place of the accident was not within the limits of the lands mentioned in sec. 3, but upon lands which became vested in the defendants by force of the provisions of sec. 4, and upon a public way reserved thereout by s-s. 5. The fence had been built before, and was existing at the time the park was vested in the defendants. The plaintiff was in the park either under sec. 10, providing that the grounds shall be open to the public, or in the enjoyment of the public way provided by sec. 4.

Held, that, in the absence of any statutory provision expressly or impliedly casting upon the defendants the duty of keeping the public way in repair or the obligation to maintain a fence or railing upon the edge of the cliff, no such duty or obligation towards the plaintiff existed.

Whether the defendants were to be regarded as servants of the Crown or not, no action lay against them for not keeping the fence in repair. If it were viewed as a protection for the travelling public in the use of the public way, the absence or insufficiency of which might, in the case of a municipal corporation, render it liable as for a default in discharging its statutory duty to keep its highways in repair, the defendants were not liable ; for the condition of the fence was not due to misfeasance, but to nonfeasance, the unauthorized act of the railway company not being chargeable to the defendants as an act of misfeasance on their part.

Gibson v. *Mayor of Preston*, L. R. 5 Q.B. 218 ; *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400 ; *Cowley* v. *Newmarket Local Board*, (1892) A.C. 345 ; *Municipality of Pictou* v. *Gildert*, (1893) A. C. 524 ; *Sydney* v. *Bourke*, (1895) A.C. 433, followed.

If, on the other hand, the defendants' liability was based upon the allegation of a duty to maintain the fence for the protection of those resorting to the park, the plaintiff's case also failed ; for no charge was made for the privileges which she enjoyed, and she occupied at most the position of a bare licensee, as to whom there would be no duty in respect of a bare defect of construction or repair which the defendants were only negligent in not finding out or anticipating the consequences of.

Southcote v. *Stanley*, 1 H. & N. 247 ; *Ivay* v. *Hedges*, 9 Q.B.D. 80 ; *Schmidt* v. *Town of Berlin*, 26 O. R. 54 ; and *Moore* v. *City of Toronto*, ib. 59 n., followed.

Held, also, having regard to the various provisions of the Act of 1887, that the defendants were intended to act in the discharge of their duties thereunder "as an emanation from the Crown," or that it was intended to make the government the principal and the commissioners merely a body through which its administration might be conveniently carried on. There was no negligence on the part of the commissioners, but the negligence was that of the subordinate officers, who had been appointed under the provisions of the Act, and the effect of a recovery would be to charge the property of the Crown vested in the defendants with damages and costs for a wrong committed by a servant of the Crown, for which the Crown was not by the law of this Province liable.

Mersey Docks Co. v. *Gibbs*, L.R. 1 H. L. 93 ; *The Queen* v. *Williams*, 9 App. Cas. 418 ; and *Gilbert* v. *Corporation of Trinity House*, 17 Q.B.D. 795, distinguished.