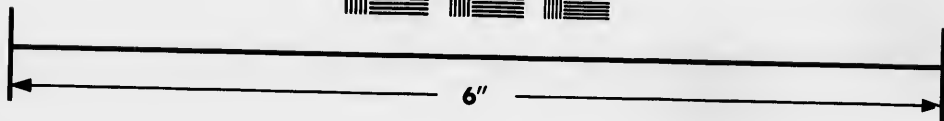
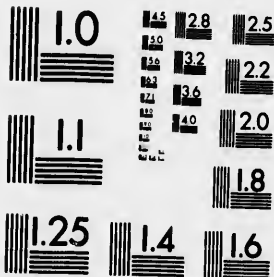


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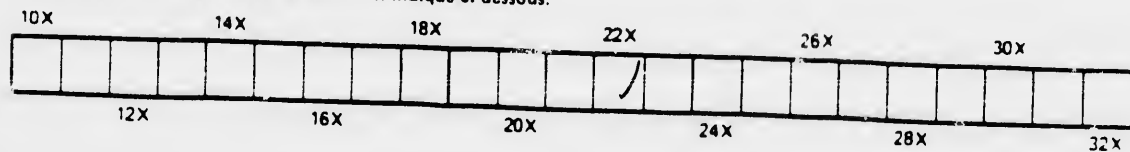
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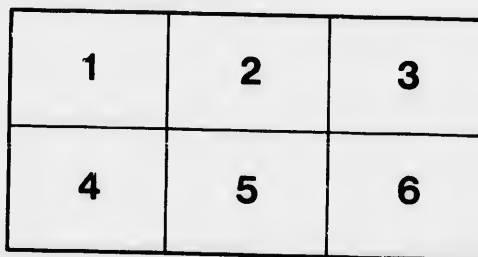
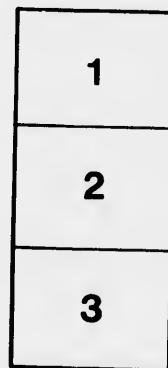
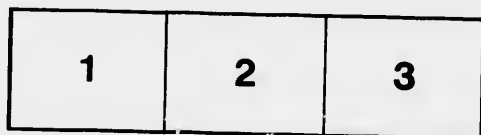
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FOR THE

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BOARD OF ORDNANCE ;

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Showing the Issue of several Lawsuits instituted
against Lieutenant Colonel By, Commanding
Royal Engineer, Rideau Canal,
in a Letter to that
Officer,

BY

JOS. N. HAGERMAN, ESQ.

BARRISTER AT LAW,

AND

SOLICITOR TO THE ORDNANCE DEPARTMENT, FOR THE RIDEAU CANAL SERVICE



PRINTED AT THE PATRIOT OFFICE

KINGSTON, 1932.

*One sent by Charles. Friedl
to the office of H. S. Friedl.*

1851-52

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ADVERTISEMENT.

In publishing the details, of the issue of several law suits, which have been brought against Lieut. Col. John By, commanding Royal Engineers, Rideau Canal, I am aware that it may be thought necessary I should explain the motives which have induced me, to obtrude upon the notice of the public, the following report:—It may be said that the result of these trials is a private matter between the parties concerned, in which the public are not particularly interested; this however is not the case, the authority, under which Col. By. acted, was conveyed to him by a Public act, of the Provincial Legislature, and the questions now settled intimately concern every individual holding lands on the Banks of the Canal, and as matter of public notoriety, cannot be considered devoid of interest, by any who have the improvement and prosperity, of the Province at heart.

The Rideau Canal, is a work of great magnitude, and ever since its commencement, in the autumn of 1826, the public mind, has been attentively directed to it, and during its progress, towards completion, it has been viewed with exceeding interest. It may now be considered complete:—the work remaining to be done, being so very trifling, that no doubt can possibly be entertained, of its being ready by the opening of the navigation, in the spring, for the free passage, of Steam floats, from one end of the line to the other. An ill constructed, and unwieldy boat, drawing four feet water, when unloaded, has already plied upon it, from Bytown, to Merricks Mills, a distance of about fifty miles; a sure pledge to the Public, of the fitness of the Canal, for steam navigation. The excellence of the workmanship, and the superior construction of the locks, and dams, require no praise; they speak for themselves, and are the subject, of universal admiration, and in the opinion of those, most competent to judge, of such works, exceed any thing, of the kind, in any part of the world.

Although experience, has long since exploded the idea of using the beds of Rivers, for the purposes of internal navigation, where a Canal may be constructed, yet the Rideau Canal, presents an instance, the first experiment of the kind, ever tried, in direct opposition, to this long established maxim, among Engineers, where the whole line of the canal, is composed entirely of the Beds of Rivers, and Lakes the only cutting, or more properly speaking, Canal making being at those places, where a Fall, or a Rapid, had to be surmounted, or one Lake, connected with another. The reason of the preference of Canal navigation, to that of the Beds of Rivers, is quite obvious, from the simple fact, that the expence of the labor in navigating a River, is far more than that necessary to be employed in working a Canal, to say nothing of the risks, and losses to which river craft are liable. In the navigation of Rivers, reliance must be placed solely upon the labor of men, while on Canals, the force employed, is generally that of horses. In this country, the labor of men, is dearer, and the subsistence of horses, is cheaper than in Europe, and therefore the reasoning on the subject, applies with greater force in this country, than it does in Europe, where the expence, attending the employment of men is much more moderate than here. Hence, as a Canal is intended for boats, towed by horses, the construction of a towing path along the Banks of a river, even supposing the river capable of being made into a canal, is of itself attended with great difficulty, and even, were other things favourable, it has always been found preferable to make a Canal along the bank of a River, to using the bed of it for purposes of navigation. But the Rideau Canal is a navigation intended for Steam Boats, where, of course, no towing path is necessary, and in the construction of it Col. By, guided by the dictates of sound experience, has adapted the work as closely as possible to the nature of the country, through which it passes. Upper Canada, consists entirely of a succession of table lands, and all the rivers, and streams, that intersect the country, have one uniform character, that of being composed of a continuity of sheets of still water, with a rapid, or fall, at those places, where the stream passes from one level to another. The commanding genius of Col. By, has enabled him to avail himself effectually, of this general feature, of the face of the country, and his great practical experience, as an Engineer, has suggested to him the readiest means of perfecting his object.

In a publication like the present, it cannot be expected, neither would space permit, that I should enlarge on the advantageous prospects thus unfolded to the Province. Suffice it to say, that by this Canal, benefits inestimable, must be secured to the Canadas. Whether beheld, in a commercial, or military point of view, its importance is incalculable. It is a fact, perhaps not generally known, that during the late war, the transport of Naval and Military Stores, and goods of all exceeded their original value, to say nothing of the danger, and risk, attendant on the navigation of the St. Lawrence, in consequence of the numerous, and dangerous rapids, that occur on that river between Montreal and Kingston, and which too, were the cause, of grievous delays in the transport of stores. The evils heretofore existing in this respect, will be obviated by the Rideau Canal, and the entire passage through its line, from Montreal to Kingston by the way of the Grenville, and Lachine Canals, performed in eight and forty hours.

While this work stands, a splendid instance of the munificence, of our paternal Government, and an imperishable monument of its fostering care, it will transmit to posterity with distinguished honor, the name of Col. By, with whom, the idea of the work, first originated, and who by a fortunate concurrence of circumstances, was destined to superintend, its construction.

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Rideau Canal 3d of December, 1831.

SIR,

I have the honor to lay before you for the information of the Master General, and the Rt. Hon. and Honorable, the Board of Ordnance, a report of the issue of certain actions, brought against you, as Commanding Royal Engineer, on the Rideau Canal, by individuals, through whose property the canal passes; for alleged trespasses, committed by you, and for the recovery of damages, said to be sustained by them, from your appropriating certain lands, to the use of the Canal under, and by virtue of an act of the Provincial Legislature, passed on the 7th, February, 1827.

Before entering into particulars, it is proper that I should say a few words, on the spirit, and meaning of the act, above alluded to, and explain its provisions, with reference to the actions, here-in after to be detailed. This act was passed expressly for the purpose of protecting such Officer, as the British Government might choose to honor with the superintendence of the work, in the unmolested discharge of his duty. The first question is, what are the powers with which the Statute, above quoted, invests the Commanding Engineer? and the next, how far, and in what instances, he can be deemed personally liable? As I transmit herewith, an authentic copy of the Statute, it will be now unnecessary, for me to quote more from it, than may require immediate observation. In the Preamble, it is stated that, "Whereas, his Majesty has been pleased to direct measures to be immediately taken, under the superintendence of the proper military department, for constructing a Canal, uniting the waters, of Lake Ontario, with the River Ottawa, and affording a convenient navigation for the transport, of Naval, and Military stores: and whereas such a Canal, when completed will tend most essentially to the security of this Province, by facilitating measures for its defence, and will also, greatly promote its agricultural, and Commercial interests; and it is therefore, expedient to provide, by law every necessary facility, towards the prosecution of so desirable a work." It is therefore enacted, "that the officer employed by his Majesty to superintend the said work, shall have full power and authority to explore the country lying between Lake Ontario, or the waters leading therefrom, and the River Ottawa, and to enter into, and upon, the lands, or grounds, of, or belonging to, any person or persons, bodies politic, or corporate, and to survey, and take levels of the same, or any part thereof,

and set out, and ascertain such parts thereof, as he shall think necessary, and proper, for making said Canal, Locks, Aqueducts, Tunnels, and all such other improvements, matters, and conveniences, as he shall think proper, and necessary, for making, effecting, preserving, improving, completing, and using in the said navigation; and also, to bore, dig, cut, trench, remove, take, carry away, and lay earth, soil, clay, stone, rubbish trees, roots of trees, beds of gravel, or sand, or any other, matter, or thing which may be dug, or got in the making, said Canal, Locks, Tunnels, aqueducts, or other improvements, or out of any lands or grounds, of any person or persons, adjoining or lying contiguous thereto, and which may be necessary for constructing, or repairing the said Canal, or other the said works, or improvements, or which may obstruct the making, or maintaining the same; and also, to make, build, erect, and set up, in and upon the said Canal, or upon the lands adjoining or near to the same, such and so many bridges, Tunnels, aqueducts, sluices, locks, weirs, pens for water, Tanks, Reservoirs, Drains, Quays, Wharves, Landing places, and other Works, Ways, Roads, and Conveniences, as the Officer aforesaid, shall think requisite, and convenient for the purposes of the Navigation; and also, from time, to time to alter the route of the said Canal, and to amend, repair, widen, or enlarge the same, or any other of the conveniences, above mentioned, as well for carrying or conveying goods, commodities, timber, and other things, to and from the said Canal, as for the carrying or conveying, of all manner of materials necessary for making, erecting, finishing, altering, repairing, amending, widening, or enlarging the works of, and belonging to, the said Navigation; and also, place, lay, work, and manufacture the said materials, on the grounds near to the place or places, where the said works or any of them are, or shall be intended to be made, erected, repaired, or done, & to build & construct, the several locks, bridges, works, & erections, belonging thereto; and also, to make, maintain repair, and alter any fences, or passages over, under or through the said Canal, or the Reservoirs and Tunnels, Aqueducts, Passages, Gutters, Water Courses, and Sluices, respectively, which shall communicate therewith; and also, to make, set up, and appoint, Drawing Boats, Barges, Vessels, or Rafts, passing in, through, along, or upon the said Canal, as the Officer aforesaid, shall think convenient, and to construct, erect, and keep in repair, any Piers, Arches, or other works, in, upon, and across any Rivers, or Brooks, for making using, maintaining, and repairing the said Canal, and the Towing Paths on the sides thereof; and also, to construct, make, and do, all other matters and things which he shall think necessary, and convenient, for the making, effecting, preserving improving, completing, and using the said Canal, in pursuance and within the true meaning, of this Act, doing as little damage as may be, in the execution of the several powers to him, hereby granted."

The act goes on, (in the second section,) to empower the Officer, above mentioned "to contract, compound, compromise, and agree with all bodies politic, communities, corporations, aggregate; or sole, guardians, and all other persons, for themselves or as trustees, not only for, and on behalf, of themselves, their heirs and successors, but

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also for and on behalf of those whom they represent." For the absolute surrender to His Majesty, his heirs and successors, of so much of the said land, as shall be required, or for the damages which he, she or they may reasonably claim, in consequence of the said Canal &c. being cut and constructed, in and upon his, her, or their respective lands, and that all such contracts, &c. shall be valid, and effectual, in law, to all intents, and purposes whatever."

The 3d. section provides that, "such parts or portions, of land, or lands, covered with water, as may be so ascertained, and set out by the Officer employed by His Majesty, as necessary to be occupied for the purposes of the said Canal, shall be forever thereafter vested in His Majesty, his heirs and successors."

The sixteenth section. I extract entire. It is as follows. "And whereas it may hereafter happen from floods, or from unexpected accidents that weirs, flood-gates, dams, banks, reservoirs, trenches, or other works of the said navigation, may be damaged or destroyed, and the adjacent lands or the property thereon thereby damaged, and that it may be necessary that the same should be immediately repaired or rebuilt, to prevent further damages, Be it further enacted by the authority aforesaid, That when, and so often as any such case may happen, it shall be lawful for any person, or persons employed by his Majesty, from time to time, without any delay, or interruption from any person, or persons, whomsoever, to enter into any lands, grounds, or hereditaments, adjoining or near to the said Canal, or branches, reservoirs, or trenches, or any of them (not being an orchard garden or yard) and to dig for, work, get and carry away, and use all such stones, gravel, and other materials, as may be necessary or proper, for the purposes aforesaid, without any previous treaty whatsoever, with the owner or owners, occupier or occupiers of, or other person or persons, interested in such lands, grounds, or hereditaments or any of them, doing as little damage thereby as the nature of the case will admit of, and making recompense for such damages to the owner, or owners of, or other persons interested in such lands, grounds property or hereditaments within the space of six Calendar months, next after the same shall have been demanded, for all damages, which shall or may be done by means of such accident, and means of the digging for, getting, working, taking, carrying away, and using such stones, gravel, and materials or any of them, which damages, and the satisfaction, and recompence, in respect thereof shall be settled, adjusted, ascertained and determined, by the ways and means, hereinbefore described, with respect to the other damage done by the making and completing the said navigation."

The above extracts from the statute are all that I think necessary to be quoted in this place. To a cursory reader of the statute, it may seem a defect, that it is silent in regard to the manner in which the lands required for the Canal, are to be taken possession of; the legal process in the case of one person dispossessing another, being necessarily tedious; but it will be seen, that the first section declares that the work is to be undertaken, by the proper military department, and

as it recognises the right of his Majesty to direct such measures, to be taken for the erection and completion of the work, as he may deem proper, it is accordingly understood, that the commanding officer shall take possession of the lands required, and issue his orders agreeably to the practice usually followed, and authorised by the Department to which he belongs. The process of dispossessing a person, in case of any individual refusing to allow the officer to take peaceable possession of the land required for the Canal, being thus necessarily tedious, and likely to be productive of very serious consequences, by retarding the prosecution of the work, and accumulating expense to one or other of the parties, the Act is silent on the subject, and it therefore leaves the officer in command, at liberty to use his discretion in possessing himself of the lands required.

From these extracts it will be seen that the Act is exceedingly comprehensive in its provisions, and decisive in the powers with which it invests the commanding Officer. In regard to the quantity of land, it authorises the commanding Officer to take for the purposes of the canal, it will be seen, that he is empowered to take as much as he may think proper and sufficient for "making, maintaining, and using the said Canal;" Now, here are three things which require consideration, and which must guide the Officer commanding, in the exercise of his judgment in appropriating lands for the service of the canal, under the act; with regard to making the Canal, the officer is empowered to "ascertain and set out" such lands or grounds, as he may think "necessary and proper, for making the said Canal," and in doing so he has of course in view what is absolutely necessary and proper for using it; and on this head, the act is, sufficiently explicit and its provisions ample,* and any lands or grounds that he may thus deem necessary for the purposes above mentioned, it empowers him to enter upon and possess, without delay, doing as little damage as may be, in the execution of the powers committed to him.

In regard to maintaining the Canal, it will be necessary to be a little more particular, as it rests in the discretion and judgment of the Commanding Officer to say, how much land is required for this purpose, in addition to what may be absolutely necessary for the mere bed of the Canal. It must be evident to all, that the Act contemplates the defence of the Canal, in case of war, from the incursions of an enemy, as well as the maintaining of it, at all times, in a state of effective operation from all accidents, that may happen from natural causes, or injuries that might be done to it from ill disposed or malicious persons. The only question is, how far can the Officer go in the execution of this part of his duty? the act itself imposes on him no restraint, or check whatever; but it must be understood, that a power of controlling him in this respect, must rest somewhere; otherwise, the Officer in command, might dispossess every person of his land, on each side of the Canal to an unlimited extent, and that too, upon his mere *ipse dixit* that it was required for the Canal. Here it appears that great,

* Vide Appendix.

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confidence is reposed in the tribunals of the country, and that the decision of the commanding Officer, must be borne out by the opinions of scientific, and experienced men; otherwise, the act, most assuredly, will not protect him. Any man who thinks himself aggrieved by another, may appeal to the proper tribunal for redress, and if the commanding officer, as agent for government, has overstepped his authority, or committed a wanton injury upon the property of any individual, and this can be proved against him, he is of course liable to suffer, and the Government may bear him out, or not, as it may think proper.

There is thus, a considerable latitude in the construction of the Act, and much scope for difference of opinion, in regard to the quantity of land, that may be thought necessary for this purpose. It will be recollected that, the Rideau Canal, is properly speaking, a navigation intended to be used by Steamboats, and other large craft differing very materially from other Canals, as they are usually constructed:—its whole line, consists of the beds of Rivers, and Lakes, the only cutting, being at those places, where it is necessary to surmount a rapid, or a fall of water, or to unite one Lake with another. There is thus formed a connected succession of sheets of still water, extending over a tract of Country for a distance of one hundred and fifty miles. Now the Rivers, and Lakes forming the Canal, being at many places of very great breadth, it will be readily seen that in making the appropriation of land, FOR MAINTAINING the Canal, as well as that required for the mere making and using it, the quantity so set out, and retained as necessary, must in the first place, be sufficient to prevent any person, from obstructing the navigation, or otherwise injuring the works, by throwing out wharves or other buildings, in the vicinity of the works, or on any part of the line, which might in any way impede the navigation, or otherwise obstruct the free passage of boats; and in the next place, in case of a war, regard must be had to the points, where an attack might be likely to be made by an enemy, and thus sufficient ground ought to be set apart, for erecting the defensive works, and establishing the depots, necessary to the protection of so vast, so costly, and so indispensable a structure. These objects would of course occupy the serious consideration of the Commanding Officer, and uniformly direct him in his duty. Liberal, as are the provisions of the act, and comprehensive, as are the powers it conveys to the Officer in command, it is not so framed, as to protect him from the vexatious and harrassing law suits, of litigious individuals. The legal tribunals of the Country being open to every man, any individual, may demand restitution, from another, who he may think has injured him or trespassed upon his rights. Attempts have been made to make the Commanding Officer personally liable in a great many instances; how far he may thus become personally responsible I shall now proceed to show.—

It is evident that the land necessary to be occupied for making the Canal, maintaining it and using it when completed may be taken possession of by the Commanding Engineer, immediately upon his deci-

sion, that such lands are required for the service; without waiting its completion, or even the result of the process of arbitration, or any other mode of adjustment, pointed out by the Act—this is absolutely necessary for the execution of the work, and the prevention of speculation, or frauds on the part of individuals, who, if so disposed might erect buildings, or incur other expences on his property, for all of which he might demand damages from Government, and perhaps oblige it to pay for pretended improvements at a most exorbitant rate, which not only it did not want, but which is more than likely would be a hinderance, and heavy cost to remove. To prevent any inconvenience or imposition of this kind, the Officer Commanding is empowered by the Act to enter upon, and take possession without delay of the premises, necessary to be occupied for the service. Now, as the powers, with which he is invested, are necessarily indefinite, it is certainly possible, but surely not very probable, that the Commanding Officer in the execution of this part of his duty, may commit an act of wanton injury, on the property of an individual, or may be guilty of an act of indiscretion, or an error in judgement, in thus appropriating lands under the authority of the Act. If a person, thus dispossessed of his property, and claiming damages shall think that more land has been taken from him than the necessity of the case seems to warrant, and that he is thus aggrieved, he may make his claim for redress, by action, and submit his case to the proper legal tribunal, and of course recover damages, provided, he can substantiate his claim.—Here a very important question arises. When the Commanding Officer has ascertained and set out any land, for the purposes specified in the Act, and the proprietor thinks he has been deprived of his property unnecessarily, and brings an action for trespass, against the Officer Commanding with a view to recover damages, who is to decide, on the merits of the case, & to pronounce, that, to be unnecessary which the Commanding Officer declares to be necessary? It would appear, altogether repugnant to the act, and entirely subversive of its intent, could it be imagined, that the judgment of the Commanding Officer, the proper and responsible agent of the Government, were liable to be set at nought, by the verdict of unskilful, irresponsible, & by more than possibility, interested men. In an appeal to a Court of Justice in any case that might arise from a difference of opinion in the construction of the Act, the Commanding Officer, in all such cases the defendant, must proceed to prove, that the act committed by him, was necessary, or convenient in the prosecution of his duty, that the land so appropriated was required for some one purpose specified in the Act, by the evidence of competent judges, men of science and experience in the construction of such works, and their testimony bearing him out, ought, and would, be considered conclusive in his favour. The jury of course ought not, nor do I imagine that they would be suffered, nicely to weigh the necessity of the appropriation. The extent of their power should be to determine whether, in the opinion of those best qualified from their scientific knowledge and perfect disinterestedness, the land in question was requisite for some one of the purposes specified in the Act; and if they are satisfied of this, it is quite sufficient

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to warrant them in giving a verdict for the defendant. If a jury how-
 ever should disregard the Act, and obstinately persist in finding a ver-
 dict for the Plaintiff, while the Commanding Officer was decidedly of
 opinion, and that, opinion corroborated by sufficient evidence, that the
 land in dispute was required for the service, the remedy in this case
 would be the obtaining of a new trial, or perhaps of several new trials,
 till a verdict should be awarded consistent with law. But it is not
 likely that a case so entirely doubtful in its circumstances should occur;
 if it did, however, and the Court should feel it necessary eventually to
 bend to a succession of verdicts against the defendant, or if it should
 decide in a manner inconsistent with the spirit and meaning of the
 Act, then, the Commanding Officer as an individual must submit, but
 it is presumed that the Government would indemnify him, unless they
 altogether disapproved, and condemned his conduct in the particular
 instance. It must be confessed, that evidence in a case of this kind, is
 in its nature doubtful; even professional men of the highest respect-
 ability, may form different opinions on the same grounds; but
 in all cases the evidence of men of acknowledged profes-
 sional talent, aided by sound common sense could not be disputed.
 It is therefore apparent that the Officer Commanding, in the execution
 of the powers committed to him, must use a sound discretion, in order
 to prevent the subject from being unnecessarily deprived of his prop-
 erty. It is the duty, of the Courts, to maintain justice, by at once
 protecting individual rights, and upholding the legal powers conveyed
 by the Statute. Thus, it is evident that the Act, does not protect the
 Officer in charge, by preventing individuals from bringing actions
 against him; the protection afforded, is by guarding him against the
 consequences of such actions as may be brought for any thing done by
 him in discharge of his duty. He is unavoidably exposed to attempts
 to make him personally liable, and such attempts, it is natural to sup-
 pose would be made, by the litigious, and they have been made. It is
 perfectly clear, that when any such action shall be brought against him
 for any thing, which the Act authorizes, it must totally fail. The
 Plaintiff loses his suit, and the Officer is subjected to no farther inju-
 ry, than by being obliged to defend a groundless charge, which is a
 vexation every man, is liable to suffer from persons who are so impru-
 dent or litigious as to urge illegal and hopeless demands. A verdict
 in his favor, entitles him to be reimbursed his cost by the Plaintiff,
 and if the Bill of cost, when taxed, will not reimburse him, or the
 means of the Plaintiff prove insufficient, he of course, must look to
 the Government, who assuredly will indemnify him. Still further to
 prevent vexatious litigation, the Act most explicitly provides, that in
 the first place (section second) an amicable arrangement between the
 parties, or their legally authorized agents may be made, and if both
 parties that is, the Officer Commanding, and the proprietor of the land,
 shall be satisfied, then there is an end of the matter; but if that shall
 not have been done, then the matter is to be decided by arbitration, in
 the manner pointed out by the sixth section of the said Act. If again
 the party claiming damages refuses to abide by such arbitration, then
 the question is to be determined by the decision of a special jury, sum-

done, and conducted in the manner prescribed by the sixth, seventh, and eighth sections, which decision is intended to be final and binding upon both parties. The party refusing to abide by the award of the arbitrators, paying the expences of summoning such jury,—which expences are fixed by the tenth section. Here it will be recollected that no allusion is made to a Court of Justice, the summoning of the jury, and all matters relative thereto, being committed to the management of the Sheriff of the District in which the case in dispute may occur, or his Deputy. The only appeal therefore, to a Court of Justice, must be in the case where more Land may be supposed to have been taken, than may seem absolutely necessary. If the Commanding Officer, in the appropriation of lands for the service, act wilfully wrong, the consequences must assuredly fall upon himself; but while his acts, testify to the faithful discharge of his duty, he certainly has a right to expect protection, not only from the Statute itself, but also, from the Government.

By the Third Section the land so set-apart, and ascertained to be necessary for the purposes of the Canal shall be forever thereafter vested in his Majesty, his heirs, and successors. It is therefore the plain meaning, and intention of the Act, that any person, whether the original proprietor, or not, hindering the Commanding Officer in the execution of his duty, by refusing him admittance upon his premises, or otherwise preventing him taking possession of the property, may subject himself to an action, instituted against him by the Commanding Officer, as Agent for Government, in the same manner as if he were the original proprietor of the land in question, and the individual had trespassed upon his property.

I have thus endeavoured to explain the provisions of the Act, and the powers with which it invests the Commanding Officer, and it will be seen that he can take as much land, as he may judge necessary for making, maintaining, and using the Canal, but in case his decision may be disputed, he must be prepared to show, upon scientific principles that he has exercised a sound judgement and discretion in the appropriation, which must be corroborated by the evidence of men of talent, and experience in the construction of such works, otherwise he cannot expect that the Act will bear him out.—

Hitherto I have only spoken of the land that may be required for making maintaining & using the Canal. As a doubt has been raised whether the Commanding Officer, under the authority of the Act, can dig stone, or gravel, or cut timber, and carry away any materials, which may be necessary for the purposes of the Canal, and which are required for the construction of any works connected with it, and which in any wise may be necessary for the completion and using of it, from any person's property, where he may find such material, without the consent of the owner of the property, upon which such materials are found. To decide this question it is only necessary to refer to the second clause of the Statute already quoted, where it is expressly enacted that the Officer in charge of the works, "may bore, dig, cut, and carry away materials" &c. &c. That clause is sufficiently explicit, to protect the Commanding Officer in appropriating any materials requir-

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ed for the service which might be found in the neighborhood of, and necessary to the said works. It has been supposed, and has even been urged by many, that such materials are private property, as much so, as any other private property, which is always a fair subject of competition in the market, and which must be bargained for in the usual way, and therefore, that supposing any materials required for the service could not be obtained, but at a distance from the scene of operations, upon lands that could not be proved to be necessary for any one purpose specified in the Act, that therefore the Commanding Officer must purchase such materials from the owners of them, in the same manner as he would purchase Cattle, or Horses, or hire men to work upon the Canal. Whatever color of Justice, may seem to have, such an opinion, it has no force in law. There can be nothing more explicit than the words of the Statute, and in fact, this provision evidently was expressly made, to prevent any hinderance in the construction of the works, by the delay that would necessarily be occasioned, by advertising and bargaining for the requisite materials. The Act, in the Sixteenth Section already quoted, positively provides, that AFTER the Canal shall have been completed, and the lands necessary for the service, set apart, and vested in the Crown, in case of any sudden breach, which may happen from floods, or any other unexpected accident, the Commanding Officer may, without delay, or interruption, of any kind, enter into any land, or ground, and get, and carry away, all such materials, as may be necessary, and proper, for repairing the said breach, or damage, without any previous treaty whatever, with the owners of such lands, doing as little damage, as the nature of the case will admit. The propriety of a provision of this kind, will clearly appear, when it is considered, that the Canal passes through tracts of Country wholly uninhabited, and uncultivated, that the real proprietors were in most cases not known, and could not be ascertained without considerable delay, trouble, and expence, and when ascertained, perhaps found to be resident in some remote part of the Province, or even in a foreign land. Such delay would afford ample room, for such speculations, and impositions, as might in fact, utterly prevent the execution of the work. I here allude only to materials found upon lands at a distance from the works, beyond the boundaries of the land, considered necessary by the Commanding Officer for making the Canal.

It cannot for a moment be supposed, that the Commanding Officer was at liberty to take such materials without paying for them, but when it can be clearly shown, that in appropriating such materials he had been actuated by no other motive than a strict regard to the faithful execution of his duty; that such materials were necessary for the service; that they were the nearest, & most convenient known, that could be obtained, and that he was willing to pay for them at a fair valuation; no jury of the Country could be found, who would subject him to the payment of damages, to litigious individuals, who might be so ill disposed as to advance illegal and unjustifiable claims. Such are the facts respecting the provisions of the Rideau Canal Act. That they have been correctly viewed the result of the actions brought against the Commanding Officer clearly prove, and as these trials have demon-

strated, that Col. By, has in the whole course of his proceedings been governed by a sound discretion, it cannot fail to be gratifying to the discerning and generous public, to learn, that he has succeeded in defeating every action. The first of which was as follows :—

In the Kings Bench, Trinity Term Second,

WILLIAM IV.

Nicholas Sparks Plaintiff

vs

Leut. Col. By, Defendant

This was an action of trespass, instituted against the Defendant, to recover damages, for his having entered upon,

and taken possession of a certain quantity of ground, the property of the Plaintiff, for the service of the Rideau Canal, by virtue of and under the authority of the Provincial Statute above quoted. The land in dispute, was taken possession of by the Defendant, on the part of the Crown for the Rideau Service, and was marked out immediately, by monuments, and land marks, and a plan thereof, made, and sent to Mr. Sparks, with a written notice, that it had been taken possession of by Col. By for the service of the Government. Part of the land so taken was cleared, and fenced, and part sown with grass seed. The Plaintiff in this case, complained, that more land had been taken than was necessary for the purposes of the Canal, or that could be proved to be required for the said purposes, under the authority of the Act already quoted; and therefore, prosecuted for the restitution of his property, or the payment for it, at the price per acre at which he had disposed of lots of ground adjoining the same premises. The argument used on the side of the Plaintiff, was, that the quantity of ground (upwards of one hundred acres) was exorbitantly great, and could not be proved to the satisfaction of the Court, and jury, to be necessary for any one of the purposes specified in the Act, and as collateral proof of this, it was shown that a portion of the land thus taken, had been appropriated to a burial ground, while a part had been sown with oats: he therefore endeavored to recover by law, damages to the amount of £10,000, which he declared he had sustained, being prohibited from selling the ground taken by Government. On the other hand, it was proved to the satisfaction of the Court, and jury, chiefly by Col. Durnford Commanding Royal Engineer in Canada, that part of the land in question was necessary for making a basin, or reservoir, to supply the eight Locks at Bytown, and that the remaining part was required for the erection of works for their defence, and this opinion was formed in conjunction with that of Sir. James Kempt, who was then President of a Board of Officers, appointed to fix the route of the Canal, after it had been laid out and surveyed by the Commanding Engineer, and who had given his certified opinion, that the land in question was necessary, which was proved by Col. Durnford upon this trial. The evidence of Col. Durnford was confirmed by other professional men of acknowledged talent and experience in their profession. It was further proved to the Court, that the circumstances of a burial ground having been formed there, was purely accidental, originating in the death of a child

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of one of the overseers of works, and as the place was a complete wilderness at the time, the father of the child, asked Col. By, where it might be buried, the reply was, in any convenient place; no particular spot having as yet been appropriated for such a purpose, by any religious denomination. The spot alluded to, was pitched upon & recommended by the Clerk of works; others were buried there afterwards, and Col. By, out of humane consideration to the relatives of the deceased, ordered the place to be fenced. It was also proved that the earth excavated from the Basin must in all probability, of necessity, be thrown upon the graves in the same manner as it would have been upon the same ground, had it not been temporarily so appropriated. In regard to sowing the ground with oats, no argument one way or other could be made out; the ground when once set out for the service, becomes *IPSO FACTO*, vested in the Crown, and Col. By, as the Officer and Agent of Government, could not be supposed to ask Mr. Sparks's opinion, what was to be done with it. The person who was allowed to take a crop of oats off it, was bound to lay it down in grass, in which state, it is at present. It was further proved, that Mr. Sparks, originally gave, only eighty five pounds, for the whole of the two hundred acres, the year before the Canal was commenced; and, that by the Canal passing through his property, its value had been enhanced more than ten fold, as it was shown in evidence, that he had sold, and is still selling lots from the residue left in his possession, of one third of an acre, for more than the original price paid by him for the 200 acres.

The Chief Justice, the presiding Judge upon this Trial, charged the Jury to the following effect: that it was clear that the Rideau Canal Act, invested the Officer intrusted with the erection of this great work, with authority to occupy such lands, as in his judgment were necessary for the purpose. Without such power, it was quite obvious, that the duties which devolved upon him, could not be performed, and it was fair to put such a construction upon the Act, as to allow Col. By, every reasonable latitude, in providing against difficulties, that might occur from not occupying in the first instance a sufficient quantity of ground: that in the case before the Court, when witnesses of professional character, and high standing in society, were of opinion, that the land was necessary for the purposes of the Canal, it was reasonable to presume, that Col. By took possession of the land, in the exercise of that discretionary power, with which he was invested, that if he had not exercised reasonable foresight, he would undoubtedly have proved himself totally unworthy of the confidence the Government had placed in him: that the Act, expressly states, for the transport of Naval and military stores, to facilitate the defence of the Province, and to promote its agricultural and commercial interests. That if Sparks, had benefited so much by the Canal, he cannot have suffered injury; and, that, if after Col. By's plan had been submitted to, and acquiesced in, by Government, it were to allow him to become a sufferer, it would be a breach of faith, and no Jury could give a verdict, in opposition to the plain meaning of an Act of the Legislature. The Jury being thus charged, and the evidence summed up, they retired for a few minutes, and

returned a verdict for the defendant, which at once fully justified the conduct of Col. By. It cannot be supposed for a moment, that Col. By had a wish to injure Sparks, or that Sparks, originally, had any design of throwing obstacles in the way of Col. By; for in 1826 he voluntarily offered as much land as might be necessary for the bed of the Canal, without any expectation or wish for remuneration.— This appeared from an authentic copy of a document produced in Court. Col. By's opinion of Sparks was, that he had been uniformly civil and willing to assist the work in every way that lay in his power, but that the rapid increase of his property in value, in consequence of the Rideau Canal, passing through it, had made him exorbitant in his demands, so much so, as totally to put it out of the power of Col. By to come to any amicable arrangement with him, and he surely was preposterously so, when it was proved, that he had only paid £85 originally for the whole premises & now demanded a remuneration for what had been appropriated by Government (100 acres) at the rate of £600 per acre! By the issue of this trial he has incurred a very heavy expence for law proceedings, and is obliged to submit to the mode of adjustment pointed out by the Act, which Col. By had repeatedly offered to him and recommended him to avail himself of—but which he as repeatedly refused, and declared that he would come to no arrangement, unless the Government paid him at the exorbitant rate above mentioned. In reviewing the circumstances of this action, one is forced to regret, that persons should ever be found, so over-reaching, litigious, and imprudent, as to advance claims, the issue of which is always doubtful, and in most cases altogether hopeless, as instanced by the result of this.

I have first detailed the above case, because it is the most simple which has occurred, and contains the most clear, and explicit decision of the Court, on the subject of the powers vested in the Commanding Engineer, by the Act, in regard to his appropriation of lands for the service of the Rideau Canal. The case which follows, is more complicated, because the Plaintiff, in addition to his being the possessor of the land, was also, a Contractor, entrusted with the execution of the works at Smith's Falls. He failed in the performance of his contract, which was subsequently let to another individual; and this case further involves the question, of the right of the Commanding Officer, to the appropriation of materials necessary for the service, which may be found, or obtained from lands lying contiguous to, or at a distance from the works, and also as to his right to remove houses or any other matter or thing, which he may find an obstacle in the way, of the proper completion of the Canal

In the Kings Bench, Trinity Term,
2nd., WILLIAM IV.

James Simpson, Plaintiff,

vs

Lieut. H. Pooley, & J. Shaw, }
Defendants,

who were acting in obedience to the orders of their Commanding Offi- } This was an action brought to recover damages, for a trespass said to have been committed by the Defendants, who were acting in obedience to the orders of their Commanding Offi-

cer Lieut. Col. By, in entering upon the close of the Plaintiff, and marking out lands for the service of the Rideau Canal, and also, for taking materials for the construction of the said work from the land in dispute. It must be borne in mind, in the recital of this case, that the Plaintiff was one of the firm of Rykert, Simpson & Co. contractors on the Line of Canal, who failed in the fulfilment of their contract, which was again let out to other persons, agreeably to the provisions of a clause in the Contract most explicitly laid down. It is also proper to be remarked, that the Plaintiff, as one of the firm of Contractors, had worked a quarry, at a distance from the Canal, and which was situated on a lot of land the proprietor of which, was not known. This quarry supplied stone for the Locks, and other works, at Merrick's Mills, Edmond's Rapids, and Smith's Falls. The labour and expense attending the quarrying, and dressing of the stone, Simpson was paid for, while he was a Contractor, as appeared in evidence, on what was called progress measurement. The land was held in joint Tenancy by the Plaintiff, and formed part of the Rideau Canal, usually Known by the name of Smith's Falls. He prosecuted to recover damages for the land taken for the Rideau service; complaining, that it was of greater extent, than necessary for the purposes of the Canal, and attempted to prove the said appropriation, to be wholly unauthorized by the Act of the Legislature; and also, for the value of the materials taken from the said lands, which were used in the construction of the Canal. The declaration in this action, contains two counts, common in actions of trespass; the one for entering a certain house, and close, the property of the Plaintiff, and the second, for taking away stone, puddle and other materials for the service of the Canal.

In regard to the land required for Canal purposes, the evidence in this action, on the part of the Plaintiff was precisely the same, as that advanced in the previous case (and therefore need not be recapitulated.) The Plaintiff complaining, that it was too much, and that Government Stores had been built upon a part of it, which he insisted were not required for the service. In answer to this, it was given in evidence by Col. Durnford, and Col. By, that no more land had been taken by Government, than was positively necessary, for the proper completion and preservation of the Rideau Canal; and Col. Durnford particularly stated, in giving his evidence, that in his opinion, the quantity that they were now in possession of, was barely sufficient for the purposes of the Canal, and, that Lieut. Pooley, in marking out the said land by boundaries, had acted strictly in obedience to the orders he had received.

In respect to materials, it was proved, that in the article of Puddle, that which was appropriated to the service was obtained from land set apart for the service of the Canal, in conformity to the Act, and, that no puddle of so good quality, or so conveniently situated, could be obtained. And in regard to the stone obtained from the quarry, and dressed by Mr. Simpson, for the Locks at Smith's Falls, it was shown in evidence, that the quarry had been opened by the Government, and that the stone thus obtained, was bona fide the property of the Government; and that the Plaintiff had been paid for the quar-

rying and dressing of the said stone, by what is called progress measurement, as has been already stated; and it also clearly appeared at the trial, that Mr. Simpson's object, in transferring the said stone, to Mittleburger (his Clerk was to enable him, if possible to force the Government to pay twice over for the said stone; the circumstances attending which will be more amply detailed in the case which follows this, and to which this question more particularly refers.

It must be borne in mind in this case, that PREVIOUS to the failure of the Plaintiff in the performance of his contract, no difficulty of any kind whatever occurred, either in regard to land, or materials required; but that AFTER the contract had been let to other individuals, every obstacle was thrown in the way of the Government by the Plaintiff. The pickets marked with the broad arrow, placed by the Officer in charge, to designate the boundaries (and which the Statute requires) were torn up by the Plaintiff, and thrown into the water, almost immediately after they were put down by Lieutenant Pooley, the most of them in his presence; that the Plaintiff had used the most abusive language to the servants of the Government upon all occasions; and that both himself and his servants had carried this opposition so far, that they could not in some instances proceed properly in the execution of the work; that during a temporary cessation, of that particular description of work, which required puddle, he had fenced in the bank from which puddle had always been obtained; that the occupants of certain houses, built by said Plaintiff, when a Contractor, for the convenience of individuals in his employment, refused to leave them, after notices were duly served upon them so to do; in which perverse conduct Mr. Simpson encouraged them, and in fact requested them to hold possession against the servants of the Crown. The said houses, either standing in the way of the embankment, or in situations to be inevitably overflowed by the waters of the Canal, Mr. Simpson had been given, most explicitly to understand, would of necessity be required to be removed, as the works advanced, in which he had all along contently acquiesced. Under these circumstances the Houses and fence were removed. It appeared from all the evidence, that this action was brought from vexatious motives, and with a view of recovering exorbitant requital, for damages, done to lands, which comparatively speaking, were not worth any thing, two years prior to the works of the Ridean Canal going into operation.

The defence in this Action rested solely upon the Provincial statute, already quoted, and it necessarily went into general detail, because it not only involved the question as to the issue of the appropriation of land for Canal purposes, by the Commanding Officer, but also to that of materials necessary in the construction of the work. The Chief Justice charged the Jury at great length, clearly illustrated, the powers the Provincial Act conferred, upon the Com. Officer, and how far he was personally liable for abusing those powers. Stating, that so long as he could justify his conduct, as he had done upon this trial, the Jury were bound to protect him. The Jury retired for a few moments, and returned with a verdict for the Defendant, which plainly showed

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that the inhabitants of the Country, as well as the Court, acknowledged the sufficiency of the Act. The case which follows, arose solely out of the foregoing being predicated on the sale, or transfer of the stone quarried and dressed by Mr. Simpson, the former Plaintiff, which was intended to be used, and has since been applied, in the construction of the works at Merrick's Mills, Edmond's Rapids and Smith's Falls, to the Plaintiff in this case, who was a Clerk to Simpson while executing his Contract; and who had been paid for the quarrying and dressing the said stone, while he was contractor.

In the Kings Bench, Trinity Term,
Second, WILLIAM IV.

William Mittleburger Plaintiff.

vs

John By,
Henry Pooley,
Edmund C. Froom,
William Richardson.
Robert Matthews,
Alexander Brownlee,
Thomas Griffiths,
James Shaw and
Richard Frain, Defendants

This was an action of trespass, brought against the Defendants, to recover damages for entering upon the premises of the Plaintiff, and seizing and carrying away a quantity of dressed and undressed stone, claimed by the Plaintiff as his property.

The Plaintiff in this action was formerly a Clerk or overseer of works, in the employment of the Firm of Rykert, Simpson & Co.

Contractors, (who were charged with the construction of the works at Smith's Falls, but who failed in their contract) who never was recognized by the Government in any other capacity than as a Clerk to the said firm; yet there are strong suspicions, that he was a partner, though this does not appear in evidence.

The Stone in question, was got out of the quarry, and prepared by Mr. Simpson. Part of it was dressed and part remained undressed, and was so left in the quarry, when Mr. Simpson abandoned his contract, and the work had been transferred to others. It must also be recollected that the quarry was situated at a distance from Smiths Falls, and supplied the stone for the locks and embankments, at Merrick's Mills, Edmond's Rapids and at Smith's Falls, and was situated upon land, originally, as is supposed, the property of Mr. Jones of Brockville. It must be remembered too, that Mr. Simpson was paid for the stone in question, prior to his failing in his contract, who it is presumed, had so arranged it, as to procure the purchase of the lot of land on which the quarry lay, to the Plaintiff in this cause, and had made over his claim to the Stone, to the said Plaintiff, with the dishonest view, of thus endeavoring to obtain payment, a second time, for the same materials. In point of fact, Simpson was already overpaid for the stone, & his general work on the Line of Canal; it having been always the practice of the Department, to advance to the Contractors, upon their preparing stone, or any other materials, a sufficient sum to enable them to draw it to the spot where it was required; he having secured this payment before he abandoned his contract, his receipts of

course exceeded the value of the stone in the quarry ; which Simpson sold as if it had been his own property, got out for private purposes, and not for the Public Service. Soon after Mr. Simpson had abandoned his contract, Lieuts. Pooley and Froom, were ordered to measure all the stone that they might find dressed, in the quarry, or about the works at Smith's Falls, and to ascertain the quantity for which Simpson had been paid. In the first attempt they made to execute their orders they were forcibly opposed by individuals, who were employed as sub-contractors under Simpson, to quarry and dress the stone in dispute. Two days after, the said Officers had been forcibly prevented from carrying their orders into effect, they made a second attempt, when to their great astonishment, the same persons who had before resisted them, rendered them every assistance, in pointing out Simpsons stone, showing their private marks by which they knew it, although they confessed, they had been most positively desired by the Plaintiff not to do so.

The only trespass committed by any of the persons summoned in this Action, was in entering the quarry opened by Simpson, & transferred by him, to the Plaintiff, Simpson's Clerk, and in measuring the stone they found prepared for the Public Service, and drawing it to the works at Smith's Falls, for which section of the Canal it was got out. The main arguments of the Plaintiff in this action, were, that the stone in question was quarried upon land, other, than that required for the Service of the Canal, and that therefore, Simpson had a right to transfer the said stone, the same as if he had got it off his own private property, and for his own use, and that he had so transferred the said stone to Plaintiff, which had afterwards been taken away, and made use of, for the Rideau Canal.

It appeared to the satisfaction of the Court, from the Plaintiff's own witnesses, that Simpson had no right to transfer the stone in question, in as much as it was got out for a particular service, and was, and had been in fact paid for & applied to a particular work in that service. So clear was the Law, on this subject, that the Solicitor General called no witnesses for the Crown, but after the evidence on the part of the Plaintiff was closed, moved the Court, upon several points particularly on the ground that stone, or any other material got out under any particular agreement, and for a special purpose, could not legally be transferred, or made over in any shape by the person so getting it out. The Chief Justice perfectly agreed with the Solicitor General, and after stating the Law points, that bore upon the question, strongly recommended the Plaintiffs Attorney to take a Nonsuit, who not feeling satisfied, insisted upon its going to the Jury, (a thing almost unprecedented in the Courts of Justice for any one of the respectable part of the profession, to go in direct opposition to the Judges opinion.) The Judge then summed up the evidence, and in his charge to the Jury, gave it as his positive opinion, that both Law and Equity required, they should give a verdict for the Defendants. The Jury, either misconceiving the grounds, upon which the Judge recommended the Nonsuit, or being previously biassed in favor of the Plaintiff, he being considered, a poor and persecuted man, and there being some shadow of evidence to show, that the said stone had been actually

transferred to the Plaintiff, and that he had allowed Simpson in his accounts a certain sum for the same, and there being no evidence produced on the part of the Crown (the case being so clear in every point, both in Law and equity,) the Jury were induced to return a verdict for the Plaintiff. This verdict so contrary to Law, to the evidence produced, and to the Judges charge, was reserved for the consideration of the Judges in Term, where all verdicts of a similar nature, are discussed, set aside, or confirmed. If set aside the judgement is entered up for the Defendants, the same, as if the Jury had returned a verdict in their favor, when the party can re-try his cause at the next sittings, which indeed is seldom done, in cases where the Plaintiffs own witness prove him to be in the wrong, and it may be safely said, there never was a stronger case in point, than the present.

Before entering upon the actions, that remain to be spoken of, it is necessary to state, that they were brought by individuals resident in the Town of Bytown, and were instituted from very different motives from those we have already gone through, as the details will show.— Bytown, is situated upon land which was purchased by Earl Dalhousie, then, Governor in Chief, for the use of Government when the Rideau Canal was first contemplated. This land was purchased, not only on account of its offering the most favorable site for the first eight Locks of the Canal, but also, as affording a valuable locality for a Village, or Town, for the lodging of artificers, & other necessary assistants. Accordingly, when the work was commenced in the Fall of 1826, it was placed in the hands of Col. By, with orders, to have it correctly surveyed, and laid off in lots of certain dimensions, to be granted according to the means of settlers, on payment of an annual ground rent to the Crown of Two Shillings and sixpence sterling. The Location ticket to contain the positive condition, of erecting a house within twelve months, covering not less than thirty feet square of ground, to be placed on the line of street, according to a plan to be made of the same. As soon as his survey was completed, & the lots & streets marked out by stakes & pickets, most of the lots, in what is now called the Upper Town, were immediately taken up. The Lower Town, was then, one continued swamp, and the land considered not worth having. But in the Spring following, when the place was cleared, preparatory to the commencement of operations on the Canal, and an establishment of work shops made it absolutely necessary to drain this swamp; form a road through it, and construct a wharf for the landing of Government stores, it became so much improved, that a great many lots were immediately taken up, at the same rate, and under the same conditions, as those in the Upper Town. Subsequently, as the ground was still further cleared, for the purpose of building Barracks, the advantages it possessed for a strong military position, were so evident, that, it was matter of regret to the Government that any part of it had been granted in perpetuity. The Government therefore ordered, that hereafter, instead of granting lots at 2s. 6s. per annum, as heretofore, the lots remaining unlocated, or which had been forfeited by non fulfilment of the conditions upon which they were granted, should be leased for the term of thirty

years, to such persons as might be willing to pay an adequate rent for them; the leases to be renewable at the expiration of the term, at an increased rent, not exceeding one fourth of the original rent. In consequence of this order, a great many lots were disposed of to the highest bidders, at different rents, according to the supposed value from the situation, or other advantages they seemed to possess.— A considerable difference thus exists in the rents, paid for lots in Bytown. The lowest sum paid since the original grants being one pound sterling, while some are let so high as ten pounds. It may be proper to mention, that these rents were placed at the disposal of the Commanding Royal Engineer, by his Excellency the Commander of the Forces, and directed by him to be expended upon public improvements for the benefit of the Town; in consequence of which, the streets are well laid out, market houses, and other public buildings, have been erected, and Bytown, is under better regulations, than any Town in the Province.

In the Kings Bench Trinity, Term
First & Second, WILLIAM 4th.

Charles Friel, Plaintiff,

vs.

John By, Defendant.

This is an action of trespass, brought to recover damages, from the defendant, for issuing a distraining warrant, as agent for Government, to recover certain rents due by said Plaintiff, to the Government. The statement of this case, as proven in Court, is as follows. The Plaintiff, in the year Eighteen Hundred, and Twenty-Seven, took possession of certain lots of land, situate in By Town, and for which he agreed to pay a certain sum annually, to Col. By, acting as aforesaid. The lots he fixed upon, being advantageously situated, a higher rent was placed upon them, than upon the generality of the lots in By Town, but not without the knowledge of Mr. Friel, or without his undertaking to pay. In fact, the rent he undertook to pay, was his own voluntary offer, knowing the advantages, the place possessed, over those adjoining. It is usual in granting those lots, for the party to take a lease, from Col. By, which lease, gives the person power to occupy for thirty years, provided they pay the rent annually, Mr. Friel never took a lease, and he being a tenant under the King, held, and now holds his land on sufferance.

The Plaintiff is a Shop-Keeper. The constable went into his shop, with a common Landlords warrant, signed by Col. By, as agent for Government. He distrained goods to the amount of the face of the warrant, and carefully removed them, and impounded them in some safe, and convenient place, of which the Plaintiff had notice. After they had been in custody for two days, the Plaintiff came to me, and paid me his rent, and the costs incurred in making the distress, and his goods were returned to him, in as good order, as they were when removed. The land on which Plaintiff was situated, is land purchased by Lord Dalhousie, on behalf of the Crown, and by him made over, or rather Col. By, was empowered by him, to convert the land, to any use he might think best for the interest of the Crown; always reserving a sufficient quantity for the Rideau Canal.

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The Declaration in this action, contained four counts. The first, for breaking, and entering Plaintiffs house, disturbing his peace, and carrying away his goods; the other three, for carrying away the goods from a certain Merchant's shop, and converting them to the Defendants own use. To this declaration, was plead the general issue—under which it was shown, that Col. By, distrained as the Kings Agent. Every step taken by Col. By in this action, was so clearly manifested in evidence, to the Court, and Jury, to be legal, just, and equitable, that the Jury retired but for a few moments, and returned with a verdict for the Defendant.

James Johnston, Plaintiff. }

vs. }

John By, and
Francis Montreule Defts. }

This is an Action of Trespass, brought to recover damages, for entering the Plaintiffs close. The following are the circumstances which gave rise to it.

In the year Eighteen Hundred and twenty-seven, Plaintiff requested defendant to lease him a lot of land in By-Town, which was granted, and his name put upon the plan of the Town, as the occupier of a certain lot, for which he was to pay the Government the sum of ten pounds per annum, Plaintiff went into possession, and put up a log fence, when he left the lot, and made no further improvements, nor did he ever pay rent.

The agreement entered into, with the party, taking a lot of ground, from the Government, was, that they should put up a House of certain dimensions within a year, from the time they took possession, and pay one half year's rent. This prudent, and very necessary arrangement Col. By had been induced to adopt, from the circumstance, that applicants were far more numerous than the lots, and from a wish that no lots should by any means be held by speculators, as tending greatly to retard the improvement of the Town. When, therefore, the Defendant found that Johnston had deserted his lot, and after he had several times refused to fulfil his agreement, he duly notified h'im that the said premises, would be leased to Francis Montreule, the present occupier, and one of the defendants in this cause, who has made the stipulated improvements, and paid the Rent. For thus taking possession, the defendants were prosecuted for a trespass. It should also be understood, that Mr. Johnston, never took out his lease. These facts being fully proved to the Jury, they returned a verdict for the Defendants.

The next case for consideration is one, in which George Lang, Matthew Connel, and Charles Hill, were Plaintiffs, and Lieut. Col. By, Defendant, and was brought to recover damages said to be sustained, in consequence of the Defendant having removed summarily the Plaintiffs and their goods from a house situated within the pale of Government ground, and erected there by Defendant for the Public Service. This action was not brought into Court, but as it excited very considerable interest at the time that the transaction which gave rise to it, took place, and which, as a matter of course found its way to the newspapers, and was there pretty freely discussed, with the usual misrepresentation, and mixture of truth and falsehood, I shall briefly give the true statement of the case.

Mr. Lang, one of the Plaintiffs is the Government Baker at Bytown, and leases a Town lot from the King. Upon this lot, a house was built by Mr. Lang, and an apartment was added to it, in which he sold bread. Upon this house the Government expended a considerable sum of money, sufficient to render it suitable for the Government Baker house. Mr. Lang having also made some improvements on the lot, & laid out some money upon the house, was permitted to occupy it rent free from the year 1827 to the year 1829, in order to reimburse him the sum he had so expended. At the expiration of this period, he took out a lease for thirty years, undertaking to pay the Government the sum of fifteen pounds curen'y per annum. About this time an Officer ordered on the Rideau Service (Capt. Cole) arrived in Bytown, and there being no room vacant in the Barracks to lodge him, Mr. Lang's house was fixed upon as the most eligible. Accordingly Mr. Lang was applied to, and agreed to give it up, on condition that Capt. Cole should pay him the exorbitant rent of Forty Pounds per annum, and that Col. By in addition, should allow him to occupy the building in question, for the sale of his bread; which being vacant, and not immediately required, for any government purpose, Col. By, permitted him to occupy it with the express understanding, and stipulation, that no ardent spirits, or liquors of any description, should be sold on the premises, and if he violated this agreement, Col. By gave him notice, that he should be under the necessity of turning him off, at a moments warning.

The necessity of a restriction of this kind, will be quite apparent, when it is recollected, that the building stands within the pale of the Government ground, where the carpenters, and blacksmiths shops are built, and where the buildings are erected, which receive the stores of every description, for the Rideau service. It must be observed, that Mr. Lang, never went into possession himself, although he had requested the use of it for a particular purpose, but upon his obtaining the key, he entered into an arrangement with Mr. Cornel, one of the plaintiffs, who was to supply goods, and liquors, and between them they engaged Mr. Hill, the other Plaintiff, to sell the said goods for them, whom they put into the house, with a Tavern License. These arrangements were totally unknown to Col. By, and they went on for several months, selling spirits without his knowledge. But when the house was undergoing some repairs, to make it more suitable for a shop, or Tavern, and they were painting the casks, to ornament the Room, Col. By, in passing the building, saw a bottle of liquor, exposed conspicuously in the window. He went, and pointed it out to Lang, and made enquiry if it was his intention to sell liquor in the building, stating to him, that if he had not been the Government baker, and needed the house in that capacity, he could not have allowed him to occupy it, at the same time reminding him of his engagement. Mr. Lang, declared it was not his intention to sell, or allow spirits to be sold there, and Col. By, having always considered him a man of his word, took it for granted he was speaking the truth, and therefore, gave himself no further trouble, or uneasiness about the matter. Shortly after this conversation, the Master Blacksmith laid a formal complaint before Col. By, stating, that it was impossible to proceed with the work, with the required despatch,

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so long as a Tavern was permitted to be open, upon the government ground. As has been already stated, the building in question, not only stands within the circuit of the ground, exclusively set apart for the service, but is adjoining to the Government Carpenters, and Blacksmiths shops, and in the yard, where all the heavy wood, and iron work of the canal, are prepared, and in consequence there are necessarily employed within that enclosure, some ninety, or a hundred tradesmen, the generality of whom, receive very high wages, and having an easy access to this building, by the back way, through an opening made in the fence, for the express purpose, of decoying the workmen.—

In consequence, they were enabled to procure liquor at any hour of the day, without the knowledge of their masters, and many of them, were constantly in such a state of intoxication, as to render them unable to perform their daily labour, to the great detriment of the public service. Upon hearing this complaint Col. By went to the house, and instead of finding Mr. Lang, found Mr. Hill in possession. Col. By asked him if he sold spirits, or had converted the building into a tavern. His reply was, "I sell liquor when I can." Col. By then told him, that Mr. Lang had been allowed to occupy the House, for the particular purpose of selling bread, and under the express condition, that he should neither sell, nor suffer to be sold, ardent spirits, or any kind of liquors; that by the breach of his agreement he had done material injury to the public service, and that, therefore Mr. Hill must quit the building, in four-and-twenty hours, or in discharge of his duty, he should be obliged to turn him out, it being quite impossible, for him to permit a Tavern to be kept in that enclosure. At the expiration of the time mentioned, Col. By went again to the House, to know if Mr. Hill had moved. There was not the slightest appearance of a move, Hill was out, Col. By asked his wife, if she intended to quit the building. Her reply was, "that she had not heard any thing about it"; Col. By then wrote an order to Capt. Victor, desiring him to send a party of soldiers to remove the goods of an intruder from out of the Government Building, called the old Engineer Office; Capt. Victor sent the men, but finding the door locked, they returned to know if force should be used, Col. By said, that it was positively necessary to remove the goods; but desired, that as little force as possible, might be used; that if they found the door locked, and the inhabitants refused them admittance, it must be broken open. The next morning, after receiving these instructions, (which made forty-eight hours notice) a Sergeant, and party, were marched to the door, which they found locked: the Sergeant demanded admittance, which was refused, he then went to the Blacksmiths shop, and procured a piece of iron, with which he forced the door, quietly removed the goods, and when the inhabitants left the building, the door was locked, and the key given to the Clerk of Stores. All was done under the eye of Dal. McKinnon, Esq. a magistrate, who did not see any disturbance sufficient to call his magisterial functions into exercise, even so far, as to command the peace, which is sufficient to prove, that the removal of the goods, was conducted, in such a manner, as not to disturb the peace, of His Majesty's subjects, in the slightest degree. The goods were not carried away by Plaintiffs, until two or three days

after they were dislodged. They say, most of them were stolen, or otherwise destroyed; this, however, never could have been substantiated, by evidence. There were but a small quantity of goods, and those of the poorest description, yet they estimated their loss, at three hundred pounds; however, after forcing Col. By to court, together with some of his Officers, and numbers of the people employed, on the Canal, which was attended with great expense, and with much detriment, and hindrance to the works, they did not think it prudent to call on the action. Unpleasant, as must have been such a proceeding, it is evident that Col. By had no alternative; for had he resorted to the tedious process of ejection, these people would have kept possession of the building in defiance of Col. By, for several months, who consequently would have been compelled to discharge for drunkenness, many of the workmen employed in the shops, all of whom were well acquainted with the particular kind of work, required for the service.

Agreeably, to the articles of War, all persons situated on Military ground, either in the capacity of a Tavern Keeper, or as a Shop Keeper, by permission of the Commanding Officer, are subject to military law, and it would therefore, have been a strange case if his Majesty's Government, should have been subjected to the payment of damages, when the Commanding Officer, in the due discharge of his public duty, had not exceeded the powers vested in him.

The result of the several actions, which have now been detailed, prove undeniably, that there has been no abuse of power, throughout the whole proceeding. It further establishes indisputably, the right of the Commanding Officer, to appropriate lands, or materials, required for the Rideau Service, and the decision of the Court, demonstrates, that in every case wherein, his conduct has been called in question, he has exercised a sound discretion, and judgment in the discharge of his duty, to his King, and Country.

In every instance where lands have been taken, the proprietors have been fully remunerated, and as far as possible, even the inconvenience of their removal has been obviated; for whenever it has been desired, they have been allowed to resume such portions of their lands, as were not required for the immediate service of the Canal, by taking a lease of the property originally held by them, at an annual quit rent, not exceeding five per cent, on the sum paid for the land, to the lessee himself. It thus fully appears, that in no case, has injustice been committed, or individual injury been sustained. The leases here alluded to, contain a clause, explicitly laid down, barring all claims for future damages, arising from the works on the Canal, or in case of the resumption, on the part of the Crown, of the property, or any part of it, and authorising its appropriation, whenever the Public service requires it. By these means, damage to individuals has been entirely prevented, and the Public interest effectually secured.

I thus, Sir, conclude my report of the legal proceedings, which have arisen in the progress of your diligent and successful labors, to perfect the most stupendous work of the age. I have been as brief as was consistent with the task of conveying a just knowledge of facts, whence alone could be formed, just opinions of your conduct, through a long

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course of most arduous trials, and unparalleled difficulties ; and shall be most happy if it serve to impart to the Honorable the Board of Ordnance, as thorough an understanding, as here, univrsally exists, of your indefatigable, and judicious endeavors, to promote the general prosperity.

I have the honor to be,

Sir, Your most obedient humble Servant,

J. N. HAGERMAN,

Solicitor, Rideau Canal.

Lieut. Col. By,
Commanding Royal Engineers, }
Rideau Canal.

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