

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

Coram Gwynne, J.

THE MERCHANTS BANK OF CANADA..SUPPLIANTS;

1881

AND

Sept. 14.

HER MAJESTY THE QUEEN RESPONDENT.

*Slide and boom dues—C. S. Can. c. 28—31 Vic., c. 12—Chattel mortgage
—Parol agreement between Crown and mortgagor in possession—Agency
of Mortgagor—Ratification by mortgagees.*

S., who was engaged in the lumber business, becoming indebted to the suppliants in a large sum of money, mortgaged to them by two separate instruments certain lumber, logs, and timber as security for the repayment of such indebtedness. The first mortgage was executed on the 18th December, 1876, and the second on the 11th May, 1877. By a collateral arrangement made at the time the first mortgage was executed, and by a proviso contained in the second indenture, S. was allowed to remain in possession of the property, and to attend to its manufacture and sale for the benefit of the suppliants. On the 15th day of May, 1878, S. became insolvent, but prior to such insolvency the suppliants had taken possession of the lumber, logs, and timber, and thereafter obtained a release of S.'s equity of redemption from his assignee. On the 6th June, 1877, while S. was in possession of the property in the manner above mentioned, by a letter addressed to the Minister of Inland Revenue he offered and agreed to pay the Government the sum of \$2 per 1,000 ft. b.m. on all lumber to be shipped by him through the canals during the then current season, and also the whole amount of his indebtedness for canal tolls and dues then in arrears. This offer was accepted by the Government, and the agreement was acted upon by S. during the season of 1877.

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 ———

In 1878, after the suppliants had taken possession of the property and began to ship the lumber for themselves without paying the sum agreed upon between S. and the Government, the collector of slide dues refused to allow such lumber to pass through the canals, and caused the same to be seized and detained until the amount due upon it in respect of said agreement was fully paid.

*Held*:—(1). Under the provisions of the 7th section of the Petition of Right Act of 1876, the Dominion Government, in enforcing a parol agreement, is entitled to whatever rights any subject of the Crown would have in respect of such an agreement in an action between subject and subject.

(2). Inasmuch as the provisions and enactments relating to tolls in 31 Vic., c. 12, are in substance and effect the same as those contained in chapter 28 of the Consolidated Statutes of Canada, under which the present regulations relating to timber passing through the slides were made, in virtue of the provisions of sec. 71 of 31 Vic., c. 12 such regulations are in effect to be construed as having been made under the later statute.

(3). There being no re-demise clause or proviso in the mortgage of the 18th December, 1876, whereby the mortgagor might have remained in possession until default, the judge, sitting in the Court of Exchequer not as a court of appeal but in an Ontario case to administer the law of Ontario, was bound by the decisions in *McAulay v Allen* (20 U. C. C. P. 417), and *Samuel v Coulter* (28 U. C. C. P. 240), to hold that, upon the execution of such mortgage, the suppliants were entitled to immediate possession of the property granted thereby, and might, if they had pleased, at any time have exercised their right to sell thereunder without the mortgagor's intervention or consent. But, while the terms of the second mortgage reserved to the suppliants the right to dictate into what description of lumber the logs should be manufactured, with whom alone contracts for the sale thereof might be entered into, and to whom upon sales it should be consigned, it was expressly provided therein that the business of such manufacture and sale should be transacted through the intervention of the mortgagor for the benefit of the suppliants. The effect and intent of the second mortgage, therefore, was to make the suppliants principals and S., the mortgagor, their agent in carrying on the business thereafter with their property, and for their sole benefit, until the property should be sold or they were paid their claim.

(4). As such agent S. must be held to have had sufficient authority to bind the suppliants by his agreement with the Government, which, under all the circumstances, was a reasonable and proper one and made in the interest of the suppliants,

(5). But whether S. was, or was not, authorized to make such an agreement with the Government, the suppliants adopted, ratified, and confirmed the agreement by acting under it and advancing moneys to pay the Government in accordance with its terms after they must be held to have had full knowledge of the nature and effect of it.

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.

Statement
 of Facts.

PETITION OF RIGHT for the release of certain lumber, logs, and timber seized on behalf of the Dominion Government for alleged non-payment of slide and boom dues, and for the repayment of certain moneys alleged to have been paid under duress and in excess of any amount owed by the suppliants in respect of such dues.

In their petition of right the suppliants allege, *inter alia* :

“ 1. The suppliants the said “The Merchants Bank of Canada” are a duly incorporated banking corporation, authorized by statute to carry on the business of bankers in the Dominion of Canada.

“ 2. For twenty years prior to his insolvency, James Skead, of the city of Ottawa, lumber merchant, carried on very extensive lumbering operations on the Ottawa river and its tributaries, and at the said city of Ottawa.

“ 3. For the purpose of conducting the said lumber operations, the said James Skead became the owner of divers timber licenses to cut timber and logs on the timber lands of the Crown, bordering on the said Ottawa river and its tributaries.

“ 4. The said James Skead from time to time cut timber and logs under the said licenses, and floated the same down the said Ottawa river and its tributaries in the usual manner.

“ 5. The said timber and logs, in the course of their transit from the said timber lands of the Crown down the Ottawa river, passed through certain slides, booms and river improvements belonging to the Crown.

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 \_\_\_\_\_  
 Statement  
 of Facts.  
 \_\_\_\_\_

“6. Under the Consolidated Statutes of Canada, chapter 28, and the Act passed by the Parliament of Canada in the 31st year of Her present Majesty’s reign, chaptered 12, and under certain orders-in-council and regulations passed in pursuance and under the authority of the said statutes, the Crown was and is entitled to exact payment of certain tolls or dues (generally known as slide and boom dues) from the owners of all timber and logs passing through the said slides, booms, and river improvements, and to demand payment of the same in advance. Under the said statutes the Crown also appears entitled to certain special remedies for the collection of the said tolls or dues.

“7. By an indenture dated the 18th day of December, A.D. 1876, and made between the said James Skead of the first part, and the suppliants of the second part, the said James Skead granted and mortgaged to the suppliants certain lumber, logs, and timber therein particularly described to secure the repayment of his then indebtedness to the said suppliants, amounting to \$136,560.

“8. By another indenture, dated the 11th day of May, A.D. 1877, and made between the said James Skead of the first part, and the suppliants of the second part, the said James Skead granted and mortgaged to the suppliants the lumber, logs, and timber therein particularly described to secure the repayment of his then indebtedness to the said suppliants amounting to \$334,147.66.

“10. On or about the 15th day of May, A.D. 1878, the said James Skead became insolvent within the meaning of the Insolvent Act of 1875, and amending acts, and at the instance of the Union Bank of Lower Canada, a creditor of the said James Skead for \$500 and upwards, a writ of attachment in

insolvency was duly issued against him out of the County Court of the County of Carleton, the proper court in that behalf, duly directed to Daniel Sutcliffe Eastwood, of the said city of Ottawa, one of the official assignees of the county of Carleton, including the city of Ottawa, the proper official assignee in that behalf, and thereupon such proceedings were duly had and taken under the said writ and acts, and at a meeting of creditors of the said insolvent James Skead, duly called and holden at the said city of Ottawa, on the 6th day of June, A.D. 1878, the said Daniel Sutcliffe Eastwood was, by the said creditors, duly elected creditor's assignee to the estate and effects of the said insolvent under the said acts, and thenceforth became and continued to be, and now is the duly appointed creditors' assignee to the estate and effects of the said insolvent under the said acts.

" 11. The said insolvent, at the time of his said insolvency, was indebted to the said suppliants in the sum of \$236,027.59, which said indebtedness was then collaterally secured by the indentures aforesaid, and the chattel property included therein. No part of the said indebtedness has since been paid or satisfied.

" 12. Prior to the said insolvency, the suppliants took possession of all the lumber, logs, and timber in and about the Nepean mills and premises, and remained in possession thereof until, and were in possession thereof, at the time of the seizure hereinafter set forth.

" 13. The suppliants duly proved for their said indebtedness against the estate of the said insolvent under the said insolvency, and duly valued their securities under the provisions of the said insolvent acts at the sum of \$160,000.

" 14. On the 9th day of July, A.D. 1878, the creditors of the said insolvent at a meeting thereof, duly called for that purpose, duly authorized the said creditors' as-

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 ———
 Statement
 of Facts.
 ———

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 \_\_\_\_\_  
 Statement  
 of Facts.  
 \_\_\_\_\_

signee to consent, and the said creditor's assignee did thereafter duly consent to the retention by the suppliants of the securities mentioned in their said proof (including the indentures aforesaid) at the valuation aforesaid, under the provisions of the said insolvent acts.

"15. By virtue of the said indentures and of the said consent, all the said lumber, logs, and timber in, around, and about the said mill and premises in the township of Nepean, known as the Nepean Mills, became, and are, the absolute property of the suppliants in equity as well as at law.

"16. Instead of exacting payment in advance of the said tolls and dues, payable by the said insolvent for the timber and logs from time to time passing through the said slides, booms, and river improvements, the Crown suffered and permitted the said timber and logs to pass through the said slides, booms, and river improvements without payment of the said tolls or dues, and suffered and permitted the said tolls or dues to fall greatly in arrears, and gave time to the said insolvent for the payment of the same, and charged the said insolvent interest for the forbearance of the payment of the same, and from time to time took security from the insolvent for the payment of the same, and suffered and permitted the said insolvent to sell and dispose of vast quantities of the said timber and logs, and the lumber whereinto the same had been converted, without requiring payment of the said tolls or dues.

"17. According to a statement furnished since the said insolvency, to the suppliants by Alexander J. Russell, who is the collector of slide dues and the Crown officer in charge of the Crown timber office at the said city of Ottawa, the Crown claimed that the said insolvent, at the date of his insolvency, was indebted to the Crown in the sum of \$20,315, for arrears of the said

slide and boom dues and interest thereon. By a subsequent statement furnished to the suppliants by the said Alexander J. Russell, the said claim of the Crown was reduced by the sum of \$4,879.69, and after deducting payments made since the said insolvency, the Crown now claims that there is due to the Crown for the said slide and boom dues the sum of \$8,533.01.

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 ———
 Statement
 of Facts.
 ———

“18. The suppliants aver that the proper slide and boom dues on lumber, logs and timber floated down through the slides, booms and river improvements on the Ottawa River and its tributaries, through which the said lumber, logs and timber now lying in and about the said Nepean Mills and premises were floated down, amount to the sum of $4\frac{1}{2}$ cents per saw log; or, when reduced to board measure, the sum of 26 cents per 1000 feet.

“19. Shortly after the said insolvency the said collector of slide dues on behalf of the Crown demanded from the suppliants the sum of \$2 per 1000 feet, board measure, for said slide and boom dues on all lumber, logs, and timber in, about, and around the mill premises aforesaid; and refused to allow the same, or any part thereof, to be moved unless this excessive charge was paid, and from time to time detained certain portions of the same, which the suppliants were desirous of moving and disposing of.

“20. Under protest and by compulsion and to avoid the further stoppage of the said certain portions of lumber by the crown officers, the suppliants from time to time paid to the credit of the Receiver-General a sum of \$6,054.69, being for slide and boom dues on said portions of said lumber at the excessive rate aforesaid of \$2 per 1000 feet board measure.

“21. Without any further warning, on or about the 12th day of July, A. D. 1878, the said collector of slide dues on behalf of the Crown seized the whole of the

1881
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.

Statement
 of Facts.

said lumber, logs, and timber in and about the said mill and premises, and thenceforth took possession of and detained and still keeps possession of and detains the same and every part thereof.

“22. The Crown has now under detention certain quantities of lumber, logs, and timber belonging to the suppliants,” [shewn in detail in a schedule annexed to the petition] “and refuses to permit the suppliants to remove or dispose of the same or any part thereof.

“23. In order to avoid litigation and delay, on the 22nd August, A.D. 1878, the suppliants tendered to the said Alexander J. Russell, the said collector of slide dues and the officer in charge of the Crown timber office, at the said City of Ottawa, for the use of the government of the Dominion of Canada for the use of Her Majesty, the sum of \$1,500, being more than the proper dues which could have been demanded on the said lumber, logs and timber seized and detained as aforesaid, and demanded the release of, and the removal of, the embargo upon the said lumber, logs and timber seized and detained by the said collector on behalf of Her Majesty, but the said collector on behalf of Her Majesty, refused and neglected and still refuses and neglects to release or remove the embargo upon the said lumber, logs and timber or any part thereof, until payment by the suppliants of the said sum of \$8,533.01.

“24. The suppliants submit that under the circumstances the Crown ought forthwith to release and remove the embargo upon the whole of the said lumber, logs, and timber now seized, detained and held possession of by the Crown as aforesaid.

“25. The suppliants submit that they ought to be repaid the sum of \$5,267.59, being the amount overpaid by them on the said sum of \$6,054.69 paid under protest and involuntarily as aforesaid.

“ 26. The suppliants understand that the Crown claims a general lien on the said lumber, logs, and timber seized and detained as aforesaid, for the whole of the said arrears of slide and boom dues and interest thereon alleged to be due to the Crown by the said insolvent at the time of his insolvency, but the suppliants submit that the Crown is not entitled under the said statutes, and under the said orders-in-council and regulations, so far as the said orders-in-council and regulations are *intra vires* of the powers conferred by the said statutes, to any lien or right of detention under the circumstances above set forth.

“ 27. The suppliants further submit that under the said statutes and the said orders-in-council and regulations, and the facts as above set forth, the Crown had no right to seize and take possession of the said lumber, logs, and timber in the manner afore described for any slide or boom dues whatsoever.

“ 28. The suppliants further submit that if the Crown had a lien or right of detention on the said lumber, logs and timber for any arrears of slide and boom dues, the amount tendered to the said collector was more than sufficient to satisfy the same ; and from thenceforth the said seizure, detention and possession thereof by the Crown was unlawful and inequitable.

“ The suppliants therefore pray :

“(1) That Her Majesty should be advised that under the said statutes and under the said orders-in-council and regulations, so far as they are authorized by the said statutes, the Crown is not entitled to a general lien on the said lumber, logs and timber at the said mill and premises aforesaid, the property of the suppliants and now in possession of and detained by the Crown officers on behalf of the Crown as aforesaid, for the said arrears of slide and boom dues alleged to be due to the Crown from the said insolvent.

1881

MERCHANTS
BANK OF
CANADA

v.
THE QUEEN.

Statement
of facts.

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 \_\_\_\_\_  
 Statement  
 of Facts.  
 \_\_\_\_\_

“(2) That the Crown may be pleased to order the release and delivery up of the possession to the suppliants of all the said lumber, logs and timber now detained and held possession of by the Crown as aforesaid.

“(3) That the Crown may be pleased to repay to the suppliants the said sum of \$5,267.59 overpaid as aforesaid.

“(4) That the Crown may be pleased to grant the costs of this suit and such further and other relief in the premises as the circumstances of the case may require, and as to the Crown seemeth just and equitable.

(5) The suppliants hereby offer to pay to the Crown the tolls or dues, if any, which Her Majesty's Court of Exchequer may determine are properly payable to the Crown by the suppliants under the circumstances.”

The Attorney-General for Canada, on behalf of Her Majesty, in his answer to the petition admitted the allegations contained in the 1st, 2nd, 3rd, 4th, 5th and 10th paragraphs thereof, but alleged, *inter alia* :—

“7. That upon the Ottawa River and its tributaries Her Majesty the Queen for many years past has owned, as public works of the late Province of Canada and of the Dominion of Canada, certain slides, booms, and river improvements.

“8. That under the statutes in that behalf the Governor-in-Council was empowered by order-in-council to impose and authorize the collection of tolls and dues, upon the said public works, and for the due use and proper maintenance thereof, and to advance the public good, to enact from time to time such regulations as he might deem necessary for the management, proper use, and protection of the said public works, and for the ascertaining and collection of the tolls, dues and revenues thereon, and by such orders and regulations to provide for the non-passing, or detention and seizure, at the risk of the owner, of any timber or goods on

which tolls or dues might have accrued and not been paid, or in respect of which any such orders and regulations might have been contravened or infringed, and for the sale thereof if such tolls or dues were not paid, and for the payment of such tolls or dues out of the proceeds of such sale.

“9. That under the said statutes all such dues and tolls are made payable in advance and before the right to the use of the public work in respect of which they are incurred accrues, if so demanded by the collector thereof.

“10. That before the time the timber and logs referred to in the said petition passed through the said slides, booms, and river improvements the Governor, under the authority of the said statutes, duly made, issued and published an order-in-council, which was in full force at the time the said timber and logs so passed through, and which among other things provided that no raft or parcel of timber should be permitted to enter any slide for the purpose of passing through without the owner or person in charge of such raft or parcel of timber first giving notice thereof to, and obtaining permission from, the superintendent, slide master, deputy slide master or other officer, as the case may be, duly appointed as aforesaid, under a penalty of not less than \$4, and not more than \$20, currency.

“Also that the owner or person in charge of any raft &c, previous to entering any of the provincial cribs or slides, for the purpose of passing such raft &c., through the same, shall make a full and complete report of such raft, containing an account of the number of cribs and the description of timber composing the raft, &c., the name and designation of the owner or owners and of the supplier or furnisher thereof, together with marks and all other particulars relating thereto, under a penalty

1881

MERCHANTS  
BANK OF  
CANADA  
v.  
THE QUEEN.  
Statement  
of Facts.

1881 of not less than \$20, and not more than \$200, for  
 MERCHANTS refusing or neglecting to make such report.

BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 Statement  
 of Facts.

“ Also that the owner or owners or person in charge of any raft, &c., shall before removing the same from any slide, boom or public work connected therewith, subscribe and deliver to the said superintendent, &c., an acknowledgment in duplicate certifying the number and description of cribs or of timber so passed, and shall pay the slide dues, or secure the same to the satisfaction of the collector of slide dues, under a penalty of not less than \$20, and not more than \$200, and shall further pay double the amount of dues which would otherwise be payable on any raft, &c., passing such slide without such acknowledgment.

“ Also that it shall be competent for the collector of slide dues, his deputy, &c., to enter upon, seize and detain at the risk, costs and charges of the owner or owners thereof, any raft, &c., which shall have been moved away from any of the provincial slides, booms or works, without the slide dues therefor, the amount awarded for damages or the fines and penalties, if any, being first paid or secured to his satisfaction.

“ Also that rafts, cribs and all descriptions of timber shall be held liable for the dues, damages, and penalties imposed under these regulations; and the slide master or other duly appointed officer is authorized and required to seize and detain any such raft, crib, or parcel of timber until payment of such dues, damages, or penalties is made, or until the owner, or person in charge shall have given satisfactory security for the payment thereof.

“ 11. That owing to the great inconvenience and loss which the said James Skead would have suffered if a strict compliance with the provisions of the said order-in-council were enforced on behalf of Her Majesty, the said James Skead was permitted, in order

to avoid such inconvenience and loss, to pass his timber and logs through the said slides, &c., without first giving notice thereof to, and obtaining permission from, the proper person in that behalf, and without previously making a full and complete report thereof, with the marks and other particulars, and without subscribing and delivering to the proper officer the required acknowledgment as above mentioned, and without paying the tolls and dues upon the said timber and logs, but upon the understanding and agreement that the said timber and logs and lumber, and other stuff, manufactured therefrom should be, and continue liable, for the payment of said dues and tolls, and to seizure and detention on behalf of Her Majesty until payment thereof.

"12. That the timber and logs passed by the said James Skead through the said slides, &c., were so passed upon the understanding and agreement above mentioned, and the said timber and logs, and the lumber and other stuff manufactured therefrom were at all times liable to seizure and detention on behalf of Her Majesty until the dues and tolls due to Her Majesty were paid.

"13. That previous to the year 1873, the said James Skead paid to Her Majesty the dues and tolls in respect of the timber and logs which he had so passed through, but in the year 1873 he made default in payment thereof, and requested Her Majesty, through Her servants, to give him time for the payment of the same, and not to seize and detain the said timber, &c.

"14. That Her Majesty, by Her servants, did refrain for a time from enforcing payment of said tolls and dues and from seizing and detaining the said timber, &c., upon the understanding and agreement that her position with respect thereto, and her right to seize and

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 ———
 Statement
 of Facts.
 ———

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 \_\_\_\_\_  
 Statement  
 of Facts.  
 \_\_\_\_\_

detain the same, should not be prejudiced, but no definite time for payment was specified.

“15. That the said James Skead having continued to make default during the years 1873, 1874, 1875, 1876 and 1877 in payment of the said tolls and dues, or part thereof, upon the understanding and agreement above mentioned, Her Majesty, by Her servants, called upon him for payment of the arrears, and would have seized and detained the timber, logs, lumber and other stuff, pursuant to Her powers in that behalf, but for the importunities of the said James Skead who represented his inability to pay the same at once in cash and requested further time for payment thereof, and upon the understanding and agreement that Her Majesty should have the right to seize and detain all the timber, logs and lumber and other stuff in and about the Nepean mills and premises in the petition referred to, as security for the payment of the said arrears of tolls and dues, Her Majesty did refrain from enforcing immediate payment thereof, and inasmuch as the said James Skead desired to be allowed to ship the lumber and other stuff manufactured by him from the timber and logs which had passed through the said slides, booms and river improvements, he made to Her Majesty’s Minister of Inland Revenue, the minister charged with the collection of the said tolls and dues, the following proposition :

“ OTTAWA, June 6th, 1877.

“ The Hon. R. LAFLAMME,  
 &c., &c., &c., Ottawa.

“ DEAR SIR,—I am indebted to your Department for slide dues, &c. I herewith propose to pay \$2.00 per 1,000 feet B.M. on all shipments made during the season. I have now on hand about eight million feet of lumber and as I propose manufacturing say from twelve to fourteen millions more this season, I expect

during the season to pay the whole amount of my indebtedness to your Department, including the dues of 1876,—shipments will be made from present date, say to the 10th of November, next. I trust this proposal will be found satisfactory and would feel obliged for an early reply.

1881  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 Statement  
 of Facts.

“ Yours respectfully,

“ (Signed) JAMES SKEAD.”

“ 16. Her Majesty was willing to refrain, and did refrain, from enforcing payment of the said tolls, &c., and from seizing and detaining the said timber, &c., so long as the said \$2 per 1,000 feet, board measure, were paid on all shipments made during the season as proposed by the said James Skead, but in so refraining it was understood and agreed that Her Majesty's right to enforce payment of the said arrears, and to seize and detain the said timber, logs, lumber and other stuff as security for payment thereof, should not be prejudiced or affected but should continue as before the said proposition was made.”

“ 17. Pursuant to the arrangement referred to in the last preceding paragraph, the said James Skead, from time to time before the proceedings in insolvency were taken against him, paid to the proper officer of Her Majesty on that behalf the sum of two dollars per thousand feet, board measure, on the lumber shipped by him, and the said James Skead was not allowed by the officers of Her Majesty to remove any of the said lumber without first paying the said \$2 per 1,000 feet, board measure, on the quantity which he desired to remove.

“ 18. Shortly before or about the time of the insolvency of the said James Skead, the suppliants claimed to have taken possession of the lumber, logs, and timber in and about the mills of the said James Skead and assumed the control and management of the same.”

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.

 Statement
 of Facts.

“ 19. That the suppliants when they so claimed to have taken possession of the said lumber, logs, and timber were well aware of the said proposal and arrangement made by the said James Skead to pay \$2 per 1,000 feet, board measure, on all lumber shipped, and of the rights claimed by Her Majesty in respect of such lumber, logs and timber, and they acquiesced in and ratified said proposal and arrangement, and paid to Her Majesty's officers, in pursuance thereof, \$2 per 1,000 feet, board measure, on many shipments of lumber made by them before making such shipments after having so assumed the control and management of the same.

“ 20. That Her Majesty was at all times willing to carry out the said proposal and arrangement and receive payment of the tolls and dues due in respect of the said lumber, &c., but the suppliants wrongfully, and without the knowledge or consent of Her Majesty's officers, removed a quantity of lumber, and shipped the same without paying the said sum of \$2 per 1000 feet, board measure.

“ 21. That so soon as Her Majesty's officers became aware of such action on the part of the suppliants, they caused the said lumber, so wrongfully removed, to be seized and detained, and also caused all the lumber, &c., in and about the Nepean mills to be seized and held to answer for the said dues and tolls due with respect thereof; and there is now due and unpaid a large sum for such tolls and dues.

“ 22. After the execution of the alleged mortgages to the suppliants they allowed the said James Skead to continue in possession of the said lumber, &c., and to manufacture lumber from such logs, and sell and dispose of the same, and in all respects to deal therewith as his own property, and in making the said proposal and arrangement for the payment of the said \$2 per 1000

feet, board measure, as above mentioned, and in entering into the various understandings and agreements above mentioned with Her Majesty, or Her officers, respecting the said tolls and dues and the rights of Her Majesty with respect to the said lumber, &c., the said James Skead acted with the knowledge, approval and authority of the suppliants, and the suppliants were and are bound by the acts of the said James Skead with respect thereto.

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 ———  
 Statement  
 of Facts.  
 ———

“ 23. That the amount paid by the suppliants with respect to said tolls and dues was not paid involuntarily or under protest, and that under any circumstances they are not entitled to repayment of the same.”

The suppliants joined issue upon the answer, except in so far as it admitted their petition, and alleged in their reply :—

“ That up to and until the month of June, A.D. 1878, the suppliants had no notice or knowledge of the said alleged understandings and agreements in the said answer set forth.

“ That the payments of \$2 per 1000 feet, board measure, made by the suppliants to Her Majesty's officers, as alleged in the 19th paragraph of the said answer, were made by inadvertence and in ignorance that the same were excessive or exorbitant charges, and in the belief that the same were the proper and usual tolls and charges ; and immediately your suppliants discovered that the said charge of \$2 per 1000 feet, board measure, claimed by Her Majesty, was in excess of the usual tolls and charges, the suppliants protested against payment of the said charge, and never paid the said excessive charge afterwards except by compulsion and under protest to get possession of a portion of the said lumber, logs, and timber seized and detained by Her Majesty as aforesaid.”

The case was heard before Mr. Justice Gwynne.

1881

MERCHANTS  
BANK OF  
CANADA

v.  
THE QUEEN.

Reasons  
for  
Judgment

*Bethune* Q.C. and *Gormully* for suppliants ;

*Lash* Q.C. and *Hogg* for respondent.

GWYNNE, J. now (September 14th, 1881,) delivered judgment.

This is a proceeding by petition of right at the suit of the suppliants as mortgagees of certain logs and lumber mentioned in two indentures by way of chattel mortgage, dated respectively the 18th December, 1876, and the 11th May, 1877, made by the Honourable James Skead, since become insolvent, whose equity of redemption in the chattels so mortgaged has been released to the mortgagees under the provisions of the Insolvent Act then in force. The object of the petition is to recover possession of the logs and lumber which were seized by the Dominion Government on the 12th July, 1878, upon a claim for slide and boom dues. The suppliants, by their petition, pray the release and delivery up to them of the logs and lumber so seized, and repayment of a sum of \$5,267.59 which they allege had been paid by them, under duress, in excess of any claim, if any, that the Government had for such slide and boom dues ; and they offer to pay to the Dominion Government the tolls or dues, if any, which the Court may determine to be properly payable under the circumstances set up in the petition.

The Honourable James McDonald, Her Majesty's Attorney-General for the Dominion of Canada, has filed his answer to this petition wherein he justifies the seizure of the logs and lumber for the purpose of obtaining payment of certain slide and boom dues alleged to have been due by Mr. Skead ; and he rests the right of the Dominion Government to seize them partly upon the statute in force relating to public works, and certain tolls established in pursuance thereof, and partly

upon a special arrangement in that behalf made by Mr. Skead with the proper officer of the Government having control of the matter.

The suppliants reply, joining issue upon this answer and further alleging that up to and until the month of June, 1878, they had no knowledge of the agreement set forth in the answer as made with Mr. Skead, and they further say that the payments of \$2 per M. feet b. m. made by the suppliants to Her Majesty's officers, as alleged in the 19th paragraph of the said answer, were made by inadvertence and in ignorance that the same were excessive or exorbitant charges and in the belief that the same were proper and usual tolls and charges, and that immediately the suppliants discovered that the said charge of \$2 per thousand feet, board measure, claimed by Her Majesty, was in excess of usual tolls and charges, they protested against payment of the said charge, and never paid the same afterwards, except by compulsion and under protest to get possession of a portion of the said lumber, logs, and timber seized and detained as aforesaid. In the 19th paragraph of the answer here referred to, the Attorney-General had averred that the suppliants, when they claimed to have taken possession of the said lumber, logs, and timber, were well aware of the said proposal and arrangement made by the said James Skead to pay \$2 per 1,000 feet, board measure, on all lumber shipped, and of the rights claimed by Her Majesty in respect of such lumber, logs, and timber, and they acquiesced in and ratified said proposal and arrangement, and paid to Her Majesty's officers in pursuance thereof \$2 per 1,000 feet, board measure, on many shipments of lumber made by them before making such shipments, after having so assumed the control and management of the same.

By the 7th section of the Petition of Right Act, of

1881  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 Reasons  
 for  
 Judgment.

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 ~~~~~  
 Reasons  
 for  
 Judgment.  
 ~~~~~

1876, it is enacted that the statement in defence may raise, besides any legal or equitable defences in fact or in law available under that act, "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." In addition, then, to any defence which the Dominion Government, represented by their Attorney-General, may have in virtue of the right to seize, asserted upon the authority of the statute law relied upon, and the regulations thereunder relating to slide dues, I must give them the same benefit of any defence set up by the Attorney-General as any private individual would be entitled to if the action were one of trespass *de bonis asportatis* against such individual at the suit of the present suppliants. I cannot, therefore, give any weight to an objection which was urged by the suppliants, *viz.*—that the Crown can acquire title only by record, and that, therefore, no claim on behalf of the Dominion Government can be asserted in virtue of the agreement relied upon in the answer of the Attorney-General as made with Mr. Skead in the terms of his letter of the 6th June, 1877, therein pleaded. The Dominion Government must, under the provision of the act above quoted, be entitled to whatever benefit may accrue therefrom equally as any subject of the Crown if the proceeding were an action against such subject.

The suppliants also raised an objection to the defence that any regulations which were made under c. 28 of the Consolidated Statutes of Canada, fell through upon the repeal of that statute by 31 Vic., c. 12, and, there having been no new regulations made since the passing of 31 Vic., c. 12, that no tolls were at all leviable for logs passing through the Government slides; but the 71st section of that act provides that the enactments in the act, so far as they are the same in

effect as those superseded, namely, those in the 28th chapter of the Consolidated Statutes, shall be construed as declaratory, and as having been in force from the time when the enactments of c. 28 became law. Now the provisions and enactments relating to tolls in 31 Vic., c. 12, are in substance and effect the same as the provisions in c. 28 of the Consolidated Statutes, under which the regulations relating to timber passing through the slides were made, and therefore, under the provisions of sec. 71 above quoted, we must read these sections as having been in force since the passing of the 28th chapter of the Consolidated Statutes, and, therefore, the regulations made under that statute are in effect regulations to be construed as made under 31 Vic., c. 12. There is, therefore, nothing in this objection. The suppliants further object that, by the regulations referred to, the charge for all timber passing through the slides is to be levied *per the crib*, and that saw logs do not come down in cribs, and that, therefore, there is no toll chargeable in respect of saw logs. The answer given to this objection, if there be anything in it, I think sufficient, namely, that the suppliants cannot be heard to make it in view of the allegations contained in the 6th and 18th paragraphs of their petition, by the former of which they aver that

Under the Consolidated Statutes of Canada, c. 28, and the Act passed by the Parliament of Canada, in the 31st year of Her Majesty's reign, c. 12, and under certain orders-in-council and regulations passed in pursuance of, and under the authority of, the said statutes, the Crown was and is entitled to exact payment of certain tolls or dues (generally known as "slide and boom dues") from the owners of all timber *and logs* passing through the said slides, booms, and river improvements, and to demand payment of the same in advance under the said statutes;

and by paragraph 18 they aver that

The proper slide and boom dues on lumber, *logs*, and timber floated down through the slides, booms, and river improvements on the Ottawa, and its tributaries, through which the *logs* and tim-

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA

v.
 THE QUEEN.

Reasons
 for
 Judgment.

ber now lying in and about the said Nepean mills and premises were floated down, amount to the sum of $4\frac{1}{3}$ cents per saw log, or when reduced to board measure to the sum of 26 cents per 1,000 feet.

All these preliminary objections being removed and disposed of, the case must be determined upon the merits, and with that view I propose to consider it 1st, as if Mr. Skead still owned the logs and lumber in question unaffected by any mortgage thereon, and that the question arose between the Dominion Government and him; and 2ndly, as one between the Government and the suppliants claiming as mortgagees under the provisions of the mortgages which have been pleaded and produced.

By the regulations made in 1865, under the provisions of c. 28 of the Consolidated Statutes of Canada, to secure the due payment of slide dues and for the protection of the provincial slides, it was among other things, provided, in short substance, that—

Sec. 2. Persons in charge of timber shall give notice to the superintendent, slide-master or deputy slide-master and obtain permission from him to pass through any slide, under a penalty stated.

Sec. 3. That all rafts or parcels of timber shall be reported before entering the provincial slides.

Sec. 4. That the owners or persons in charge shall not allow any description of timber to accumulate at the head of any slide, but shall immediately pass the same through the slide.

Sec. 6. That the owner or person in charge before removing any parcel of timber from any slide, boom, or other work connected therewith shall subscribe and deliver to the said superintendent, slide-master, &c., &c., an acknowledgment in duplicate of the timber and description of the timber so passed, and shall pay the slide dues and secure the same to the satisfaction of the collector of such dues under a penalty.

Sec. 9. That it shall be competent for the collector of slide dues or any person duly authorized by him to detain, at the risk and cost of the owner, any parcel of timber which shall be moved from any slide without the slide dues being first paid or secured to his satisfaction.

Sec. 10. That rafts, cribs *and all descriptions of timber* shall be held liable for the dues, etc., etc., imposed under the regulations, and the slide-master or other duly appointed officer is authorized and required to seize and detain any such raft, crib, or *parcel of timber*, until payment of such dues, etc., etc., is made, or until the owner or person in charge shall have given satisfactory security for the payment thereof within thirty days after the same shall have been declared to have been incurred, or shall have been demanded—and in default of such payment being made within the said term of thirty days, then the said slide master, etc., may proceed to sell by public auction any such raft, crib, or parcel of timber; but at least two weeks notice of the day of the intended sale by auction shall, in the meantime, have been given and inserted in one or more of the public newspapers published at the nearest place from the said works, and a copy of such notice shall also have been placarded during the same time (two weeks before the intended sale), in a public and conspicuous place, at or near the said works where the raft, crib, or timber is lying.

1881

MERCHANTS
BANK OF
CANADA
v.
THE QUEEN.

Reasons
for
Judgment.

At the time of the making of these regulations there were, as appears by the evidence, only a few slides and these at Ottawa. Afterwards a number of slides were constructed higher up the river Ottawa and its tributaries, several being on the Madawaska, down which river all the logs in question came; some of the slides being located 200 miles up that river in places where there are no inhabitants or slide-masters. Since those slides have been constructed, from the fact of some of them being in such remote places, and also because logs belonging to different owners and being destined for different points, came down loose, by night as well as by day, carried by the current of the river without any person in charge, it became practically impossible to apply the regulations to the collection of slide dues, &c., on logs coming down the Madawaska; acting as a juror, I find this as a fact from the evidence. I, in like manner find as a fact, that in consequence of this impossibility, and in the interest of the log owners, and for the purpose of enabling them beneficially to conduct their

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 ~~~~~  
 Reasons
 for
 Judgment.
 ~~~~~

business, an arrangement was come to between the department of the Government having supervision of the matter and the persons getting out logs, whereby it was arranged that the owners should, at the end of the season upon the arrival of their logs at their respective mills, make a return to the Government officials of all logs so come down, which return was checked by returns previously received by the Government, through their wood-rangers, of all logs cut in the woods by each log owner; and, upon the quantity being thus determined in the case of each log owner, the slide dues were agreed to be paid by the log owners, such dues being estimated at 4½ cents per log. For the benefit of the log or mill owners, also, arrangements were from time to time made between such log owners and the Government officials, whereby time for payment of such dues was extended upon the mill owners satisfying the Government officials that they had logs and sawed stuff at their mills out of which the Government could, at any time, by sale thereof, realize the dues if the mill owners should not keep the terms agreed upon by them as to the mode and time of payment, upon the time for payment being extended to them. I find this to have been the constant practice of the department of the Government having charge of the matter at the time when Mr. Skead first became a mill owner, and owner of logs coming down the Madawaska, and thence continually until the present time. I find also, as a fact, that from Mr. Skead first becoming the owner of logs coming down the Madawaska until the month of June, 1877, he settled with the Government for his slide dues only under the above arrangement, and that from 1873 until June, 1877, he became largely in arrears for slide dues, the time for payment of which was repeatedly, from time to time at his request, ex-



tended under and subject to the terms of the above arrangement, which, in fact, had become the constant and invariable practice of the Government, established in the interest of and for the benefit of all mill owners. I find, moreover, as a fact that on the 6th June, 1877, the said Mr. Skead being largely in arrears to the Government for slide dues upon logs of his floating down the Mada-waska to his mills, called the Nepean Mills, addressed a letter to the Minister of the Dominion Government having charge of the matter in the words following :—

1881

MERCHANTS  
BANK OF  
CANADA  
v.  
THE QUEEN.

Reasons  
for  
Judgment.

OTTAWA, June 6th, 1877.

The Honorable R. LAFLAMME, &c., &c.,

Ottawa.

DEAR SIR,—I am indebted to your Department for slides dues, etc. I herewith propose to pay \$2 per 1,000 feet b. m., on all shipments made during the season. I have now on hand about eight million feet of lumber and as I purpose manufacturing, say, from twelve to fourteen million more this season, I expect during the season to pay the whole amount of my indebtedness to your Department, including the dues of 1876, shipments will be made from the present date, say to the 10th of November next. I trust this proposal will be found satisfactory, and would feel obliged for an early reply.

Yours respectfully,

(Sgd.) JAS. SKEAD.

And I further find that as a fact on the same 6th day of June the said Mr. Skead addressed a letter to Mr. A. J. Russell, the officer who, as Crown Timber Agent, had immediate control of the matter under the Minister to whom the above letter was addressed, which letter to Mr. Russell is as follows :—

OTTAWA, June 6, 1877.

A. J. RUSSELL, Esq.,

Crown Timber Office,

Ottawa.

DEAR SIR,—I have made a proposal to the Minister of Inland Revenue to pay upon all shipments of lumber from my yard, during the season, \$2 per M. b. m., with a view to liquidating my indebtedness. I have about eight (8) million feet of old lumber now on hand and am now cutting from (12) to (14) twelve to fourteen million feet. I enclose you a check for \$216, being \$2 per M. b. m. on a barge load

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.

Reasons
 for
 Judgment.

which left yesterday containing 108,000 feet, odd. The barge "C. S. Morse," Capt. S. M. Hoadley. I will feel obliged if you will send me a permit for same, or telegraph the canal authorities to pass the vessel.

Yours very truly,

JAMES SKEAD.

At the same time Mr. Russell, at Mr. Skead's request, went with him to his mills for the purpose of satisfying the former that the statement made by the latter as to the stuff he had at his mills was correct, and that it afforded abundant security to the Government for payment of the arrears in the manner proposed. Upon a thorough inspection by Mr. Russell, with this end in view, of the stuff at Mr. Skead's mills, the former (to whom the letter of the latter to Mr. Laflamme, of the 6th June, was referred for a report) reported recommending the proposition of Mr. Skead to be acceded to, which was accordingly done, and the acceptance of it was communicated to Mr. Russell, for his guidance, by a letter of the 5th July, as follows :

INLAND REVENUE DEPARTMENT,

OTTAWA, July 5, 1877.

SIR,—Adverting to reference No. 21159, being the proposition of Mr. Skead as to the payment of arrears of slide dues, and to your report thereon, I have to inform you that:—1. The Minister consents that if Mr. Skead makes regular payment of two dollars (\$2) per thousand feet on all lumber shipped by him, your recommendation may be carried out. 2. If it shall appear that payments so made are likely to be sufficient to extinguish Mr. Skead's liabilities within a reasonable time, no further immediate action will be taken for the recovery of such dues.

I have the honor to be, sir,

Your obedient servant,

A. BRUNEL, Commissioner.

A. J. RUSSELL, Esq.,

Crown Timber Agent, Ottawa.

And I find that the arrangement thus made with Mr. Skead continued to be acted upon by him, he paying \$2 per M. b. m. on each shipment as agreed upon, until the month of July, 1878, when sawn lumber was

shipped by railway to Brockville without payment of the stipulated \$2 per M., and without the knowledge or permission of the department, and I find that although nothing was expressly said as to the rights of the Government to realize out of the stuff at Mr. Skead's mills, in case he should violate the agreement so entered into with him by shipping lumber without payment of the \$2, and without the knowledge and permission of the Department, yet, from the rules and practice in the Crown Timber Agent's Office, with which Mr. Skead was thoroughly conversant, and to conform with which the agreement was intended, it was the intention of Mr. Skead in making the above arrangement not only that the Government should secure themselves by refusing permits for vessels to pass through the canals until the stipulated rate of \$2 per 1,000 feet on each shipment by water should be made, but also, by seizing and selling the stuff at the mills, to realize the arrears in case lumber should be removed by land, in prejudice of the agreement, without payment of the stipulated rate, and without the knowledge and permission of the department; and this I find to have been in substance and effect the purport and intent of the agreement made by Mr. Skead with the Government, upon the basis of the former's letter of the 6th June, 1877.

I come, therefore, to the conclusion that if Mr. Skead were the suppliant, asserting a claim against the Government based upon a seizure of the lumber, made for the purpose of realizing thereout the arrears of slide dues, he would, under the circumstances above detailed, be entitled to no relief unless, nor until, he should pay the arrears. To such a claim the defence that what was done was done by the leave and license of Mr. Skead, and in pursuance of an agreement to that effect made by him, would have been sufficient.

1881

MERCHANTS
BANK OF
CANADA
v.
THE QUEEN.

Reasons
for
Judgment.

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

Between subject and subject placed in the like position, such a defence would be abundantly good ; and, therefore, under the terms of the Petition of Right Act, it would be equally good if set up by the Crown as a defence to the claim of a subject ; and that it should be so is consistent with reason and justice. The extent to which the courts go in modern times, wholly independently of the above provisions of the statute, to enforce, both in favor of and against the Crown, oral contracts made between individuals and officers of the Government as representing the Crown, may be seen by reference to the *Attorney-General v. Contois* (1). There, letters patent of certain land granted by the Crown were set aside at the instance of the Attorney-General upon the ground that they were issued improvidently, but the learned Chancellor of Ontario, giving judgment, expresses his opinion to be that relief could, under the circumstances, be properly afforded in equity upon the same ground as relief could be afforded between subject and subject, namely, that the applicant for the patent obtained it upon the faith of its being left open to the grantor of the patent to grant a license to cut timber, and that being so it was a fraud on his part to do anything in contravention of that in faith of which he obtained it. The case was, that while a lot of Crown land was subject to a timber license terminating upon the 30th day of April then next, the lot was sold to a purchaser, and the commissioner endorsed upon the letters patent a memorandum to the effect that if the license should be renewed for one year from its expiration on the 30th April then next, the letters patent should be subject to such renewal although the statute authorizing the issue of licenses to cut timber did not authorize any license to be issued affecting lands after they should be granted by the Crown ; but

(1.) 25 Grant 346.

whether or not in such a case the relief under the ordinary principles of the doctrine of equity, as suggested by the learned Chancellor, could have been granted in the above case, there can be no doubt that, in view of the provision above quoted from the Petition of Right Act, whatever could be relied upon as a defence to an action in a similar case between subject and subject, may with equal effect be relied upon by the Government to the suit of a suppliant by a Petition of Right.

1881

MERCHANTS  
BANK OF  
CANADA  
v.  
THE QUEEN.

Reasons  
for  
Judgment.

I may, however, here say that from Mr. Skead's evidence, it is quite apparent that no such claim as is here made would ever have been asserted by him, for the reason that in his opinion it would not have been fair or honorable in him to make such a claim in view of the fact that the time and mode of payment arranged by him with the Government, was altogether in the interest of, and for the benefit of the business he was carrying on. Indeed the Department of Public Works would become an intolerable nuisance if it should be so administered that no relaxation of the strict regulations of the department should be permitted at the instance and in the interest of the commercial community having dealings with it, unless at the peril of the sacrifice of the rights and interests of the public whose agent only the department is.

I come therefore, secondly, to the consideration of the case as one between the suppliants, claiming as they do through Mr. Skead, of the one part, and the Government, of the other. The suppliants insist that as the agreement of June, 1877, was entered into by Mr. Skead after the execution of the indentures under which they claim, they cannot be affected by that agreement however much Mr. Skead personally might have been if the indentures had not been executed, and they contend that under the statute affecting public works,

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 ~~~~~  
 Reasons  
 for  
 Judgment.  
 ~~~~~

and independently of the above agreement, the logs having passed the slides, the Government has lost all claim upon the logs or their produce for the recovery of the dues, and that the claim of the Government was one only in the nature of an action for debt against Mr. Skead personally.

By indenture, bearing date the 18th December, 1876, Mr. Skead granted, bargained, sold and assigned to the suppliants, their successors and assigns, all the lumber and logs situate at his mills and booms in the indenture particularly described, situate on the Ottawa River, in the Township of Nepean, to have and to hold the same to the only proper use and behoof of the suppliants, their successors and assigns forever; with covenant of warranty, subject to a proviso that if he, his executors or administrators, should pay to the suppliants the amount of certain promissory notes in the indenture mentioned, to the amount of \$136,560, and all renewals thereof with interest not extending beyond the 15th December, 1877, then the said indenture should be void; and Mr. Skead thereby covenanted that if default should be made in payment of any of the said promissory notes, or of any renewals thereof, or in case he should attempt to sell or dispose of, or in any way part with the possession of the said goods, chattels and property, or any part thereof, otherwise than in the usual course of business, or to remove any part thereof out of the County of Carleton, without the consent of the suppliants, their successors, or assigns to such removal, it should be lawful for the suppliants either to sell the said goods, chattels and property, or at their option, that they should peaceably and quietly have, hold, possess and enjoy the said goods, chattels and property without the let, molestation, eviction, hindrance or interruption of Mr. Skead, his executors, administrators or assigns. This indenture contained

no redemise clause or proviso, that until default the grantor should continue in possession of the goods and chattels so granted, bargained and sold, or of any part thereof.*

Now, upon the authority of *McAulay v. Allen* (1), the suppliants by this indenture, by reason of there being no re-demise clause or proviso as to grantor retaining possession until default inserted in it, became entitled both to the property and possession of the property granted, bargained and sold by the indenture, and being so entitled might, if they had pleased, at any time have exercised their right to sell therein contained without subjecting themselves to any action, suit, claim or demand by the grantor—and that without waiting for the maturity of the notes. Whether that decision be right or wrong, that is to say, whether a right in a grantor to retain possession until default may or may not arise by implication from the terms of an indenture, without what is called the re-demise clause or proviso for retaining possession until default being inserted therein, sitting in this court, not as a Court of Appeal, but in an Ontario case to administer the law of Ontario, I am bound by that case, which has since been confirmed and followed in *Samuel v. Coulter* (2).

Moreover, assuming even that a Court of Appeal should, if the point came before it, hold, that such a right to retain possession might arise by implication from the terms of an indenture, although there should be no such re-demise clause inserted in it, I should be of opinion that this case should be governed by the decision in *McAulay v. Allen* for two reasons: 1st, because the proper inference to be drawn from the fact of the re-demise clause being admitted is, I think, that the parties entered into the arrangement, for carrying out which the indenture was executed, in

1881
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 Reasons
 for
 Judgment.

(1) 20 U. C. C. P. 417.

(2) 28 U.C.C.P. 240.

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 ~~~~~  
 Reasons
 for
 Judgment.
 ~~~~~

view of the decision in *McAulay v. Allen*, and in contemplation of the rights of the grantees being as is therein laid down; and 2dly, because I find, as a matter of fact, that by a collateral arrangement made at the same time as the indenture was executed, it was agreed that sales of lumber should be made only by Mr. Skead upon the condition that the proceeds of all sales should be paid to the suppliants, who were to supply the cash necessary to enable him to carry on the business, and who were to have control of the sales. Upon these terms the business was conducted, so that the proper inference to be drawn from the fact of the re-demise clause being omitted is, in my opinion, that the intention of the parties to the indenture was that the suppliants were to have such absolute control of the property granted, bargained and sold to them by the indenture as would enable them to sell the property themselves, using Mr. Skead as their agent for that purpose, and irrespective of all default as to the payment of the promissory notes. I am confirmed in this opinion by the terms of the indenture of the 11th May, 1877, in which the terms of the arrangement are set out at large. By this indenture, after reciting that Mr. Skead was then indebted to the suppliants in the sum of \$334,147.66, for \$136,560, part of which, they held the property conveyed by the indenture of the 18th December, 1876, and other property conveyed by other indentures, he granted, bargained and sold to the suppliants 60,000 saw logs then in the woods, not yet brought down to Ottawa, to have and to hold the same to the suppliants, their successors and assigns, to and for their own use for ever, subject to a proviso that if Mr. Skead, his executors or administrators, should pay certain promissory notes mentioned in a schedule annexed to and made part of the indenture, representing the whole of the



said debt of \$334,147.66, and including the notes secured by the indenture of the 18th December, 1876, or renew the said notes, the whole, however, to be paid and satisfied before the 20th day of December then next, and also should (in the event of the suppliants having to pay or advance any money to get the said logs down the streams to the mills to be manufactured, or for the purpose of causing the same to be manufactured for market in order to their realizing their claims,) repay the same, and all moneys the suppliants might be obliged to pay to get the said timber to market, in order to realize their money or part thereof thereout, together with interest, and if he, Mr. Skead, should observe, perform and keep all the covenants upon his part therein contained, then the said indenture should be void; and the said Mr. Skead thereby warranted the said goods and chattels to the said suppliants, their successors and assigns. This indenture contained no re-demise clause or proviso that the grantor should retain possession of the said goods and chattels until default, but in lieu thereof it was provided, and Mr. Skead thereby covenanted, that he should and would, with all reasonable despatch, that season, if possible, drive or cause to be driven the said saw logs to his mills aforesaid, and then would, with like despatch, manufacture the same into lumber of such description as should be approved by the suppliants through their manager at Ottawa, and that he would, in like manner, with all reasonable despatch, drive and get to market all the square timber covered by that indenture; that all sales of the sawn lumber made on time should be subject to the approval of the suppliants, which approval should be first had through the suppliants' manager for the time being at Ottawa, and no sale on time should be made without such approval; that if the lumber should be shipped to

1881

MERCHANTS  
BANK OF  
CANADA  
v.  
THE QUEEN.

Reasons  
for  
Judgment.

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 ~~~~~  
 Reasons  
 for  
 Judgment.  
 ~~~~~

any consignee or consignees for sale, the suppliants should first approve of such consignees and no lumber should be shipped without such approval; that when lumber should be sold otherwise than for cash in the mill yard, all bills, notes, and bills of lading taken therefor, should be handed over to the suppliants at once, and should be applied as follows: the proceeds of all cash sales should be handed over to the suppliants, and with all other the proceeds of said lumber should be applied first to pay off and discharge all sums of money which the suppliants might have paid out, or have advanced, to secure the getting of said logs to the mills and their conversion into lumber, and getting the same to market and the like, and all interest and charges in respect thereof, and that the balance should be applied in reduction of the said debt due to the suppliants. That the said Mr. Skead in all respects in getting the saw logs to his mills, and in the manufacturing of said stuff, should in all things carry on the work in a proper and efficient manner to the satisfaction of the suppliants, and as they might require in order to the efficient and rapid realization of the said debt and to the greatest advantage.

Now upon the authority of *McAulay v. Allen* (1), and of *Samuel v. Coulter* (2), the suppliants were by this instrument possessed of the right of property and of the right of possession in all the chattel property at Mr. Skead's mills, and of the logs in the woods cut in the winter of 1876-77 not yet come down. There being no proviso that until default Mr. Skead should remain in possession of the property, he could not have maintained any action against the suppliants if they had taken possession of what sawn lumber then remained at the mills and had sold it, or if they had sold the logs not yet come down as logs before being manufac-

(1) 20 U. C. C. P. 417.

(2) 28 U. C. C. P. 240.

tured into lumber, if it had not been for the special provision in the indenture qualifying that right. I must then read the provision in that behalf in the indenture as inserted designedly to supply the place of the omitted proviso, and to control the manner in which the business should be carried on at Mr. Skead's mills so as to enable the suppliants in the most efficient manner, and in the mode most satisfactory to themselves, to realize the payment of their debt. The substance and effect of the indenture, therefore, and the intent of the parties to it, was that the suppliants, being possessed of the right of property and of possession in the goods in question, should prepare the lumber for market and make all sales and ship the lumber, so being their property, through the intervention of Mr. Skead as their agent for that purpose. Mr. Skead was to cause the logs not yet brought down to be brought down to his mills, doing whatever might be necessary for that purpose, and was to manufacture them only into such description of lumber as the suppliants might require. So likewise no sales on time were to be made by him, nor was any lumber to be shipped or consigned to any person without the consent and approval of the suppliants for that purpose first obtained. No sales for cash were to be made by him except upon condition that the moneys arising from such sales should be forthwith handed over to the suppliants; and in like manner it was provided that all bills and notes received by Mr. Skead in payment of lumber sold on time should be delivered to the suppliants, such moneys to be applied 1st, in discharge of all moneys to be advanced by the suppliants in payment of the expenses attending the getting down the logs not yet brought down and attending the manufacturing the same into lumber, the getting the lumber to market, and all interest and all charges in respect thereof; and 2ndly, in

1881

~
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN

Reasons
 for
 Judgment.

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

reduction of the suppliants' debt. All the work, in fact, was to be done with the property, which was the suppliants', through Mr. Skead's intervention, to the satisfaction of the suppliants and as they might direct and require; he receiving whatever moneys should come to his hands as the proceeds of the sale of such property solely to the suppliants' use, and they supplying all the funds necessary to carry on the business, adding the amount to their claim against Mr. Skead.

Here then we find all those particulars provided for, the absence of which was relied upon in *Mollwo, March & Co. v. The Court of Wards* (1) as establishing the non-existence of the relations of principal and agent in that case. The property is conveyed to the suppliants who expressly reserve to themselves the right to dictate into what description of lumber the logs shall be manufactured, with whom alone contracts for the sale of the lumber may be entered into, to whom upon sales it shall be consigned. All this is provided for being done through the intervention of Mr. Skead, but for their sole benefit. They assume to deal with the property as their own, in fact as it was in law by the terms of the indenture, but so to deal with it as is provided specially in the indenture, through the intervention of Mr. Skead, who covenants to act only under the direction of, and to the satisfaction of, the suppliants. There can be no doubt, it appears to me, that the effect and the intent of the agreement contained in this indenture was to make the suppliants principals and Mr. Skead their agent in carrying on the business, in which he had theretofore been engaged, in future for the benefit of the suppliants and with their property, until it should be sold or they should be paid their debt.

It was while conducting the business under the

(1.) L. R., 4. P.C., p. 419.

terms of this indenture, that Mr. Skead made the agreement involved in his letter of the 6th of June and the acceptance thereof of the 5th July, 1877. It will be observed that as to the 60,000 logs cut in 1876-7, it was plainly the interest of the suppliants that those logs should be brought down to the mill to be manufactured into lumber for the suppliants' benefit. From the terms of the agreement it is apparent that it was contemplated that the suppliants should advance whatever sum might be necessary to secure their being brought down. The suppliants also were aware at the time that this indenture of May, 1877, was being prepared, and when it was executed, that Mr. Skead was in arrears to the Government for slide and boom dues accrued due in previous years' upon logs brought down and already manufactured into lumber. Mr. Skead's only doubt is whether they were not aware of this at the time of the execution of the indenture of December, 1876; but it is quite certain that they were aware of it in May, 1877, and that is sufficient for my present purpose, for, between December and May, there does not appear to have been anything done with the property mentioned in the indenture of December. The logs mentioned in that indenture still remained as logs, and the sawn lumber still remained at the mill, in May, 1877, when the indenture of the 11th May was executed, and that indenture was executed not merely to give to the bank security upon the 60,000 logs cut in the winter of 1876-77, but to make arrangements for the sale of all the sawn lumber then at the mill, and for the manufacture into lumber of all logs covered by the indenture of December, 1876, as well as by that of May, 1877.

Mr. Skead says that Mr. Hague, the general manager of the bank, when one of those indentures was being prepared, asked him "if any person had any lien upon

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 ———
 Reasons
 for
 Judgment.
 ———

1881
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 ~~~~~  
 Reasons
 for
 Judgment.
 ~~~~~

this lumber?" Whereupon Mr. Skead asked in reply whether he meant the sawn lumber or the logs? Mr. Hague answered "both." To which Mr. Skead replied that "there was none but the Government lien for slidage and boomage." He adds also that on one or two occasions the bank had statements made out from his books by his book-keeper, who is now dead, and that his books would have shown the amounts of the arrears; and, finally, he says he has every reason to believe that the suppliants must have known the terms of the agreement because he was giving cheques on the bank for the amounts from time to time payable under the agreement. Mr. Hague not having been called to disprove his having had the knowledge thus imputed to the bank through him, I must find as a fact that undoubtedly at the time of the execution of the indenture of May, 1877, if not at the time of the execution of that of December, 1876, the bank had knowledge that Mr. Skead was in arrears to the Government for slide and boom dues on logs previously brought down to the mills and then already manufactured into lumber.

It would not, perhaps, be too much to infer that as business men they had taken the means which were in their power to inform themselves of the amount of those arrears, which they could have done by applying to Mr. Skead's book-keeper, to whom as appears they did apply upon some occasions for some purposes. Mr. Skead himself appears to have had no means whatever to pay those arrears, all his means being, as he says, in the business in which the bank had become interested in the manner provided by the indenture of May, 1877. Now the suppliants being interested in having the logs cut in 1876-7 brought down to the mill and manufactured into lumber, and Mr. Skead being bound by the in

denture of May, 1877, to take such measures as should most effectually secure the logs being brought down and manufactured into lumber such as the suppliants should require, and having in fact covenanted with the suppliants to carry on the business for their benefit under the terms of that indenture, he may, for the purpose of making arrangements with the Government which should secure the safe conduct of the logs to the mill without any interference upon the part of the Government, and for the purpose of providing for payment of the arrears of slide and boom dues, fairly, I think, be held to have been invested by the suppliants with sufficient authority to make such an arrangement with the Government as to him would seem reasonable and proper, and as he should make if still carrying on the business wholly and solely for his own benefit; and that, therefore, he had sufficient authority to bind them by the terms of the letter of June, 1877, which, under all the circumstances, must, I think, be admitted to have been reasonable and proper, and, indeed, in the interests of the suppliants; for I conclude from Mr. Skead's declared inability to pay the amount due to the Government, that if the Government had refused to comply with Mr. Skead's proposal, and had in any way proceeded to enforce their claim (whatever may have been their legal right) in that case, Mr. Skead's insolvency, which subsequently took place, would inevitably have been precipitated at a time when it would have been prejudicial to the suppliants' interest, unless they had come forward to pay the amount.

But whether it may, or may not, be a fair conclusion to draw that Mr. Skead was invested by the suppliants with sufficient authority, as their agent, to enter into the agreement made by him with the Government, it is not necessary to decide. It is not

1881

MERCHANTS  
BANK OF  
CANADA  
v.  
THE QUEEN.

Reasons  
for  
Judgment.

1881  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

necessary to rest the case upon his having had such previous authority, for I am unable to arrive at any other conclusion from the evidence than that as a matter of fact the suppliant adopted, ratified and confirmed that agreement by acting under it, and advancing moneys to pay the Government in accordance with its terms, after they must be held to have had full knowledge of the nature, purport, tenor and effect of it.

I have already drawn attention to the fact (which acting as a juror, I find to be established by Mr. Skead's evidence, which is not contradicted) that at the time of the execution of the indenture of May, 1877, the bank who are the suplicants, had notice that Mr. Skead was in arrears to the Government for slide dues upon logs then already received by him.

Mr. Ritchie, who gave his evidence in that cautious manner which would naturally be expected from a truthful and conscientious witness, when interrogated as to the details of conversations after the lapse of some years, has, by his evidence, strongly impressed my mind with the conviction, and I therefore find it to be a fact, that upon some occasions in the summer of 1877, when presenting to the bank a cheque or cheques of Mr. Skead for slide dues calculated upon the basis of the letter of June, 1877, he gave to Mr. Kirby, the agent of the suplicants at Ottawa, and who, by the indenture of May, 1877, had control of Mr. Skead's business, the information that the cheque or cheques so presented was or were for arrears of slide dues at the rate of \$2 per 1,000 feet, and that the Government was exacting and receiving at that rate from all parties in arrears for slide dues, of whom Mr. Skead was one. Further, that upon an occasion in the year 1877, or in the beginning of 1878, of Mr. Kirby making enquiries at the office of the Minister of Inland Revenue in relation to these slide dues, the witness exhib-



ited to him Mr. Skead's account with the Government for slide dues, showing him to be in arrears, and that witness then gave Mr. Kirby a pencil memorandum of that account as appearing in the ledger shown to him, which Mr. Kirby took away with him. Indeed Mr. Kirby's own evidence is, to my mind, quite conclusive, wholly irrespective of Mr. Ritchie's evidence, to affect the suppliants with knowledge of the contents of the agreement resulting upon the letter of the 6th June, 1877, before they made any of the payments made by them for slide dues in the year 1878.

Mr. Kirby, who was the suppliants' manager at Ottawa, from some time in 1870 unto some time in 1878, says :

The usual intimacy between a banker and his customer existed between Mr. Skead and myself, as manager of the suppliants. I did not know the *amount* of arrears of dues owing by Mr. Skead to the Government *at the date of the chattel mortgage*. I was very much in ignorance of the indebtedness of Mr. Skead to the Dominion Government for slide dues. Mr. Skead never told me the *amount* he was in arrears. *He only told me of being in arrears for dues when he wanted me on behalf of the suppliants to make payment of such arrears*. From the date of the chattel mortgage of the 11th May, 1877, if any payments were made by Mr. Skead on account of slide dues, they must have been paid by Mr. Skead's cheques.

Then speaking of the agreement or proposal contained in the letter of June 6th, 1877, he says :

I *believe* I first became aware of this proposal or arrangement *in the close of the year 1877 or in the beginning of the year 1878*. The way I became aware of this *proposal or arrangement* having been made was by finding it recorded in the books of the Crown Timber Office at Ottawa, when searching there in reference to other matters. I found in said books that there was a large arrear due by Mr. Skead for slide dues amounting to about \$16,000. I then made enquiries at the Crown Timber Office as to the nature of this indebtedness, and was informed by the officials in the Crown Timber Office, *and others*, that Mr. Skead, as well as several other lumbermen, were *then* in arrears to the Dominion Government for slide dues and *were petitioning or applying* to the Government for an extension of time for payment of such arrears. *I also found at that time that the purport of the application by such lumber-*

1881  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 Reasons  
 for  
 Judgment.

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 ~~~~~  
 Reasons  
 for  
 Judgment.

men, including Mr. Skead, for such extension *was to be allowed to pay such dues by paying to the Government the rate of two dollars per thousand feet, board measure, on all lumber shipped by them.* I was not then made aware, nor did I know till some time afterwards, that Mr. Skead had, previous to that time, been paying at the rate above described of \$2 per one thousand feet, board measure, on all lumber shipped on account of said arrears of dues. I may have seen at that time just referred to, in the books of the Crown Timber Office, that some such payments had been made by Mr. Skead, and I think that the books in said office did show some such payments. After discovering that there was an indebtedness by Mr Skead for arrears of dues, I reported it to the suppliants, and called upon Mr. Skead's book-keeper shortly afterwards for a statement of the amounts paid by Mr. Skead under the above described *pro rata* proposal or arrangement. I remember asking Louis Belanger, Mr. Skead's book-keeper, for a memorandum of the amounts so paid. I got this memorandum and found that it showed payments on account of those dues of which I had not previously been correctly informed. *I must have known at that time that the pro rata arrangement for payment of the arrears was in existence, and I must thus have known all about it.*

He adds :

I must have had interviews with Mr. Skead about this *pro rata* arrangement, but I do not remember any special conversation with Mr. Skead about the matter. The suppliants [he adds] were very much incensed at the fact of there being the large arrears of slide dues mentioned when I reported same to them.

It appears, then, that the witness reported to his principals, the suppliants, the contents of this memorandum furnished to him by Mr. Skead's book-keeper ; and it may reasonably be inferred that he forwarded it to them.

He had had also a memorandum previously furnished him by an officer of the Crown Timber Office, but he neither gives us, with any degree of preciseness, the date of his acquiring the information which he admits he did acquire, nor do the suppliants, who must have in their possession the communication or report upon the subject made to them by their agent, and which, as he says, so much incensed them, produce the report, or furnish the Court with any information as to its date.

Under these circumstances it would not be unreasonable to take Mr. Kirby's evidence in a sense most strongly against the now contention of the suppliants, and that evidence, if criticised closely, would justify the conclusion that Mr. Kirby's enquiries at the Crown Timber Office, and the information which he admits he obtained there, was obtained while Mr. Skead's proposal as contained in the letter of the 6th June, 1877, was as yet under the consideration of the Minister, that is, before the 5th July, 1877; and that the payment previously made by Mr. Skead upon the basis of that proposal, which the witness admits that he thinks he saw in the books of the department, may have been the payment made accompanying the letter of the 6th June, which was a payment calculated upon the basis of the proposition contained in that letter. The witness says:—

The way I became aware of this proposal or arrangement having been made, was by finding it recorded in the books of the Crown Timber Office at Ottawa when searching there in reference to other matters. I found in said books that there was a large arrear due by Mr. Skead for slide dues, amounting to about \$16,000. I then made enquiries at the Crown Timber Office as to the nature of this indebtedness, and was informed by the officials in the Crown Timber Office, and others, that Mr. Skead, as well as several other lumbermen, were then in arrear to the Dominion Government for slide dues, and were petitioning or applying to the Government for an extension of time for payment of such arrears. I also found at that time that the purport of the application by such lumbermen, including Mr. Skead, for such extension, was to be allowed to pay such dues by paying to the Government at the rate of two dollars per thousand feet, board measure, on all lumber shipped by them.

From this language it would seem that the time when the bank, through their agent, Mr. Kirby, became acquainted with the terms of the proposal contained in the letter of the 6th June, 1877, was while that application was under the consideration of the Government and before it was acceded to, and this

1881

MERCHANTS  
BANK OF  
CANADA

v.

THE QUEEN.

Reasons  
for  
Judgment.

1881  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 ~~~~~  
 Reasons  
 for  
 Judgment.  
 ~~~~~

view would accord with Mr. Ritchie's recollection that it was in the summer of 1877, when presenting some or one of Mr. Skead's cheques to cover the agreed rate of \$2 per M. feet, that he gave Mr. Kirby information of the purport of the agreement under which the cheque was given.

But however this may be, I can have no hesitation in finding upon this evidence that the suppliants had all the information spoken of by the witness and relating to the subject, prior to the payment made by them for slide dues on, and subsequently to, the 25th May, 1878; and, therefore, long before the payment made by them of the amounts now claimed to have been paid under protest upon and subsequent to the 22nd June, 1878.

I can come to no other conclusion than that the payments made by the bank upon, and subsequently to, the 25th May, and prior to the 22nd June, 1878, were made by the suppliants with full knowledge of the terms of the agreement made in adoption of the proposal contained in Mr. Skead's letter of the 6th June, 1877, and in ratification and confirmation of that agreement; and that the protest accompanying the payments made upon, and subsequently to, the 22nd June, 1878, was merely designed, in consequence of Mr. Skead's insolvency, to evade and defeat the agreement, of which up to that date the suppliants had been willing to take, and did take, the benefit.

The petition must, therefore, in my opinion, be dismissed with costs. As the suppliants have submitted and have undertaken to pay what the court should determine to be properly payable under the circumstances, I think they should pay the arrears according to the account as appearing in the books of the Crown Timber Office, the correctness of which has not been disputed; together with simple interest on the amount

from time to time remaining due, and that it should be referred to the registrar of this court to determine the amount in case the parties shall differ about the same ; which is ordered accordingly.

Having taken the view which I have above expressed of the case, it has not been necessary for me to consider whether, if the mortgages had been ordinary chattel mortgages with provisions for the mortgagor retaining possession and carrying on his business in the ordinary manner until default, it would, or not, have been in his power *in the interest of his business* to have made the arrangement with the Government contained in the letter of 6th June, 1877, so as to bind the suppliants equally as he himself would have been bound thereby if he had continued to carry on the business and had made no default ; whether in fact the arrangement was or not proper and expedient to be made by him in the ordinary conduct of his business ; and if so, whether it was, or not, one which would be proper for a mortgagor, under a chattel mortgage framed in the ordinary way, to make so as to bind the mortgagees of the property.

*Petition dismissed with costs.**

Solicitors for suppliants: *Stewart, Chrysler & Gormully.*

Solicitors for respondents : *O'Connor & Hogg.*

*On appeal to the Supreme Court of Canada by the suppliants, the judgment of Gwynne, J. in the Exchequer Court was reversed.

PRESENT : Sir W. J. Ritchie, C. J., Strong, Fournier, Henry and Taschereau, JJ.

SIR W. J. RITCHIE, C. J.—The question I am called upon to discuss in this case is one between the Dominion Government and the appellants, the Merchants Bank of

Canada, (the suppliants in the court below) claiming as mortgagees under two chattel mortgages, which have been pleaded and produced herein.

The first mortgage, dated the 18th day of December, 1876, contains this provision :

[His Lordship here recites so much of the said mortgage as is stated in the judgment of the Exchequer Court on page 30].

1881

MERCHANTS
BANK OF
CANADA

v.

THE QUEEN.

Reasons
for
Judgment.

1882

June 22.

1882
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 ———  
 Ritchie, C.J.  
 on  
 Appeal.  
 ———

The learned judge in the court below found, as a matter of fact, that a collateral agreement was made between the parties at the same time the first mortgage was executed, whereby the mortgagor was to remain in possession of the property and carry on the business of its manufacture and sale for the benefit of the appellants, and as their agent, but I have been unable to discover any evidence of such an agreement.

The second mortgage dated 11th May, 1877, contains the following provisions:

[His Lordship here recites so much of this mortgage as is stated in the judgment of the Exchequer Court, on pages 32-34].

Upon the dates when the mortgages were executed it is undisputed that Skead was indebted to the appellants in the amounts intended to be secured thereby, that he was carrying on the business as usual, and that he was in the sole possession of the property granted by such mortgages. It is also established by the evidence that Skead continued to carry on his business for and on his own account without change, until he was made a bankrupt by the proceedings in bankruptcy.

I can find no evidence, whatever, in this case, of any contract, express or implied, creating a general lien or charge on the lumber in question so as to bind third persons to whom the same has been conveyed for valuable consideration.

With reference to the agreement entered into between Skead and the Crown upon the terms contained in his letter to the Minister of Inland Revenue on the 6th June, 1877, and relied upon by the Crown in support of

the seizure herein, I find that Skead had no authority, express or implied, from the appellants, after the execution of the mortgages, to interfere with their rights under such mortgages by pledging the property covered thereby for the payment of any arrears of Crown dues; or to impose on such property any lien, charge or burden, other than the law had attached thereto, for the slidage and boomage of that specific property.

Nor does the evidence establish the fact that the bank knew that there were arrears other than on the lumber mentioned in the mortgages, or that the Crown claimed any lien or charge other than for the slidage and boomage on the logs in dispute. But, even if the bank did know there were arrears for slide or boom dues on logs previously brought down and manufactured into lumber, such knowledge would not create a charge or attach a lien for such dues on other lumber than that for the slidage and boomage of which they became due. Moreover, if Skead did propose, by any arrangement with the Crown, to give the Crown a charge or lien for arrearages due upon other lumber, I can discover no sufficient evidence of any adoption, ratification or confirmation of any such arrangement by the appellants.

I find nothing in the law, or in the regulations, giving the Crown any general lien for arrears or general balances, or any lien except on the specific lumber for the amount due for its passage or boomage, viz.: 4½ cents per log, equal to 26 cents per 1,000 ft. b.m.

As to usage in respect to collecting dues, it appears the regula-

tions have become inoperative from the fact that, as Mr. Russell says, it is impossible to collect the dues at the slides. On account of this impossibility of enforcing the regulations, the Government appear to have generally allowed logs to pass through the slides without a compliance with any of the provisions of the regulations in that behalf. With respect to Skead's logs, Mr. Russell says that they were allowed to pass without the dues being demanded in advance for the reason above mentioned. He explains that the regulations were made without reference to the further development of the slide system, and that he had recommended new regulations to meet the requirements of the extended system, but they appear never to have been adopted by the Government. Now, the officers of the Crown who were examined in this case appear to have been under the impression that so long as there was sufficient lumber in the possession of the mill-owner to satisfy the claims of the Government for dues against him, the Government was secured; but I can discover no proof of any understanding or arrangement by which, in consequence of logs being allowed to come through the slides without the regulations being complied with, any general lien should attach to them at the mills. Nor do I find any instance where the Government asked, or that the mill-owners generally, or any one of them in particular, agreed that any such lien should attach to lumber manufactured at the mills; and no evidence was given of any occasion where such a general lien was claimed by the Government

and submitted to by the mill-owners, or enforced by the Government.

The only evidence as to usage in respect of Skead's logs is found in Mr. Russell's evidence:

"Q. Did you ever press Mr. Skead for payment of arrears?

A. Decidedly I did.

Q. By letter?

A. By letter and verbally.

Q. Was that in 1873?

A. It was every year.

Q. From 1873?

A. Yes; and before. The accounts are regularly rendered and they are dunned.

Q. In answer to these duns or pressures did Mr. Skead see you himself?

A. He comes in casually.

Q. Did you give him time for the payment on some of his arrears?

A. They all got time that way during the bad times.

Q. You say that he has seen you with reference to the demands which have been made upon him?

A. Yes.

\* \* \* \*

Q. You charged these dues against Mr. Skead personally?

A. Yes.

Q. You charged these dues as an ordinary debit, did you not?

A. Yes; from the beginning.

\* \* \* \*

Q. After June, 1887, did he continue his business up to the time of his bankruptcy?

A. Yes.

Q. Had he made shipments of lumber during that time?

A. I am not aware. I have no record of them. The railway takes away lumber. I think there were arrangements for sales made in 1877, some of them were carried

1882

MERCHANTS  
BANK OF  
CANADA  
v.  
THE QUEEN.  
Ritchie, C.J.  
on  
Appeal.

1882  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 ~~~~~  
 Ritchie, C.J.  
 on  
 Appeal.

out afterwards, I know. I do not know whether they were all or not.

Q. Up to Mr. Skead's bankruptcy, or the time that the bank took possession, did he carry on his business as he had previously done?

A. Apparently as usual, he gave cheques and these cheques were received.

Q. Were you aware of the mortgages which the bank had obtained?

A. Not then.

Q. When did you first become aware of the mortgages of the bank?

A. I forget.

Q. Was it after the bankruptcy?

A. Yes; I think so.

Q. The only arrangement that you had with Mr. Skead was that contained in the letter of the 6th June?

A. It was the only explicit arrangement as to what he was to pay.

Q. You had no other arrangement except that one?

A. No other special arrangement.

Q. Had you any other arrangement at all?

A. No; except a perfect understanding that the timber was liable to seizure. That was the reason that all the lumberers always showed me that they had plenty left.

Q. Was there anything said between you and Mr. Skead about the timber being liable to seizure?

A. It would not be discussed by any lumberer. When they give me memoranda showing there is enough left to cover all their indebtedness, it means that there is enough there to seize.

Q. But there was nothing said to Mr. Skead about it?

A. We talked about the quantity there. We would not be so strict in his case as in others.

Q. You have already stated:—

“The letter dated 6th June, 1877, was received by me from Mr. Skead. This letter contains the terms of the only arrangement proposed by Mr. Skead for the settlement of his arrear dues to the Crown, and this arrangement was agreed to by the Crown, having been first reported favorably on by me, as appears by my letter of 2nd July, 1877, now marked as exhibit ‘G.’ That letter is now filed as petitioners’ exhibit, number eleven.” You continue:—

“I do not know of any other arrangement having been made by Mr. Skead as to the payment of his arrears, and no other arrangement was made with me in reference to the said arrears.”

That is correct is it not?

A. Yes; that is the only special arrangement made.

Q. I will read further:—

“I did not consider that Mr. Skead had made any special arrangement to pay those dues apart from his obligation to pay under the regulations, until his arrangement already referred to with the Minister of Inland Revenue.”

A. That is what I have been saying to you.

Q. Then you say here:—

“Mr. Skead never made any verbal arrangement with me for the payment of dues.”

A. I would not admit any verbal arrangement.

Q. You understand your duties too well for that; you would not do anything so unofficial?

A. No; there would be a great



deal said backward and forward, of course.

Q. But when you got to the basis of an agreement you would, of course, put that in writing?

A. It was not for me to decide upon. We would talk about the usual business, and there would be the fact that there was plenty there to secure the Government that we could, in my opinion, take possession of. The quantities of timber that they had on hand were always made the basis of delay in cases of that kind,—the fact that there was enough for the Government to take its arrears upon.

Q. Was a seizure made to enforce arrears immediately, or was it left in abeyance?

A. It had been left in abeyance on various grounds.

Q. Will you state what was the arrangement with Mr. Skead, or the understanding with him, with reference to the security of the Crown for the payment of arrears?

A. Mr. Skead desired me to go up and look at the timber and see if there was ample security there. He drove me up, and I saw that there was ample security. Taking into consideration the state of his business and the number of logs that he had, I believe that he was justified in saying that, if the business had gone on, he could have met all his obligations.

Q. When was this? On more than one occasion?

A. Not more than one occasion specifically that way, though I have often been there. I was satisfied that the proposition which he made was a reasonable one.

Q. (By the Court). When was this?

A. Before recommending Mr.

Skead's proposition to the Commissioner.

Q. What proposition?

A. The proposal of June, 1877. The matter was referred to me for report.

Q. That is the one in which he is to pay two dollars per thousand feet?

A. Yes, *pro rata*.

Q. You went to the mills to see if there was sufficient security?

A. Yes.

Q. Security for what?

A. For the whole sum due on the whole material sawn and unsawn. The rate at the *pro rata* would cover his indebtedness.

Q. Was there anything said or understood between you and Mr. Skead with reference to rights of action of the Crown in case he made default in payments?

A. It was never talked of. All that was asked was that they should have enough stock on hand to cover the demand of the Crown."

What does all this go to show but that so long as Skead appeared to have sufficient property on hand to cover the demand of the Government, the officers of the Crown were willing to trust him upon the understanding that the timber arriving at different times at the mills was liable to seizure for the specific amount of dues payable thereon? Certainly it is no evidence of any understanding or usage that the timber at the mills at any given time was liable for the arrears of dues for timber passed in years gone by.

But, if Mr. Russell's evidence is to be relied on, the Crown officers, as a matter of fact, did not, in this case, act on the supposition that any charge on the lumber existed

1882

MERCHANTS  
BANK OF  
CANADA  
v.  
THE QUEEN.  
Ritchie, C.J.  
on  
Appeal.

1882  
 ~~~~~  
 MERCHANTS
 BANK OF
 CANADA
 v.
 THE QUEEN.
 ———
 Ritchie, C.J.
 on
 Appeal.
 ———

because he says (*ante* p. 47) these dues were charged against Skead personally, and as an ordinary debt from the beginning; and he makes it clear that the timber was not seized under, or by virtue of, any claim or lien arising from any understanding, usage or contract, for he distinctly says that he had no authority for making the seizure except the authority contained in the regulations and statutes.

Upon this point Mr. Russell speaks as follows in his direct examination:—

“Q. If Mr. Skead had not made this arrangement to pay two dollars per thousand on the arrears due by him, what course would the Government have pursued with reference to his stuff?”

A. If he had deferred too long I would have taken possession of his lumber anywhere in the Province. I have done it in other cases.

Q. Mr. Skead was aware of that?

A. Yes. I had been in the habit and practice of doing so. I have seized lumber on the Richelieu, going out of the country. I held myself justified on account of the law and regulations to seize for the slide dues.”

And in cross-examination upon this point:—

“Q. You say that you thought those regulations enabled you to seize for slide dues in any part of the Province?”

A. Yes.

Q. You say that those regulations gave you the same powers as to dues to be collected for the Ontario Government?

A. No; I said I thought inasmuch as there were statutes of the Board of Works which provided for timber being seized anywhere

within the Province where timber, or the owner of it, was to be found—it is all in the statutes.

Q. I should like to see the statute which you think gave you the right?

A. There are the old Consolidated Statutes and the new act, 31 Victoria, chapter 12, section 61, sub-section 3.

Q. Is that all?

A. Yes; that is all the act mentions about slide dues.”

Whether the Government, in proceeding to enforce their claim (whatever may have been their legal rights), assuming their refusal to comply with Mr. Skead's proposal as to payment of slide dues, would have precipitated Mr. Skead's insolvency or not, and whether such an event would have been so prejudicial to the appellants as to warrant Skead in making the arrangement he did in their interest, as suggested by the learned judge in the court below, are matters of mere surmise, and matters concerning which I have no right to speculate. But even if we accept the learned judge's conclusions in this behalf, they cannot affect the question upon which the whole case turns. Either Skead had, or had not, authority to bind the appellant's property by the agreement he entered into with the Government. If he had not, the agreement is not available to the Crown. I think it is clear from the evidence that he had no such authority, and, such being the case, we have no right to say that he ought to have had, or that what was done was for the appellants' benefit, and, therefore, they must be bound by it.

I am of opinion that the fair in-

1882
 ~~~~~  
 MERCHANTS  
 BANK OF  
 CANADA  
 v.  
 THE QUEEN.  
 ———  
 Fournier, J.  
 on  
 Appeal.  
 ———

tainly incompatible with their contention that the regulations, in virtue of which this sum was due, were no longer in force. But, admitting this contention to be well founded in law, the logs in question having passed through slides which are the property of the Government, there would still be due to the Government the value of the services rendered. In tendering the sum of \$1,500, the appellants virtually admitted that something was justly due to the Government, if not legally due, in virtue of the regulations.

STRONG and TASCHEREAU, JJ.  
 dissented.

*Appeal allowed with costs.*