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Oct. 8.

JOHN PENNY.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Injurious affection of property by construction of public work—Petition of Right—Defence of statute of limitations—50-51 Vict. c. 16 (The Exchequer Act, 1887)—Retroactive effect.

Held, following the case of *The Queen* v. *Martin* [20 Can. S. C. R. 240], that the court has no jurisdiction under the provisions of 50-51 Vict. c. 16 to give relief in respect of any claim which, prior to the passing of that Act, was not cognizable in the court, and which, at the time of the passing of that Act, was barred by any statute of limitations.

THIS was a claim for the injurious affection of the suppliant's property at Halifax, N. S., occasioned by the construction of the extension of the Intercolonial Railway into that city in the year 1881.

By *The Government Railways Act*, 1881, it was provided (sec. 27) that if any person should have a claim upon the Government for alleged direct or consequent damage to property arising from the construction of any Government railway, such person might give notice of his claim to the Minister of Railways and Canals, stating the particulars thereof and how the same had arisen; and if the Minister, from want of sufficient or reliable information as to the facts relating to the claim, or on account of conflicting statements of facts, did not consider the case one in which a tender of satisfaction should be made, he might refer the claim to one or more of the Official Arbitrators for examination and report both as to matters of fact involved, and as to the amount of damages, if any, sustained. Section 30 provided that any such claim should not be submitted to, or be entertained by, the

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Official Arbitrators unless the claim and particulars thereof had been filed with the Secretary of the Department within twelve calendar months next after the loss or injury complained of.

No claim was made by the suppliant and no proceedings taken in the matter before the Official Arbitrators under the provisions of these sections.

By the 18th section of *The Exchequer Court Act* (50-51 Vict. c. 16) it is enacted that "the laws relating to prescription and the limitation of actions in force in any province between subject and subject shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province."

By the 58th section of this Act the Board of Official Arbitrators was abolished, and all their powers and duties were transferred to the Exchequer Court.

The suppliant proceeded with his claim by a petition of right some twelve years, or thereabouts, after the cause of injury arose in 1881. His petition, with a request for a fiat, was received in the Department of the Secretary of State on the 12th June, 1893; the fiat was granted on the 5th October, 1894, and the petition with the fiat thereon was filed in the Exchequer Court on the 12th October, 1894.

In its answer the Crown set up by way of defence to the claim that the same was barred by certain limitations in the Act of the Parliament of Canada 50-51 Vict. c. 16, secs. 16 and 18; the *Revised Statutes of Nova Scotia*, 5th Ser. c. 112, s. 1; the *Revised Statutes of Nova Scotia*, 4th Ser. c. 100, s. 1; *The Revised Statutes of Canada*, c. 136, s. 8 and c. 40, s. 8; 39 Vict. c. 27, s. 7; and 44 Vict. c. 25, s. 30.

The case came on for hearing on the 5th, 7th and 8th days of October, 1895; and, amongst other defences,

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that of the limitations in the above statutes was relied on by the Crown.

T. J. Wallace for the suppliant:

It has been raised on the pleadings, and will doubtless be relied on by counsel for the respondent, that this claim is barred by the statute of limitations. I submit that there is no authority to show that the Crown might avail itself of the statute of limitations in bar of the right of the subject. Even if such a defence could be raised it is not available to the Crown here, because the statute could not be said to run when there was no court that had jurisdiction to try this case before the constitution of the Exchequer Court as it now exists. The jurisdiction in such matters conferred upon the Official Arbitrators was, I contend, an exclusive one, and not enjoyed by them concurrently with some other court. The matter of petition of right was confined to the court, but the subject could either proceed by petition or by reference to the Official Arbitrators.

Under *The Exchequer Court Act*, whenever the subject is injured he has the right to have his claim heard in this court and have it adjudicated upon. (He cites section 16 of 50-51 Vict., c. 16). This section is wide enough to include all claims against the Crown, and I have always understood this statute to mean that the moment you admit there is a claim, that very moment you establish a right by petition. The right to petition exists essentially under our Constitution, and I doubt very much if the legislature could curtail or limit the subject's inherent right to prefer his petition to the Sovereign at any time.

With reference to the period of limitation applicable to this class of cases, under *The Exchequer Court Act* the period of limitation applicable to such actions in the Province of Nova Scotia must prevail. Then, I take it that the period of limitation for bringing actions

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such as this under *The Nova Scotia Railway Act*, 1880, sec. 25, must regulate the proceedings here, and that would be six months after the doing of the damage ceases; and it is a continuous damage, and has not ceased yet. Now, under the 30th clause of *The Government Railways Act*, 1881, it is provided that claims for land taken or injured by the construction of any government railway, must be filed with the Secretary of the Department of Railways and Canals within twelve calendar months after the injury was occasioned, or else it could not be entertained by the Official Arbitrators. Now, admitting for the sake of argument that the railway was completed about the time of the expropriation, although the plan and description of the property was not filed until 1882, I contend that this section from *The Government Railways Act*, 1881, which I have read from, in its latter clauses refers to that section of *The Nova Scotia Railway Act*, 1880, limiting the bringing of actions. That being so, then we have a period of six months in which to bring the action after the "accruing of the claim." In the case before the court the time is not very well fixed when the claim accrued; but I contend that it could not accrue until the Government had completed the railway, and under another provision in *The Government Railways Act*, 1881, the claimant was not in a position to make his claim. The suppliant was bound to wait to see if the Government would not substitute some new street for the old way that was taken. Under the Act, the Government had the right to substitute another street for a portion of the one which they had taken.

I submit that the suppliant would not be in a position to press his claim the moment the expropriation was made, without waiting to see if the Government intended to give the abutting owners a new street.

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The court should say that it was only proper for the suppliant to give the Government time to substitute a new street for the one taken, before bringing his petition.

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I submit, further, that if we are bound by *The Government Railways Act*, 1881, we ought to have the benefit of it. Now, I say it was compulsory on the Minister of Railways to submit cases to the Official Arbitrators the moment that he found that damage had been sustained. He might have, for instance, submitted this case to the Official Arbitrators within two or three days after the taking of the street. It was clearly his duty to refer cases where land had been injuriously affected only, as well as cases where land had been taken.

The Petition of Right Act, 1876, reserved all the rights of the subject to bring his petition of right as formerly. Therefore, I submit, in this case the suppliant would have the right to come into this court and proceed on his petition, even if no such Act had been passed. It must also be remembered that the provincial legislation which *The Government Railways Act*, 1881, invoked, gave the party six years within which to prosecute his claim.

My contention is that the suppliant had six years from the time of the filing of the plan and description wherein to bring his petition. I maintain that under the Acts in *The Revised Statutes of Canada* regulating the limitation of such an action as this, this action was not barred, because *The Revised Statutes of Canada* did not come into operation until the 1st of March, 1887, and so there was really only about three or four months that the provision in *The Revised Statutes* was in force before it was repealed by *The Exchequer Court Act*, 1887 Before the six years expired under that Act we would be down to the time this court got jurisdiction. The

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Official Arbitrators had none of the jurisdiction that this court had formerly, so that the only thing that could work against us would be the limitation in this statute of 1887 (*The Exchequer Court Act*).

I submit with great confidence that this statute which my learned friend contends gives the Crown the right to plead the statute of limitations is *ultra vires*. There is a statute passed by the Imperial Parliament which enacts that no colonial parliament or legislature can make a law contrary to the law of England.

[Mr. *Borden*, Q.C. My learned friend is here referring to *The Colonial Laws Validity Act*, 1865. That prohibits legislation contrary to Imperial statutes, not to the *laws* of England which would curtail the powers of colonial legislatures to an absurd extent.]

I submit that colonial legislation limiting the fundamental right of the subject to petition the Sovereign is in excess of the powers of any colonial legislature. Moreover, I submit that it is a most demoralizing example to the people of this country that the Crown should set up such a plea as the statute of limitations to the just claim of the subject. (He cites 7 & 8 William III, c. 22, and *Chitty on Prerogatives*, page 31). The statute I have just cited enacts that all laws which shall be in practice in any of the colonies repugnant to any law made or to be made in this Kingdom relative to the said plantation shall be utterly void and of none effect. (He cites 33 Henry VII, chap. 39, ss. 7 and 9; also *Chitty on Prerogatives* pp. 310 and 366). I maintain that the authorities show that the subject under a petition of right cannot be denied justice by the Crown pleading the statute of limitations. (He cites *Chitty on Prerogatives*, pages 370-361; 2 *Manning's Exch. Pr.* 581, 613, 614).

I submit that so far as it was possible for the suppliant, he brought the claim within six years after the

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coming into force of *The Exchequer Court Act*, 1887. This petition was prepared and filed in the office of the Secretary of State and kept more than a year or fifteen months after they received it. They had a whole year in which to make up their minds to grant it, it was received by them on the 12th June, 1893, and the fiat was not granted until October, 1894. Therefore I say that it is inequitable on the part of the Crown to plead the statute of limitations now.

R. L. Borden, Q.C., for the respondent: Dealing first with the statute of limitations, our contention is that under the 27th section of *The Government Railways Act*, 1881, my learned friend should have had his claim referred to the Official Arbitrators in the mode directed therein, and under the 30th section it must have been referred within the time limited, that is within twelve calendar months after the cause of injury arose. He did not do so, and so far as these provisions of the statute go there is an end of the question. On the other hand he contends that he had a right of action under *The Petition of Right Act*. Then if this contention on his part is a proper one, the grounds upon which he would base his petition existed in 1881, and so he is equally out of court whichever course he takes. Now as to the law on the question of the statute of limitations, I submit that it has been decided in the Supreme Court of Canada in the case of *McQueen* v. *The Queen* (1), that by way of defence to a petition of right the statute of limitations can be pleaded by the Crown. The judges in that case were only divided as to whether the 7th section of *The Petition of Right Act* was retroactive, but they had no doubt that the Act gave the Crown the right to invoke the statute of limitations. (He refers to the judgment of Chief

(1) 16 Can. S. C. R. p. 1.

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Justice Ritchie, at page 61 of 16 Can. S. C R.; and also to pages 80-82, 97, 113, 114, 117 and 118.)

The suppliant's claim accrued in the year 1881, the fence complained of was erected in 1882, and in that year the Crown filed the plan and description, and inasmuch as the petition of right was not filed until March, 1894, and was furthermore not presented for a fiat until the year 1893, it is quite clear that under *The Government Railways Act*, 1881, and the provisions of the Nova Scotia statute, which the former Act makes applicable to this case, the claim is wholly barred. With regard to the other alternative, assuming that my learned friend had also an opportunity of giving notice to the Minister of Railways of the claim and obtaining and prosecuting a reference to the Official Arbitrators under *The Government Railways Act*, 1881, then I say his claim would be barred under the provisions of section 30 by something like twelve years. Now then, is there anything in *The Exchequer Court Act* of 1887 which would counteract the effect of *The Petition of Right Act* 1876, or the provisions of section 30 of *The Government Railways Act* 1881? So far as petition of right is concerned, you don't find anything there to aid the suppliant; but, on the contrary, you find in section 18 a provision that the laws relating to prescription and the limitation of actions in force in any province, between subject and subject, shall apply to any proceeding against the Crown in respect of any cause of action arising within such province. Therefore, it is plain that, as under the Nova Scotia statute of limitations the suppliant's claim would be barred in six years, my learned friend is still out of court. Under *The Government Railways Act*, 1881, section 30, the suppliant's claim must have been proceeded with before the Official Arbitrators within twelve months after the claim had accrued, and *The Exchequer Court*

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Act, 1887, does not have any retrospective operation in the way of rendering it possible to prosecute claims before the Exchequer Court as now constituted, which were barred before the Act of 1887 came into force. That *The Exchequer Court Act*, 1887, has no retroactive effect for such a purpose was decided by the Supreme Court of Canada in the case of *The Queen* v. *Martin* (1). The result of the judgment in that case would seem to be that if the party brings his action in the Exchequer Court after the year 1887, in respect of a claim which had accrued before the Act came into force, the court has no jurisdiction to entertain it. In order to take the benefit of the Act, the right of action must have accrued after the Act came into force. I think that your Lordship's jurisdiction to entertain claims like this is denied by the Supreme Court in the case of *The Queen* v. *Martin*. The facts in that case are not dissimilar in all respects to those present here. The cause of action was barred in the Province of Quebec before *The Exchequer Court Act* came into force. It was decided by the Supreme Court that claims of this character were not revived by the provisions of the Act.

Counsel for the suppliant has argued that *The Petition of Right Act*, 1876, is unconstitutional, inasmuch as it affords the Crown the right to plead prescription in defence to a petition. I do not propose to take any time in dealing with that, because it is familiar constitutional law that all the powers or authorities that could be exercised by the Legislature of Nova Scotia before Confederation, are now vested in the Parliament of Canada or in the Legislature of Nova Scotia. Now, it is undoubted that the Parliament of Canada has the right to legislate upon the subject of petitions of right to the Crown in the right of Canada; and that being so, then Parliament would have the right to regulate

(1) 20 Can. S.C.R. 240.

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the conditions under which the petition of right should be proceeded with. It is pretty clear that the right to legislate on this subject does not exist in the Legislature of Nova Scotia, and therefore it must of necessity be vested in the Parliament of Canada. It is plain from *The Colonial Laws Validity Act*, 1865, that every colonial legislature has full power to establish courts of judicature within its jurisdiction and to make provision for the administration of justice therein. [He cites and discusses the cases of *Beckett* v. *The Midland Railway Co.* (1); *The Queen* v. *Archibald* (2); *The Queen* v. *Barry* (3); *Cripps on Compensation* (4); *City of Glasgow Union Railway Co.* v. *Hunter* (5); *Hammersmith, &c.*, v. *Brand* (6)].

[*By the Court.*—What have you to say, Mr. Wallace, against the view that I am bound in this case to follow the decision of the Supreme Court in the case of *The Queen* v. *Martin* ?] (*supra*)

Mr. *Wallace.*—I think that that case was decided contrary to the principles laid down by the English courts in their judgments in similar cases. I do not think that the Exchequer Court is bound to follow that decision if it is bad law.

[*By the Court.*—I am not able to distinguish this case from that of *The Queen* v. *Martin* in respect of the retroactive effect of *The Exchequer Court Act*, 1887.]

I think that the date of the institution of the action should be the date when the petition was received in the Department of the Secretary of State with the request for a fiat. Surely the Government ought not to be allowed to keep the petition one or two years before granting the fiat, and then plead the statute of limitations.

(1) L.R. 3 C.P. 82.
(2) 3 Ex. C.R. 251.
(3) 2 Ex. C. R. 333.
(4) 119, 120 and 121.
(5) L.R. 2 Sc. App. 78.
(6) L.R. 4 H.L. 171.

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Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT.—I think that in this case the suppliant cannot succeed. In principle I do not see any difference between *Martin's* case (*supra*) and this. If, prior to 1887, the suppliant's only remedy was, as probably it was, by a proceeding before the Official Arbitrators, then he is out of court; because his claim was not made in the time prescribed by the provisions of the statutes regulating such proceedings.

If, however, it were thought that he might, prior to 1887, have proceeded by petition of right, then it is clear that the claim is barred by the statutes of limitations. *Martin's* case (*supra*) must, I think, be taken to establish this proposition at least, that this court has not, under *The Exchequer Court Act*, 1887, jurisdiction to give relief in respect of any claim which, prior to the passing of that Act, was not cognizable in the court, and which at the time of the passing of the Act was barred by the statutes of limitations.

The judgment is, that the suppliant is not entitled to the relief which he seeks, or to any part of it, and the petition is dismissed with costs.

Judgment accordingly.

Solicitor for suppliant: *T. J. Wallace.*

Solicitor for respondent *R. L. Borden.*