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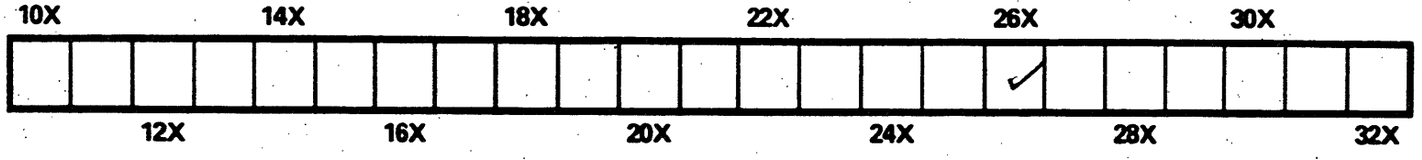

On Petition of Right.

LUCY MacQUEEN,

SUPPLICANT,

AND

H. M. THE QUEEN,

DEFENDANT.

Supplementary Statement of facts and References in Case.

NOTES.

1826, September.	Rideau Canal commenced under Colonel By, Survey and plans of with lands set out, Building Store Houses, &c.
1827. 17th February.	Rideau Canal Act passed 8 Geo. IV., Ch. 1, U.C.
" May.	Active operations on Canal commenced at Bytown.
" 16th August.	Corner Stone laid at Bytown by Sir John Franklin, R. N.
1832, May.	Canal completed and opened for traffic.

LANDS.

1801, 20th May.	Patent to Grace MacQueen, Lots E. & D., Concession D,.....400 acres.
" 20th June.	" to " " " D. & E., broken.....200 "
Case, Paragraph 1.	With usual reservations, about 600 acres

" " 4. 1st. Of above lands, Col. By set out on Plan 110 acres which he thought necessary for Canal purposes, and which the Canal Act forthwith vested in the Crown for such purposes, and since then hitherto they have been held in the possession of the Crown or of purchasers from the Crown. Only 20 acres of the said 110 acres were actually required and used for the Canal purposes, leaving 90 acres, the subject of this suit, not necessary nor used therefor, but retained in possession as aforesaid.

" " 19. 2nd. No payment was ever made by the Crown for the said 110 acres or any part thereof, either to the said Grace MacQueen, their owner, from whom they were taken, nor to any person claiming under her, nor to

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the said Suppliant, either for the said 20 acres so required and used for the Canal, or for the said 90 acres not necessary nor used therefor and superfluous to the requirements of the Canal.

Case, Paragraph 4. 3rd. For the purpose of this suit it is admitted, that the said 110 acres of land were so set apart and vested in the Crown for the Canal purposes, before the death of said Grace MacQueen, the owner thereof, from whom they were taken.

" " 2. 4th. She died intestate on the 18th September, 1827, in possession of her said patented lands, less the said 110 acres thereof, so set apart and vested as aforesaid, leaving, her surviving, her husband Alexander MacQueen, and also her eldest son, William MacQueen, her heir-at a law, to whom her said patented lands descended, less the said 110 acres, which never passed into his possession.

" " 5. " " 6. 5th. Her husband Alexander, by deed of 31st January, 1832, conveyed his life estate in the said lands to the said William MacQueen, who by indenture of 5th February, 1832, purported to convey the same without reserve of any part thereof, to Colonel By, for himself, his heirs and assigns for the *bloc* consideration in the indenture mentioned.

" " 8. 6th. The Rideau Canal was completed and opened for traffic in May, 1832, and of the said 110 acres set apart and vested as aforesaid in the Crown, no more than the said 20 acres were required and actually used for the said Canal, leaving the said 90 acres or thereabouts unnecessary and unused therefor. " " 18.

7th. The said William MacQueen, whilst residing out of Canada, died intestate 20th October, 1845, leaving him surviving, the said Lucy MacQueen, the Suppliant, his sole child and legal issue of his body. She was then a minor residing out of Ontario, and has never since resided there.

8th. Upon the death of William McQueen in October, 1845, the said Lucy MacQueen became and was by law the sole direct and immediate legal representative and heiress-of-law of said Grace McQueen in and for the said 90 acres of superfluous land as an estate in reversion to her for the same, and upon the determination of the said vested interest of the Crown therein, she alone in her said heritable quality would be entitled by law to the restoration of the said 90 acres as her estate in possession.

9th. Subsequently, on the 18th of February, 1869, the Government of Canada, acting for Her present Majesty by the Under-Secretary of State for Canada duly authorized in that behalf to represent Her Majesty, published an advertisement, copy whereof is herewith for re-

ferences, for the sale by auction at the City of Ottawa, as building lots of a portion of the said 90 acres of superfluous lands so taken and vested but not required nor used for the Canal purposes, but retained in the possession of the Crown as aforesaid : and on the 16th of March following, portions of the said 90 acres were sold for the benefit of Her Majesty in pursuance of the said advertisement, notwithstanding the Caveat and protest, whereof copy is herewith for reference, by and on behalf of the Suppliant, against the said sale of the said lands, the said advertisement and sale to all intents declaring that the said lands were not wanted by the Crown for the Canal purposes for which they were taken and vested in the Crown, thereby in effect and absolutely determining the vested interest of the Crown in the said 90 acres, which thereupon and by law became an estate in possession to the said Suppliant.

10th. The Statutes having reference to the Canal undertaking shew, that only *so much of the lands set apart under the Rideau Act for Canal purposes and so vested in the Crown for such purposes, as should be ascertained and found to be necessary for the Canal and its works*, should be taken and surrendered and used therefor, which, with the lands damaged by having been cut through or built upon or injured by the Canal, became subjects of valuation or compensation, to be found by a jury if necessary, and to be paid from Imperial funds, the claims for which were required by the Canal Act to be made before the completion of the Canal, afterwards extended by the amending Canal Act of 1836, 6 W. 4, ch. 16, U. C., and further by the Act of 1839, 2 Vic., ch. 19, U. C., to 1st April, 1841, when the said valuations and compensations having become personalty by law, were barred absolutely after that date.

11th. No provision was made in those Statutes nor otherwise either by the Imperial or Provincial Legislatures for the acquisition or the payment by the Crown of the 90 acres so taken and vested but not necessary nor used for Canal purposes, and which by non-user thereof were outside of the operation and application of the said Statutes, the requirements for the canal purposes in so far as respected the said 110 acres having been exhausted under the Canal Act by the user of the said 20 acres only, therefore such provision was one of those cases which the law does not suppose, and therefore makes no provision for them, and specially, as in this matter, the land requirements for the Canal being supplied from those parts of the set out and vested lands which were actually taken and used therefor ; and therefore any compulsory taking of private lands, surperflous to the requirements and necessities of this work of public utility, the Rideau Canal, would have been a taking by the Crown *in invitum* as a mere land speculation for the profit of the Crown without legislative authority therefor and an injustice

to the unpaid and unwilling owner and subject of Her Majesty, destructive of the owner's franchise in his property and in breach of public policy and justice in such cases of the compulsory appropriation of private lands for public utility.

12th. At the date of the conveyance by William MacQueen to Colonel By, the Canal was not completed and was subject under the Canal Act to change and deviation from its original line. At the said time the said lands so set apart for Canal purposes were vested in and in possession of the Crown as aforesaid, and could not be passed to Colonel By by the said conveyance, the said William MacQueen having no title to convey or pass the same 110 acres of land or any part thereof to Colonel By, who had no power to take the same by the said conveyance, which was absolutely void at law in respect of the said 110 acres, as it was so decided by the judgment of this Honorable Court rendered on the 13th of May, 1878, by the Honorable Chief-Justice Richards, which dismissed the suit on Petition of Right of Tylee *et al*, representatives of the then deceased Colonel By, against H. M. the Queen for the said lands.

13th. The judgment of the said Court so rendered was as follows:—
" At the time of the conveyance by William MacQueen to Colonel By, the
" land (the said 110 acres) had been set out for the purposes of the Canal,
" and was therefore in the actual possession of the Crown, and by the
" Statute vested in the Crown. This conveyance was void as to the 110
" acres under the Statute 23, Hen. 8th, ch. 9. This principle was estab-
" lished in numerous cases in Upper Canada both before and since the
" date of the Deed from MacQueen to Colonel By, and was the well
" settled law of the land until the passing of the Statute in 1849, legal-
" izing the contract of a mere right of entry into or upon lands whether
" immediate or future, vested or contingent." The Chief-Justice cited
" the cases of the Bishop of Toronto *vs.* Cantwell, 12 U. C. C. P., p. 611,
" and Smith *et al vs.* Hall, 26 U. C. Q. B., p. 554, as among the later
" cases there referred to, where many of the decided cases were cited.
" The Chief-Justice also added, 'that William MacQueen did not take
" the lands, 110 acres, by descent from his mother if she died,' (as ad-
" mitted by preceeding par. 4 & 3) 'after the land was set out and ascer-
" tained for Canal purposes under the Rideau Act, and vested in the
" Crown as before mentioned.' "

With regard to the validity of the said conveyance to Colonel By, the Court also decided that both the said Deeds of 31st January, 1832, by Alexander MacQueen to William MacQueen, and of 5th February, 1832, by William MacQueen to Colonel By, " were void as to said 110
" acres in dispute, unless made for the benefit of the Crown, if not, then
" it (the conveyance) was void." The Deed being declared void, the said judgment has not since been disturbed.

14th. The Suppliant makes no claim by this suit for the said 20 acres actually used for the said Canal and its works, nor for their value, which by their user for the Canal and by law became personalty, but she claims at Common Law and by Statute, the restoration to her of the said 90 acres of superfluous lands aforesaid which remained in specie and in their original quality of real property as when set out and vested for the Canal purposes and have never since become personalty expressly or impliedly.

15th. The Crown was not justified either at Common Law or by the Rideau Canal Act to set apart from the said patented lands of Grace MacQueen and to have vested in itself and to retain in possession for its own benefit, more thereof than was actually necessary and used for the Canal purposes, which could only have been ascertained as directed by the Canal Act after the completion of the Canal, and the said greater quantity, to wit, the said 90 acres being found not to be necessary nor used for the Canal and thereby superfluous to its requirements, were bound to be restored to their said owner, or to her heirs or representatives and assigns as was practised by Her Majesty acting by the Government of Canada in several cases of similar superfluous lands which were restored in specie to the respective representatives of their owners, from whom they had been taken for Canal purposes under the Canal Act, by Letters Patent to the said Representatives without being subjected to any statutory or other real property limitation whatever in respect thereof.

16th. The following among other Letters Patent for such restoration were issued, on behalf of the Crown, namely, one, by Letters Patent of Canada dated 27th March, 1863, and two, by Letters Patent of the Dominion of Canada of the 5th May, 1873, and of 28th July, 1877, respectively, copies whereof are herewith for reference, which severally recite: "that the said lands set out and restored by the said Letters "Patent were taken for the Canal purposes under the Rideau Canal Act, "8 Geo. IV., ch. 1, U. C., and held by Her Majesty, and when so set out "were the property of their original owners, the Grantees thereof whose "right and property therein had passed to their respective representa- "tives or assigns, and were restored to them, as no consideration in "money was paid for them, and they were found to be unnecessary for "the purposes of the said Canal, and therefore deemed to be just and "expedient to restore them to their owners, representatives or assigns." These foregoing recitals expressing also the Suppliant's similar grounds of claim for the restoration required to be made to her of the said 90 acres.

17th. The law in cases of compulsory taking of private lands for public utility is elementary, and will be found detailed among other references in

Broom's Maxims, p. 1 & Seg.-
Brice Ultra Vires, p. 43 & Seg.; and
Brown's Lexicon & Dictionary, &c.,

from which the following extracts are taken and are there supported by numerous authorities: —

Broom p.

(*a*) Assuming that the general rights of all Governments to interfere with the private property of individuals for the public defense and utility are indisputable, "it belongs to the Legislature to decide what "works or improvements are of sufficient importance to justify the exercise of the compulsory power, and to authorize by a previous law the "taking of the necessary property under such regulations to prevent "abuse or oppression, as the necessity may require and upon reasonable "compensation therefor, because the law cannot authorize the compulsory taking of private property for any other purpose than public "utility and for reasonable compensation."

(*b*) "The authority by Statute to take private property for public "uses under compulsory powers, must be considered only of such property "within such limits as are neceesary for the public purpose which, by "the Statutory Grant, may be taken for such purpose. The restriction "imposed is that not more land shall be taken and appropriated beyond "the limits prescribed by the necessity of the purpose, because the franchise of the subject in his property is in effect a branch of the "Sovereign power subsisting in the subject by a grant from the Sovereign, and can be recalled only to the extent required by the public "purpose."

Brice p.

(*c*) "Public advantage requiring the exercise of competent powers "to take private property, it would be *ultra vires* and against the general "principle of all such compulsory powers for the public good to appropriate more than is necessary for the purpose. The arbitrary nature "of the taking power must be indulged with caution; the true principle "applicable to all such cases being, that the private interest of the individual is never to be sacrificed to a greater extent than is necessary "to secure a public object of adequate importance." So held by Lord Langdale, M. R., in Coleman *vs.* the Eastern Counties R.R. Co., 16 L.J., Ch., p. 78, and not since disturbed, "that since the public interest is "to protect the private right of individuals, and to save them from liabilities which the powers by such Acts necessarily occasion, they must "be always carefully looked at, and must not be extended further than "is expressly provided by the Act, or than is necessarily and properly "required for the purpose, which it has sanctioned." And, in 10 Beaver Rep., p. , it is laid down, "'that a Corporation has no existence for any "other purpose than that for which it was created.' Therefore lands

" set apart for a special undertaking, but not required nor used therefor, " are in excess of the power exercised," and in Great Western R. R. Co. *vs.* May, L. R., He. of Ls. R., p. 282, it was held, " that superfluous land " is land acquired by the promoters of an undertaking but not required " therefor. The word *required* does not mean *demanded* but *necessary*, " and when it ceases to be *necessary* it becomes *superfluous*, and if more " land is taken for a special purpose than on the execution of the work " appeared to be needed, or, if taken temporarily for such purpose, when " such purpose is ascertained and it is not required."

Brice, p. 43. (*d*) Brice in *ultra vires* also explains the distinction of the practice of the compulsory powers as exercised in Great Britain and in the United States. " In Great Britian in determining questions of ownership, little " weight is attached to the mere fact of the compulsory taking, because " all private titles of conveyance and Acts of Parliament for the under- " taking are construed by the doctrine of *ultra vires* in connection with " the public undertaking. The doctrine has curtailed the powers and " obligations of Corporations which exist for the attainment of certain " objects only, and if their powers are not expressly they are impliedly " restricted to such only as are necessary for the attainment of their " object, and consequently, they can perform no act or enter into no " transactions, &c., but such as spring out of or are otherwise incidental " to the purpose for which they have been created, as held by Lord " Langdale, M. R., in Coleman's Case (*supra*), and in respect of super- " fluous lands acquired and held more than required or used for their " special purposes, the original owners have the right to recover their " surplus land taken under compulsory powers in excess of what is " needed for the undertaking. These lands in the first place can be " taken only if *bona fide* required for the special purpose, and secondly, " if in the result it turns out that they are not required, then in the ab- " sence of special powers to the contrary, very seldom, and if the Corpo- " ration be within the Lands Clauses Act never can such lands be re- " tained by it or alienated to others. They are governed by the provi- " sions of their Acts of Parliament, whether general or special, which " govern the *precise rights* of the parties interested. Special powers and " privileges to take lands compulsorily are given in a *qualified manner*, " *not absolutely;* if the conveyance is doubtful, the construction is against " the Grantee, and the Grantor is not deemed to have parted with any " greater interest than required for the purposes for which the convey- " ance is made."

L. R., 18 Eq., p. 368. Great Western vs. May, *supra*.

5 Q. B. N. S., p. 174.
29 L. J. Ch., p. 40.
S. R., 10 Q. B., p. 16.

Brice, p. (*e*) " In the United States Eminent Domain continues, and in de- " termining questions of ownership there, the taking by compulsory " power is considered highly important and is made the rationale of the

" distinction. They agree with the English Rule where lands are ac-
" quired by ordinary contract, but if by compulsion, the rights so acquir-
" ed are in the nature of Easements only co-extensive with the purposes
" of their acquisition, and the presumption is always against the taking
" Corporation. In the United States where it is proposed to divert such
" surplus lands to other purposes, or to abandon the original use altoge-
" ther, the right to such lands reverts to the Grantor or his Representa-
" tive. The right of the Grantee, though having authority to do all acts
" for the complete utilization of the powers, is *pro tanto* restricted to the
" using of the lands for the purposes of the undertaking: these words
" mean the user of the land as land, as the cutting of a Canal, erection,
" of Locks, &c., but not the sale or letting of the land for other pur-
" poses."

ce, 111. Note.

(*f*) Similar compulsory powers exist in force in France and are recognized law from the building of the Canal of Languedoc two centuries ago. The jurisprudence was then settled and is still retained as a principle of public policy, where it is held that, " no person can be de-
" prived of his property unless it be for a purpose of public utility legally
" constituted evidently requiring it. The State may expropriate private
" property for public utility; it does not acquire the property like an
" individual but only as a conditional acquisition, and only for purposes
" of public utility *travaux d'utilité publique.* If this purpose is not realiz-
" ed the expropriated owners or their representatives or assigns, *les an-
" ciens proprietares ou leurs ayans cause*, may claim the retrocession of the
" unrequired or unused land so taken and their claim is privileged before
" all others. It is only on the refusal of the owners to take back their
" lands that the Government may dispose of them to others."

D personnel & Dela-harre Expropria-ion, pp. 5, 10.

Act, 3 May, 1841.

Gr diet Expropita-ion, p. 51.

18th. The compulsory taking powers restricted as above in their exercise in this matter apply to the lands granted by the Rideau Canal Act, which grants authorized the survey and setting out of such lands as might be thought necessary for the undertaking, or for any deviation or alteration thereof, which the said Act vested in the Crown for the purposes of the Canal, as described in the following Statutory Grants, namely:

Act 8, Geo. IV. ch. 1 U. C.

" Lands set apart and ascertained to be necessary for making and completing the said Canal."

" So much of the said lands set apart, &c., as shall be required on which the Canal shall be cut and constructed."

" Lands set apart and necessary to be occupied for the Canal."

" Lands of any person through which the Canal was cut and constructed."

" Power to contract and agree with land holders and owners of land for surrender of so much of said lands as shall be required for the Canal, &c., payable therefor, &c."

" Lands, or portions of land covered with water, set apart as necessary to be occupied for the purposes of the Canal."

" Lands for Canal cut or constructed upon for compensation reasonably claimed therefor."

" Such parts of set out lands as upon any alteration or deviation from the original line of the Canal were necessary therefor."

The foregoing with other similar references localized and restricted the compulsory taking power to the lands taken and ascertained or surrendered as necessary and used for the Canal.

19th. Construing these statutory land grants by the above Common Law, the said restricted compulsory power was confined to the 20 acres aforesaid actually taken and used, and cannot apply to the 90 acres of superfluous lands aforesaid found not to be necessary nor used therefor, which though unpaid for and unacquired by surrender to the Crown have since their setting out and vesting as aforesaid, and specially since the completion of the Canal without deviation thereof, have been unjustly retained by or through the Crown as aforesaid.

20th. The foregoing establish the Common Law claims of the Suppliant, which is also vindicated by Statute Law, to wit, by the United Canada Act, 7 Vic., ch. 11, known as the Ordnance Vesting Act, which declaring that it was expedient to sell from time to time such portions of the lands and real property within the Province (to wit, the United Provinces of Lower Canada and Upper Canada) held for military defense and to provide for the better administration of said lands and real property, authorized Her Majesty to transfer and did in effect transfer to the Principal Officers of Her Majesty's Ordnance in England in trust for Her Majesty, Her Heirs and Successors, all the said lands and real property referred to in the said Act, and specially the lands and real property within the said United Provinces described in the Lands Schedule annexed to the Act, including particularly " the said Rideau " Canal at Bytown constructed under the said Act 8, Geo. IV., ch. 1, and " the lands and other real property lawfully purchased and taken and " set out for the purposes of the said Canal," the said transfer so made under *the powers by the Act granted to the said principal Officers and subject to the provisions of the said Act*, to wit as expressed in the 1st and the 29th Sections of the Act as follows, as by the first Section :

1st. " Exempting from the operation of the Act all property &c-

"quired by the Provincial Government for Provincial purposes, although "in charge of the Ordnance Department."

2nd. "Exempting as aforesaid lands before the passing of the Act "granted by Her Majesty or Her Royal Predecessors to any other per- "son unless subsequently to the grant, lawfully purchased or acquired "or taken for the purposes of the Ordnance Department."

3rd. "Not to impair, diminish or affect any right, title or claim "vested in or possessed by any person or party at the time of the pass- "ing of the Act to in or upon any lands or real property whatsoever," and,

4th. "Not to give to the said Principal Officers any greater or "better title to any lands or real property than is now vested in the "Crown or in some person or party for the Crown," and as by the 29th Section the following proviso therein enacted as follows: "provided al- "ways and be it enacted, that all lands taken from private owners at "Bytown under the authority of the Rideau Canal Act for the uses of "the Canal which have not been used for that purpose be restored to the "party or parties from whom they were taken."

Under the provisions and exemptions enacted in the first Section of the said Vesting Act, the said 90 acres of superfluous lands aforesaid unnecessary and unused for the Canal purposes, were in fact and in effect exempted from the operation of the said Act as forming part of the Royal Land Grants to said Grace MacQueen now represented for the said lands by the Suppliant, her heiress-at-law therefor, which were "neither "lawfully purchased nor acquired for the purposes of the said Ordnance "Department nor for the Canal," nor surrendered to Her Majesty nor paid for out of Imperial or other public funds therefor, although retained by the Crown from the owner thereof or her said representative, "whose "right, title and claim possessed by her to the said lands," were by the said provisions and exemptions "not to be impaired, diminished or "affected by the said transfer to the said Officers, who under the said "provisions and exemptions were to have no greater or better title in or "to the said lands than Her Majesty had," and which said lands moreover as being in fact part of the "lands taken from private owners at "Bytown under the authority of the Rideau Canal Act and which have "not been used for the purpose," by the said proviso enacted in the 29th Section of the Act, were ordered "to be restored to the party or parties "from whom they were taken." These mentioned provisions and exemptions in the nature and purport of provisoes to the Vesting Act, are qualified by Dwarris as follows, "A proviso to an Act is something engrafted "upon a preceding enactment and is legitimately used for the purpose of

" taking special cases out of the general enactment and providing spe-
" cially for them;" and in Note 11, p. 118, it is added, "the office of a
" proviso generally is either to except something from the enacting
" clause to restrain its generality, or to exclude some possible ground of
" misinterpretation of it as extending to cases not intended by the Legis-
" lature to be within its purview."

The proviso enactment, however, preventing the Principal Officers from retaining possession of certain of the unused Canal lands at Bytown among which was a large portion owned by Nicholas Sparks, doubts and difficulties upon the construction of its terms were raised by or for them to settle which a Bill, known as the Reserved Act, passed both Houses of the Provincial Legislature in 1845 for the removal of the said doubts, which setting out the proviso in its preamble, affirmed the same and declared it in its terms " to express the intent and purpose of the Legisla-
" ture that enacted it, and directed that all such unused lands at By-
" town, whereof a large portion belonged to Nicholas Sparks, taken from
" their owners for the said Canal but still retained by the principal
" Officers in contravention of the proviso, were the absolute property of
" their owners and should be re-vested in them, and divested from the
" principal Officers, &c., &c., reserving to them certain lands owned by
" Sparks along the banks of the Canal, &c."

The Act was disallowed and in the next Session of the Legislature in 1846, was replaced by the so-called Explaining Act, 9 Vict., ch. 42, which setting out " the said proviso at length and expressly referring to
" the disallowed Act for setting at rest the doubts as to the lands to
" which it applied, and specially the doubts as to the exclusion from the
" proviso of the said Sparks' lands, *declares the desire of the principal Offi-
" cers and of the private land owners whose lands at Bytown* had been
" taken but not used for the said Canal to settle all matters in difference
" between them," and therefore enacted in the first Section of the Act, without repealing the said proviso either expressly or impliedly, but assuming its existence to be in full force, "*that the said proviso shall be
" construed to apply to all lands at Bytown set out ascertained and taken
" from Nicholas Sparks under* 8 *Geo. IV., ch.* 1, *with the exception of cer-
" tain lands, &c.*" The true construction being, merely to include within the benefit of the general terms of the proviso, the lands of Sparks, but without excluding therefrom the set out and unused lands at Bytown of the other private owners already within the benefit of the proviso, and assuring the same beneficial effect of the proviso as for those also to the unused lands of Sparks which were also included thereby within the terms of the proviso; the remainder of the Act providing for the settlement of the land disputes between the principal Officers and Sparks. As the proviso stands therefore it is an independent and remedial enact

ment declaratory of the Common Law in its purport and application for the benefit of all the private interested parties for their unused lands at Bytown originally taken and held but not used by the Crown for Canal purposes, and as such it cannot be restrained by restrictive laws nor have its Common Law right abridged by merely permissive words, and therefore unqualifiedly protects the said 90 acres from the operation of the transfer of the Vesting Act, leaving to the Suppliant her rightful claim at Common Law to the said 90 acres, even irrespectively to her right under the said proviso.

As to the matter of defence to the claim, the objection of the Statute of Limitations raised against the claim of the Suppliant for the recovery and restoration to her of the said 90 acres of superfluous lands is answered by the fact of her disability of having no person to sue therefor and against whom to wage her remedy therefor, because Limitation means against some one, and "there must be not only a person to sue but a per-"son to be sued." Angell Limitations, No. 62. Wilkinson on Limitations, p. 51, says, "to support the plea of the Statute there must be not "only a cause of action and a person to sue and be sued but a jurisdic-"tion in which the action may be maintained. Cause of action is the "right to prosecute an action with effect and no one can have a complete "cause of action unless there be some person that he can sue, and no laches "can be attributed to one for not suing whilst there is no one against "whom he may bring his suit." It is notorious that until the existence of the Dominion Legislation of 1876 the Suppliant was under disability to sue Her Majesty in Ontario, and until the Petition of Right Act of that year, and the exclusive original cognizance of Petitions of Rights thereby conferred upon the Exchequer Court of Canada established in 1875, Her Majesty could not be sued effectually in Upper Canada, now Ontario, where the lands in question are situate, and only at and from the said year 1876 could Her Majesty be impleaded by suit or action in a competent Court as between subject and subject. Until therefore the incapacity so to sue Her Majesty was removed, the time of the Suppliant's disability was by law excluded from the computation of the time of limitation. Statutes of Limitation as regards the Crown are not retrospective, as explained by Blackburn, J., concurred in by Cockburn, C.J., in Bristamjeé *vs.* The Queen, L. R. 1, Q. B., p. 487, "if a Statute of "Limitations existed it has relation to actions between subject and sub-"ject; there is no pretence for saying that the Statute of Limitations "applies to the Crown at all. It would be proper and right and judici-"ous for the Legislature to pass an Act to say that *in future* some Sta-"tute of Limitations shall apply but it has not been done yet." In this respect the Dominion Legislature has anticipated that of the Empire and here Her Majesty may be impleaded by Her subjects. In the United

States "Statutes of Limitation are not retrospective and being applied "only to a right of action which is to be commenced *in future* do not im- "pair vested rights." Angell, No. 22. See also 20 Grant, Ch. R. U. C., p. 273. The Canada Central R. W. *vs.* The Queen. The plea of the Statute can have no effect or begin to run until after the removal in 1876 of the Suppliant's disability to sue.

The objection that the claim of the Suppliant is barred by the lapse of time by her being out of possession of the said lands in question, and by the provisions of the Statute of Limitations of Ontario is also answered by the fact of her disability to take proceedings by ejectment or other real action or suit or writ of right against Her Majesty's illegal and unauthorized detention of the said lands from the said Suppliant. This objection is the so-called prescription of long years for giving or taking title, in effect to divest the Suppliant of her right of property in the lands in question, and to acquire them to the Crown by adverse possession. This prescription for title rests upon the supposition of a legal origin of the right and to complete the title acting upon presumptions such as the determination of a limited period to make an entry. No mere length of possession will in law amount to a presumption of title; it merely excludes objections to a title which is *prima facie* good, and which by a long time in belief of the possession has so remained, without having been the subject of any claim or controversy, in other words without having been legally interrupted. It is only a fact with others to determine whether a conveyance has actually taken place. Broom says, "It is a general rule or maxim that "prescription does not run against persons not entitled to sue or not "enabled to sue for their demands, *contra non valentem agere non currit* "*prescriptio.*" This is the rule of law between subject and subject, but until 1876 the possession of the Crown, however it may have originated or been continued, could not have been interrupted or arrested by proceedings in justice before a competent Court, and till then prescription by mere possession could not run for Her Majesty. In respect of the said 90 acres in question, their quasi or temporary possession by the Crown was for the particular purpose of the Canal, and that purpose was limited under the Common Law for lands actually used and paid for or ascertained for payment being in possession of the Crown for the special purpose; the Crown could not be dispossessed until the use for the purpose was declared and given up by the Crown; as was declared by the Advertisement above referred to of February, 1869, by the Secretary of State acting for Her Majesty for the sale as of building lots of the lands mentioned, being part of the said 90 acres. After that, the mere detention by the Crown is no possession, the purpose of the possession ceasing, the power to hold also ceases. Until the Crown declared its non-use of the said excess

as by above Advertisement of Sale, the disability of the Statute has no effect and the Crown remains a holder in trust for the owner, and a merely nominal holder against outside pretenders; during that forcible divestment, the principle of law holds against the disability of the Statute. The plea of the Crown *nullum tempus*, &c., runs for the Queen, but when the use is abandoned, the rule of the subject, *vigilantibus*, &c., runs for the subject, and only from the cessation of the use could the limitation for the Crown by adverse possession begin to run, because only then the disability is removed from the Owner or Claimant, and until then the rule *contra non valentem*, &c., protects the Claimant. Until then, the holding by the Crown was an enforced and compulsory forbearance of the Claimant by the act of the Crown. It has been long established "that the "right of entry in the person in remainder can in no case be affected by "the Statute of Limitations during the existence of the particular "estate." 3 Cruise, Dig. 403. 2 Stark. on Ev., 887. Under the compulsory possession by the Crown of the said 110 acres set out for the Canal purposes, whereof only 20 acres were made a perfect possession by the Crown by actual user, the possession of the excess, to wit the superfluous 90 acres, could not change the imperfect possession by the Crown into one of a different and more perfect character, until after the declaration of abandonment by the Crown when a right of adverse possession then might commence to run: until then there could by no adverse possession or adverse interest leading up to a fee by the Crown. The law deems every person to be in the legal seisin and possession of the land to which he has a good title, and these are co-extensive with his right until ousted therefrom by an actual possession of another under a claim of right. The fact of possession *per se* is only an introductory part to a link in the chain of title by possession, and will not simply of itself, however long continued, bar the right of entry of him who was seized, and will create no positive title in any case. It might only be such a possession which the M. R. said, in the case of Lord Cholmondeley *vs.* Lord Clinton, 2 Jac. & Walk R. 1, "however long continued it might be could never ripen into a "title against anybody." Every presumption therefore is to be made in favor of the true owner, and a bare possession is evidence of no more than the fact of present occupation, and in 3 Cruise, Dig. 485, it is laid down, "it follows that no person can plead the Statute of Limi- "tation unless his possession has been adverse to that of the person who "claims against him." The term adverse possession denotes disseisin expressive of any Act the necessary effect of which is to divest the estate of the former owner. The tendency of modern decisions in England has been to disclaim the admission of any species of disseisin where the consequence would be to work moral injustice, and particularly where the party entered by a good title; the old learning on the subject is much qualified by recent cases. Angell, No. 388, in *fine*. The

reversionary right of the Claimant for the recovery of the said superfluous lands is established by Ch. 88, ss. 1 & 4 of the Cons. Stat. of Upper Canada, 1859, consolidating the U. C. Act 4 W., 4 ch., 1, enacting, " that when the estate or interest claimed shall have been an estate or " interest in reversion or remainder or other future estate or interest, " &c., then such right shall be deemed to have accrued at the time at " which such estate or interest became an estate or interest in possession," and by a subsequent clause, " that the right to make an entry or to bring " an action to recover any land shall be deemed to have first accrued in " respect of an estate or interest in reversion at the time at which the " same shall have become an estate or interest in possession by the de- " termination of any estate in respect of which such land shall have been " held." The benefit of these enactments was supended so far as concerned the claim of the Suppliant until 1876 by the legislative existence of the said Petition of Right Act with its original cognizance of Petitions of Right by the Exchequer Court of Canada, removing thereby the Claimant's disability to sue Her Majesty as between subject and subject, although in this case the determination of the conditional and temporary estate and interest and possession of the said superfluous lands had been determined by the public advertisement by the Crown in 1869. It will be noticed that by the restrictions of the Rideau Canal Act and by the Common Law as above, the Crown interest and estate in the said 110 acres of land so set out for the Canal purposes was limited to so much thereof as was necessary and used for the Canal where situated, namely to the said 20 acres, actually required and used therefor, leaving the excess of 90 acres superfluous and unused lands in specie and real property as when originally vested in the Crown for Canal purposes, and held in possession therefor conditionally until the determination thereof in 1869, when the interest of the Crown therein ceased, when the occasion which had caused their possession was advertized by Her Majesty to have ceased.

Under all the circumstances of the case it is apparent that after the completion of the Canal in 1832, and the non-user by the Crown of the said 90 acres of superfluous lands for the Canal at any time thenceforth, the said lands not being vacant lands they were in effect held in possession by the Crown conditionally for possible user without fee therein and without adverse possession, the said disability preventing such possession, and without claim of right, creating no positive title in any case; the Crown holding them in trust for the Suppliant, who in Law had the seisin of the lands as such Heiress-at-Law of the said Owner, the seisin being an incident of ownership under title which has never been annihilated. The plea of the Statute of Limitations against the Suppliant's claim of remedy for the recovery of the said lands, the matter of this

litigation, and against her proprietory right and title therein and thereto, are untenable at Law, as Defenses by the Crown avowedly and exclusively pleading on the ground of its own wrong. "The principle on "which the plea is predicated is not that the party who invokes it has "set up an adverse claim for the period specified in the Statute, but that "such adverse claim is accompanied by such invasion of the rights of the "opposite party as to give the party a cause of action which, having "voluntarily failed to prosecute within the time limited by law, he is "presumed to have extinguished or surrendered;" of course this only avails where the opposite party is under no disability to prosecute and there is nothing to prevent his doing so.

The objection has also been taken against the Suppliant that her claim had not been prosecuted in the Courts of England or against the principal Officers in Ontario. It is elementary to say that these Courts have always refused to exercise their jurisdiction in respect of extra territorial lands upon the ground that they could not decree *in rem* nor enforce their decree *in rem*. Two old cases are leaders cited by the authors, one for a house and land in Philadelphia in the Plantations, and another afterwards for a land in Ireland, and more lately in the case of the Petition of Rights by the Representatives of Colonel By against the Queen, instituted on failure of Colonel By's *and their* claim in Ontario against the Crown, for the recovery of the identical 110 acres of land set out as above for the Rideau Canal. The case was dismissed in England on the long recognized ground that the English Courts had no jurisdiction, that they had no power to decree for lands in the Colonies, nor could enforce their decree there. Holmes *et al vs.* The Queen, 2 J. & H. R., p. 527. See also Judgment of V. C., Strong in 20 Grant, Ch. R. of Ontario, p. 273, *Supra.*

Laches and delay are pleaded, also as precluding the Suppliant in Equity. It may be sufficient to answer that the disability to sue the Crown by a subject subsisted in Upper Canada, now Ontario, during all the time from the passing of the Rideau Canal Act in 1827 and previously thereto, to the passing of the Petition of Right Act in 1876, which alone caused the preclusion referred to. In addition, it may be stated, that the said William MacQueen at the passing of the Vesting Act in 1843, was residing out of Canada and abroad, where he died in 1845, that the Suppliant was then a minor also residing abroad, but at her coming of age a Memorial of Claim was presented by the Suppliant to the Governor-in-Council praying for the restoration of the said lands in litigation, and by Order-in-Council of the 11th of January, 1869, her petition was not entertained, which however did not preclude her right to proceed at Law when the said disability was removed in 1876, and her

Petition of Right in this behalf was then duly granted to her. Upon the public advertisement of the sale of the lands in February, 1869, the Suppliant's Counsel gave notice to the public Officers charged with the sale, and to intending purchasers, forbidding the sale proceeding and claiming the advertized lands as her property. To these matters and the existing disability of the Suppliant till 1876 may be added that all the Acts from 1827 inclusive up to the British North America Act of 1867, respecting these lands, have reserved expressly the rights of private indivduals to or upon them.

The Defense has set up the Deed from William MacQueen to Colonel By of the 5th of January, 1832, as a valid conveyance of surrender through him for the benefit of the Queen of the 110 acres of set out land, and which Deed the judgment of the Chief-Justice declared to be absolutely void in respect of the said land. The allegation is at direct and positive variance with the acts and intents of Colonel By himself until his death, and his persistent claims for them for his own benefit under the Rideau Canal Act, and by his Representatives after his death as part of his estate, on their applications by Petitions of Right without success in the Courts of England, which refused to take cognizance of their suit from want of jurisdiction, and by their subsequent Petition of Right in Canada, which was dismissed, from the adjudged invalidity of the Deed aforesaid and its absolute voidance for the said 110 acres. This same absolute void Deed is now offered as a valid surrender to the Crown of the 90 acres of superfluous land, neither necessary nor used for the Canal purposes nor paid for by the Crown to any party having interest therein, and assumed as a fee by the Crown. By the 2nd Section of the Rideau Canal Act after the lands thought by Colonel By, the parliamentary or legislative Superintendent of the construction of the Canal, to be necessary for the Canal purposes had been set out, and thereby forthwith vested in the Crown for such purposes, he was authorized by the said Section to agree with the Owners of the said set out lands, to acquire from them by surrender to Her Majesty, *so much only of them* as should be ascertained to be necessary and actually used therefor, the Contract of Surrender when made to be a valid and effective Contract in the Law, and the consideration to be paid after the completion of the Canal, plainly as being then finally ascertainable. As a matter of fact, no Agreement or Contract of Surrender for the said 110 acres so set out was ever made, nor even for the only part thereof amounting to 20 acres taken into possession and used by the Crown for the Canal, without contract or compensation paid by the Crown for the said 110 acres or for any part of them. Colonel By's compulsory power to acquire lands for the Canal purposes was limited to those necessary and used therefor, and no power existed by the Act for the purchase either

by Colonel By for the Crown or directly by the Crown itself, or for the payment out of the Imperial funds in either case, of any excess of the lands set out beyond the Canal requiremonts by which they could be vested absolutely as a fee in the Crown. The Chief-Justice admits that as at the time of the conveyance the said 110 acres were vested in the Crown as stated for Canal purposes, no absolute surrender of those lands could be made without the authority of the Crown in whose possession they were, and that authority not being given the Deed was absolutely void as to them. The Chief-Justice also says in reference to this imaginary surrender that "if it was of a lesser quantity than that set apart, "the surplus would not be considered as vesting in the Crown," but he omits to mention the converse position, equally effective in Law, "that "the Crown could not compulsorily vest in itself the excess of any larger "quantity so set apart, remaining unrequired and unused for the Canal, "and thereby compulsorily divest the subject of her property even to the "extent of that actually used, which has never been paid for." No such Agreement or Contract for Surrender having been made, and no consideration having been paid by the Crown for the lands so used for the Canal, although 20 acres were so compulsorily used and the superfluous quantity of 90 acres compulsorily held in possession by the Crown, the Crown could assume or have no fee in the said superfluous 90 acres, and Brice, *Ultra vires*, 101, says, "the effect of *ultra vires* upon the assumed fee by "the *holder*, is not absolute, but unless surrounding circumstances" (which "do not exist here) "raise a contrary implication, these fees are simply "qualified and conditional, by reason whereof the ultimate and final re-"version remains in the original Grantor," (owner, or his representative.) "To make such fees there must be conveyances to the parties in "clear and explicit language making them such and amounting to an "extinguishment of all the Grantor's rights of reversion or otherwise." There being no surrender to the Crown of the 90 acres, there is no fee in them for the Crown.

The equitable conversion of Colonel By's void purchases into a valid conveyance in Equity for the benefit of the Crown is raised upon the assumption of his alleged fiduciary duty to the Crown as the Agent and Trustee for the Crown. The Deed of Conveyance shows no such delegation of power, and its adjudged voidance was on the ground that the vendor William MacQueen had personally no title or right to make any conveyance whatever; without such power no sale could have been effected and Colonel By's alleged purchase could have had no existence in favor of the Crown either directly or indirectly, as he could acquire nothing under the void Deed. The circumstances before detailed show that the lands in question in this suit, to wit the said 90 acres of lands set out, but superfluous to the requirements of the Canal, never were at

any time the property or held in fee or in any way acquired or purchased or paid for by the Crown and were not necessary or used by the Crown for the Canal, and under the Common Law and Public Policy as such unnecessary and unused and superfluous lands, the said 90 acres even if so purchased could not have been held in fee or in property by the Crown as within the Statutory Grants of the Rideau Canal Act or the Canal requirements, but subject to be divested from the Crown and restored to their owner or the owner's representative, the Suppliant. It is elementary to say that the conversion by equity of the purchase by the fiduciary Agent or Trustee to his principal or the Cestius que trust is only allowed where the principal or the Cestius had a property or a proprietory interest in the land or thing purchased for himself by the Agent or Trustee; in this case no such property or interest existed in the Crown in respect of the said 90 acres, which in fact were held by the Crown without right or title as a Constructive Trust for the Owner or the Representative of the Owner. The absolute want of property or proprietory interest by the Crown in the said superfluous lands prevented the alleged conversion by Equity, and of right divesting the conveyance in Law of a vendor to sell and of a purchaser to take, &c., left the Deed of Conveyance absolutely void in Equity for the said superfluous lands, as it was adjudged to be at Law by Chief-Justice Richards by the judgment of this Honorable Court in 1878. This equitable conversion suggested by the Defense is therefore without foundation.

For Suppliant

ORDNANCE LANDS, OTTAWA.

Public Notice is hereby given, that on TUESDAY, the 16th Day of MARCH, Next, at Noon, at Gowan's Hall, Sparks Street, will be Sold, or Let on Lease, by Hector McLean, Auctioneer, to the highest bidder, the following Lots and Pieces of Land, in Ottawa, and the Township of Nepean:

To Let or Lease for a term of Twenty-one years, Four Wharf Lots on the North-East side of the Rideau Canal to the South of Sappers' Bridge, Nos. 9, 10, 11 and 12.

To be sold, the following sub-Lots lying East of the Rideau Canal, in Lot F, Concession D, Nepean: Nos. 2, 17, 18, 20, 21, 28, 29, 30, 31, and broken sub-Lots 32 and 33.

On the North of the Rideau Canal, being part of Lot K, Concession C, Nepean, sub-Lots 34, 35, 36, and of Lot K, Concession B, sub-Lots 22, 23, 24, 25, 26, 27; Gore of Gloucester, Hogsback, front of Lot 21, sub-Lots 69, 70, 71.

In the City of Ottawa, on the South side of Maria Street, Lots 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57.

And on the North side of Gloucester Street, Lots 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, and on the South side of Gloucester Street, pieces of Land, numbered 51, 52, 53, 54, 55, 56 and 57 and letter A.

Terms of Sale—Ten per cent. cash, and the balance in nine equal annual instalments, with interest at the rate of 6 per cent. on unpaid amounts.

Plans to be seen at the Ordnance Lands Office, of this Department. Further conditions at time of sale.

By Order,

E. PARENT,
Under Secretary of State.

WILLIAM F. COFFIN,
Ordnance Lands Agent,
Ottawa, February 18th, 1869.

CAUTION TO PURCHASERS

At Ordnance Lands Sale,

OTTAWA,

The public are hereby notified that certain of the Lots advertised by Government to be sold on the Sixteenth day of March, 1869, namely :—

In the City of Ottawa,

ON THE SOUTH SIDE OF MARIA STREET, Lots 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, and on the NORTH SIDE OF GLOUCESTER STREET, Lots 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, and ON THE SOUTH SIDE OF GLOUCESTER STREET, pieces of Land numbered 51, 52, 53, 54, 55, 56, 57, and letter A, are portions of the Land originally taken from MRS. GRACE MCQUEEN, deceased, for the purposes of the Canal, and being no longer required for the Canal, as the fact of their attempted Sale most clearly shows, now belong to her sole Heiress-at-Law, MISS LUCY MCQUEEN, under and by virtue of the proviso in the 29th Section of the Ordnance Vesting Act, 7 Victoria, Cap. 11, which declares that the lands no longer required for Canal purposes shall be restored to the party or parties from whom the same were taken.

MISS MCQUEEN now claims those lands, and is about to enforce her rights against all concerned.

The Public are therefore hereby warned

not to purchase, and on behalf of MISS MCQUEEN I hereby protest against the Sale.

Dated Ottawa, 16th March, 1869.

RICHARD F. STEELE,
Solicitor for LUCY McQUEEN