be appointed under *The Public Works Act*.

The 10th, 11th and 12th paragraphs of the petition allege that the officials, under the authority of the Government of Canada, engaged in constructing the extension of the Intercolonial Railway, took and continued to keep forcible possession of a portion of the tracks of the suppliants' railway and expelled them therefrom, and deprived them of the use and enjoyment of the same, and that the Government of Canada dedicated and appropriated the tracks of the company to their use, and took possession of the same, and hold the exclusive possession thereof against the suppliants, having by their officials and employees ejected the suppliants and their workmen therefrom. They therefore prayed that

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Her Majesty might be pleased to order that the several matters alleged in the petition might be tried in Her Majesty's Exchequer Court of Canada, to be holden in the City of Halifax. They claim the sum of \$260,000 as damages, and for compensation for the several claims, wrongs and injuries set forth in the said petition.

The crown demurred to the petition.

[His Lordship here refers to the demurrer which will be found on p 439.]

The suppliants' claim, in effect, is for damages for a trespass committed by the officers of the Government of Canada employed in constructing a portion of the Inter-colonial Railway. The suppliants are in this dilemma: If the statutes of the Dominion Parliament authorized the doing of the acts complained of and vested the land (which the suppliants claim was their own or in which they had an interest) in the crown, then their remedy is that pointed out in the statute. If the parties who committed the trespass were not doing acts warranted by the statute and the land was not vested in the crown under the Act, then the parties who did the acts were trespassers, and under a petition of right the crown cannot be proceeded against for trespass.

In *Tobin v. The Queen* (1) the matter of redress by petition of right was elaborately discussed by Sir W. Erle, Chief Justice, who delivered an exhaustive judgment, and on this very point decided for the crown. His words are (2): "On the third ground above mentioned; viz., that a petition of right cannot be maintained to recover unliquidated damages for a trespass, our judgment is also for the crown." He then refers to authorities shewing that the doctrine is based on the fundamental principle that the king can do no wrong. But the person doing the act though authorized by the superior power would be answerable.

(1) 16 C.B.N.S. 310 (1864).

(2) *Ibid.* p. 353.

In *Feather v. The Queen* (1) the same doctrine is affirmed by Chief Justice Cockburn who, in his judgment, says, he sees no reason to dissent from the conclusion arrived at by the Court of Common Pleas. Further on in his judgment, he says (2): "The maxim that the king can do no wrong applies to personal as well as 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 a 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." Further on in his judgment, he says (3): "But in our opinion no authority is needed to establish that a servant of the crown is responsible in law for a tortious act done to a fellow-subject, though done by the authority of the crown, a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the crown on the one hand and the rights and liberties of the subject on the other."

Thomas v. The Queen (4) was decided in November

(1) 6 B. & S. 294; 12 L. T. N. S. 114. (2) 6 B. & S. 295.

(3) *Ibid.* 297.

(4) L.R. 10 Q.B. 31.

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1874. Blackburn, J., in giving the judgment of the
 “court, said (1): “The authorities to which we must
 “have recourse are, many of them, antiquated and con-
 “nected with forms of procedure with which no one
 “now alive is familiar, and which we now approach
 “with diffidence, as they may be misapprehended by
 “us.”

The suppliant's claim, in that case, was based on the fact that it was agreed if he furnished the War Department with models of improvements that he had made in artillery, and attended a committee at Woolwich and gave his personal explanations, in the event of the invention being approved of and being adopted in Her Majesty's service, a reward in that behalf should be given by Her Majesty's Government to the suppliant, to be determined by the master-general and board of ordnance. Suppliant averred performance of condition precedent, yet the amount of the reward had not been delivered nor had the same or any part thereof been paid to the suppliant.

The second paragraph alleged that he had invented certain artillery constructed upon a new principle, and, having in his possession certain plans and drawings explaining the same, and having incurred heavy costs, charges, and expenses in perfecting the invention, in consideration of the suppliant showing and delivering his plans to Her Majesty's Government, Her Majesty's Government promised the suppliant that, in the event of certain trials showing a successful result so far as the principle was concerned, the expenses to which the suppliant had been put should be reimbursed to him by the Government. He averred the performance of all conditions precedent, and that Her Majesty's Government had not reimbursed him. The Attorney-General demurred to the petition and the two paragraphs thereof.

(1) L. R. 10 Q. B. p. 34.

The case was argued on the grounds:—That a petition of right will not lie for any other object than specific chattels or land, and that it will not lie for a breach of contract nor to recover money claimed either by way of debt or mortgage.

It was left for further discussion to determine who had authority to make contracts on behalf of Her Majesty, and whether the contracts on which the suppliant relied were, in fact, made by anyone on behalf of Her Majesty, and, if so made, whether they were made within the scope of that person's authority. The learned judge who gave the judgment of the court said that contracts can be made on behalf of Her Majesty with subjects, and the Attorney-General, suing on Her behalf, can enforce these contracts against the subject, and if the subject has no means of enforcing the contract on his part there is certainly a want of reciprocity in such cases. The court held, on the authority of the *Bankers Case* (1), that the suppliant's claim for damages arising out a contract could be made under a petition of right.

In *Rustomjee v. The Queen* (2) it was decided that a petition of right would not lie charging the crown with receipt of money as a trustee, and that decision was affirmed on appeal (3). In *Dixon v. The London Small Arms Company*, [decided in the Queen's Bench (4); reversed on appeal (5), and the latter decision in turn reversed and the original judgment restored in the House of Lords (6)] *Feather v. The Queen* (7) is referred to, but only on the point whether the crown may manufacture a patented article notwithstanding the exclusive rights granted by the patent. It was held that the crown's privilege to manufacture such article ought not to be

(1) 14 How. St. Tr. 1.

(4) L. R. 10 Q. B. 130.

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

(5) 1 Q. B. D. 384.

(3) 2 Q. B. D. 69.

(6) 1 App. Cas. 632.

(7) 6 B. & S. 257.

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extended to a person who, on his own behalf, enters into a contract to supply the crown with such article.

In Re Tufnell, in Chancery (1), it was held that compelling an officer or a surgeon in the army, having the permanent medical charge of the military prison at Dublin, to retire on half-pay, gave no right to claim to be compensated for loss, damage or injury sustained by him through such forced retirement, on the ground that his office, like that of all other officers of the army, was only tenable *durante bene placito*.

In *Kirk v. The Queen* (1), the question of right to proceed for torts by petition of right is discussed at some length, but the conclusions arrived at are entirely in harmony with the doctrine laid down in the earlier cases.

There can be no doubt of the right of the Dominion Parliament to legislate in reference to the Intercolonial Railway. By *The British North America Act*, 1867, it is stated, in section 145, to be the duty of the Government of Canada to construct and complete, with all possible speed, a railway to connect the River St. Lawrence with the City of Halifax. As it is a railway connecting the Province of Nova Scotia with the Provinces of New Brunswick and Quebec, it is excepted out of the class of cases as to which the local legislatures have the exclusive right to make laws, by section 92, sub-section 10. And under section 91, it is one of the matters coming within the class of cases on which the Dominion Parliament has the right to make laws.

It may also, to some extent, be included in the right to legislate concerning the public debts and property of the Dominion, as part of the road in Nova Scotia is referred to in one of the statutes as constructed by the Government of Nova Scotia, and became the property of the Dominion under *The British North America Act*.

(1) 3 Ch. D. 164.

(1) L. R. 14 Eq. 558.

Having the right to legislate on the subject, the Dominion Parliament must decide on the means which they consider best for carrying out its objects. It is necessary that they should be able to take lands and property on and over which to construct the railway if they are to build it, and they in their wisdom must decide the manner and basis on which it is to be taken and the mode of compensating the owner.

The taking of a man's property for public purposes certainly interferes with his civil rights. But it would be impossible to construct a railway without giving the right to acquire, by compensation if necessary, the land on which it is to be built. All the legislation as to building railways shows such to have been the case. The right to take the land belonging to an incorporated street-railway, or to build a track over or under, it seems to me to involve interference with civil rights, or the rights of property, to no greater extent than to take the land of an individual.

The 7th and 9th sections of the Act. 31 Vic. c. 13, for the construction of the Intercolonial Railway, authorize the taking of the land and making the road upon and across any rails or tramways, and the statutes 38 Vic. c. 22 and 39 Vic. c. 16 declare the line from Richmond station to North Street in the City of Halifax, then under construction, forms part of the Intercolonial Railway.

In argument it was not contended that, by the statutes referred to, the *locus* in question was not a part of the Intercolonial Railway, nor was it argued that all the powers, under 31 Vic. c. 12, conferred on the commissioners were not possessed by the Minister of Public Works in reference to the part of the road out of which this dispute arises.

As at present advised, taking the statutes together, they appear to authorize the servants of the crown or

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the crown, when sued, to set up the right to do the acts complained of under the statutes and that the statutes did authorize them to take possession of the land which thereby became vested in the crown.

The result is that whatever remedy the suppliants have in the premises is, as I have before indicated, by reference to the Official Arbitrators under the provisions of sec. 14 of *The Public Works Act*.

Even if this view is not correct, the authorities show that the suppliants cannot, under writ of right, recover damages against the crown for the trespasses complained of, and the demurrer must be allowed with costs if asked for.

Since writing the above and looking at *The Petition of Right Act, 1876*, it occurred to me that the suppliants may wish to contend that under the 19th section (b) of that statute the Government were to be considered as referring the question of the amount of compensation to be paid the suppliants to this court instead of the Official Arbitrators. That question was not raised on the argument, and if the suppliants wish to raise it I think they should have an opportunity of doing so, and they may apply in chambers for leave for that purpose.

*Demurrer allowed, costs reserved.\**

Solicitors for suppliants: *Cockburn & Wright.*

Solicitors for respondent: *Mowat, MacLennan & Downey.*

\*The point indicated by the learned judge as reserved for leave to argue was heard before him, and was decided (October 1st, 1877) in favor of the respondent, with full costs of demurrer.

The suppliants' claim was then referred to the Official Arbitrators

who, after taking evidence, reported as follows:—

"1. We find, with regard to the first item of the claim, that the company [suppliants] are not entitled to recover for the loss of their railroad and its plant, and real and personal properties, be-



cause their railroad was neither totally nor partially lost by any actual interference of the Government with the company's property."

"2. We find, with regard to the second item of the claim, that the company are not entitled to be paid any compensation, because the Government have not "divided their (the company's) railroad into two portions, rendering each valueless," or destroyed the value of the railroad."

"3. We find, with regard to the third item of the claim, that the company is not entitled to any compensation, because the Government did no actual damage to the crossing, and because the company were not obliged to sacrifice horses, plant, or properties in consequence of any act of the Government, and did not suffer any depreciation in the value of their real estate within the meaning of *The Public Works Act* (31 Vic. c. 12), and did not lose their charter, and the privileges and rights guaranteed under it, by any act of the Government."

"4. We find, with regard to the fourth item of the claim, that nothing is due to the company for interest."

On appeal from this award to the Exchequer Court, Mr. Justice Henry set the same aside and gave judgment in favor of the suppliants for a lump sum of \$8,000.

He based his allowance of such sum chiefly on the assumption that inasmuch as the Dominion Parliament had passed an Act (42 Vic. c. 10), three years after the doing of the acts complained of by the suppliants, amending the Act authorizing the extension of the Intercolonial Railway into the City of Halifax (39 Vic. c. 16), and providing, *inter alia*, "that nothing in this Act or in the Act intituled *An Act respecting the Public Works of Canada* shall injuriously affect or prejudice in any way the rights, franchises and properties of the Halifax City Railroad Company, as granted to them under certain Acts of the Legislature of Nova Scotia," the passing of such Act must be taken to have been intended as a legislative declaration that compensation should be made to suppliants in the premises.

On appeal from this judgment, the Supreme Court of Canada reversed the same and restored the award of the Arbitrators with costs against suppliants.

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