

[E.C.] 1883 WINDSOR AND ANNAPOLIS RAILWAY CO. *v.*
 May 18. THE QUEEN AND THE WESTERN COUNTIES
 [S.C.] 1885 RAILWAY CO.

Feb'y. 16. *Agreement with Government of Canada for continuous possession of railroad—Construction of—Breach of, by Crown in assertion of supposed rights—Damages—Joint mis-feasor, judgment obtained against—Effect of, in reduction of damages—Pleading—37 Vic. c. 16.*

By an agreement entered into between the Windsor and Annapolis Railway Company and the Government, approved and ratified by the Governor-in-Council, 22nd September, 1871, the Windsor Branch Railway, (N.S.), together with certain running powers over the trunk line of the Intercolonial, was leased to the suppliants for the period of 21 years from 1st January, 1872. The suppliants under said agreement went into possession of said Windsor Branch and operated the same thereunder up to the 1st August, 1877, on which date C. J. B., being and acting as Superintendent of Railways, as authorised by the Government, (who claimed to have authority under an Act of the Parliament of Canada, 37 Vic., c. 16, passed with reference to the Windsor Branch, to transfer the same to the Western Counties Railway Company otherwise than subject to the rights of the Windsor and Annapolis Railway Company,) ejected suppliants from and prevented them from using said Windsor Branch and from passing over the said trunk line; and four or five weeks afterwards said Government gave over the possession of said Windsor Branch to the Western Counties Rail-

way Company, who took and retained possession thereof. In a suit brought by the Windsor and Annapolis Railway Company against the Western Counties Railway Company for recovery of possession, &c., the Judicial Committee of the Privy Council held that 37 Vic., c. 16, did not extinguish the right and interest which the Windsor and Annapolis Railway Company had in the Windsor Branch under the agreement of the 22nd September, 1872.

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On a petition of right being filed by suppliants, claiming indemnity for the damage sustained by the breach and failure on the part of the Crown to perform the said agreement of the 22nd September, 1871, the Exchequer Court of Canada, (Gwynne, J., presiding), *Held*, that the taking the possession of the road by an officer of the Crown under the assumed authority of an act of parliament was a tortious act for which a petition of right did not lie.

On appeal to the Supreme Court of Canada, it was *Held* (Strong and Gwynne, JJ., dissenting,) that the Crown by the answer of the Attorney-General did not set up any tortious act for which the Crown claimed not to be liable, but alleged that it had a right to put an end to the contract and did so, and that the action of the Crown and its officers being lawful and not tortious they were justified. But, as the agreement was still a continuous, valid and binding agreement to which they had no right to put an end, this defence failed. Therefore the Crown, by its officers, having acted on a misconception of, or misinforma'ion as to, the rights of the Crown, and wrongfully, because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong, by such breach, become possessed of the suppliants' property, the petition of right would lie for the restitution of such property and for damages.

Prior to the filing of the petition of right, the suppliants sued the Western Counties Railway Company for the recovery of the possession of the Windsor Branch, and also by way of damages for monies received by the Western Counties Railway Company for the freight or passengers on said railway since the same came into their possession, and obtained judgment for the same, but were not paid. The judgment in question was not pleaded by the Crown, but was proved on the hearing by the record in the Supreme Court of Canada, to which court an appeal in said cause had been taken and which had affirmed the judgment of the Supreme Court of Nova Scotia.

Held: (per Ritchie, C.J., and Taschereau, J.), That the suppliants could not recover against the Crown as damages for breach of contract what they claimed and had judgment for as damages for a tort

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committed by the Western Counties Railway Company, and in this case there was no necessity to plead the judgment.

(Per Fournier and Henry, JJ.), that the suppliants were entitled to damages for loss of profits for the time they were, by the action of the Government, deprived of the possession and use of the road to the date of the filing of their petition of right. See Can. S. C. R., vol. X., p. 335.

REPORTER'S NOTE.—Leave to appeal to the Judicial Committee of the Privy Council from the judgment of the Supreme Court of Canada was obtained by the suppliants (W. & A. R. Co.), and the appeal being heard, the said judgment of the Supreme Court of Canada, in so far as it adjudged that the suppliants were intitled to damages for loss of profits from the time they were by the action of the Government deprived of the possession and use of the Windsor Branch to the date of the filing of their petition of right, was reversed, but, *quoad ultra*, was affirmed.