registry of articles of association in *England* under the statute, I think to be beyond the legislative power of the Dominion to provide for. I, therefore, am of opinion that the court in this case had no power to take the procedure it did, and that the appeal should be allowed with costs.

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TASCHEREAU, J., was also of opinion to allow appeal with costs.

Appeal allowed with costs.

Solicitors for appellants: *J. N. & T. Ritchie.*

Solicitors for respondents: *Meagher, Chisholm & Drysdale.*

THE WINDSOR AND ANNAPOLIS RAILWAY COMPANY..... APPELLANTS;

AND

THE QUEEN AND THE WESTERN COUNTIES RAILWAY CO..... RESPONDENTS.

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*Nov. 5.

1884

*Nov. 3, 4.

1885

*Feb'y. 16.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of right—Agreemcnt with Government of Canada for continuous possession of railroad—Construction of—Breach of, by Crown in assertion of supposed rights—Damages—Joint misfeasor—Judgment obtained against—Effect of, in reduction of damages—Pleading—37 Vic. ch. 16.

By an agreement entered into between the *Windsor & Annapolis Railway Company* and the Government, approved and ratified by the Governor in Council, 22nd September, 1871, the *Windsor Branch Railway, N. S.*, together with certain running powers over the trunk line of the *Intercolonial*, was leased to the suppliants for the period of 21 years from 1st January, 1872. The suppliants under said agreement went into possession of said *Windsor Branch* and

*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

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operated the same thereunder up to the 1st August, 1877, on which date *C. J. B.*, being and acting as Superintendent of Railways, as authorized by the Government, (who claimed to have authority under an Act of the Parliament of *Canada*, 37 *Vic.*, ch. 16, passed with reference to the *Windsor Branch*, to transfer the same to the *Western Counties Railway Company* otherwise than subject to the rights of the *Windsor & Annapolis Railway Company*,) ejected suppliants from and prevented them from using said *Windsor Branch* and from passing over the said trunk line; and four or five weeks afterwards said Government gave over the possession of said *Windsor Branch* to the *Western Counties Railway Company*, who took and retained possession thereof. In a suit brought by the *Windsor & Annapolis Railway Company* against the *Western Counties Railway Company* for recovery of possession, &c., the Judicial Committee of the Privy Council held that 37 *Vic.*, ch. 16, did not extinguish the right and interest which the *Windsor & Annapolis Railway Company* had in the *Windsor Branch* under the agreement of 22nd September, 1872.

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

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

Prior to the filing of the petition of right, the suppliants sued the

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

Held, *Per Ritchie*, C.J., and *Taschereau*, J.—That the suppliants could not recover against the Crown, as damages, for breach of contract, what they claimed and had judgment for as damages for a tort committed by the *Western Counties Railway Company*, and in this case there was no necessity to plead the judgment.

Per Fournier and *Henry*, JJ., that the suppliants were entitled to damages for the time they were by the action of the Government deprived of the possession and use of the road to the date of the filing of their petition of right.

APPEAL to the Supreme Court of *Canada* from the judgment of Mr. Justice *Gwynne*, in the Exchequer Court of *Canada*, in favour of Her Majesty the Queen.

The suppliants are a company incorporated by an act of the Legislature of the Province of *Nova Scotia*, and owners of a line of railway running from *Windsor* to *Annapolis* in that province.

On the 22nd day September, 1871, an agreement was entered into between the Government of the Dominion of *Canada* and the suppliants, whereby the *Windsor Branch Railroad*, extending from *Windsor* Junction, on the *Intercolonial Railway*, to the suppliants' railroad at *Windsor* aforesaid, together with running powers over the trunk line of the said *Intercolonial Railway*, to and from *Halifax*, were leased to suppliants for the period of twenty-one years from the 1st January, 1872.

The suppliants, under said agreement, went into possession of said *Windsor Branch* and operated the same thereunder up to the 1st day of August, 1877,

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on which date *Charles J. Brydges*, being and acting as Superintendent of Government Railways, and acting for the Government of *Canada*, ejected suppliants from and prevented them from using said *Windsor Branch* and from passing over the said trunk line; and shortly afterwards said government gave over the possession of said *Windsor* Branch to the defendants, the *Western Counties Railway Company*, who took and retained possession thereof.

Under the proceedings taken the suppliants sought to recover from Her Majesty the Queen damages for the said breach of the agreement of September 22nd, 1871.

After answers had been put in on behalf of Her Majesty and the *Western Counties Railway Company*, respectively, evidence was adduced and an argument was had thereon in the Exchequer Court before Mr. Justice *Gwynne*, and judgment given in favor of Her Majesty, with costs, as follows:—

GWYNNE, J.:—

"This is a petition of right wherein the suppliants claim relief against Her Majesty in respect of the same matter as was the subject of complaint in a bill filed by the suppliants, as plaintiffs, against the *Western Counties Railway Company*, as defendants, in the Supreme Court of the Province of *Nova Scotia*, and decided in favor of the plaintiffs, and carried from thence by appeal to the Privy Council, where the judgment of the Supreme Court of *Nova Scotia* has been confirmed and is reported in L. Rep. 7 App. Cases 178. Upon the hearing of the case before me, the only points raised and discussed were: Whether proceedings by petition of right could be taken against Her Majesty to obtain satisfaction in damages for the pecuniary losses alleged to have been sustained by the suppliants by reason of the conduct which is the subject of the sup-

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pliants' complaint, and, if a petition of right does lie in such a case, what is the proper and reasonable amount which is recoverable by them from Her Majesty under the circumstances and for which judgment should be rendered in this case.

"The petition alleges that the suppliants are a company incorporated by an Act of the Legislature of the Province of *Nova Scotia*, passed prior to the passing of the *British North America Act*, for the purpose of constructing a railway from *Windsor* to *Annapolis*, in the Province of *Nova Scotia*, under the provisions of the said Act, and of an agreement of the 22nd November, 1866, therein recited, and incorporated into and made part of the said Act, whereby among other things it was provided that prior to the opening of the railroad a traffic arrangement should be made between the suppliants and the Provincial Government for the mutual use and enjoyment of their respective lines of railway between *Halifax* and *Windsor* and *Windsor* and *Annapolis*, including running powers, or for the joint operations thereof on equitable terms, to be settled by two arbitrators to be chosen by the said parties in the usual way in case of difference. That the suppliants, in pursuance and exercise of the powers vested in them by the Act, completed the said railway from *Windsor* to *Annapolis*, with a junction at *Windsor* communicating with a railway called the *Windsor Branch Line* and thereby with another railway called the *Trunk Line* into *Halifax*, both of these last mentioned lines being sections of the provincial railways, afterwards known as the *Nova Scotia Railway*, which at the time of passing the said Act was the property of the Government of *Nova Scotia* and so continued, subject to the rights claimed by the suppliants therein, until the 1st July, 1867, when by operation of the provisions of the *British North America Act* the said

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railway lines so far as they were the property of the Province of *Nova Scotia*, and subject to the rights of the suppliants therein, became the property of *Canada*. That an agreement between the Government of the Dominion of *Canada*, acting therein by the Minister of Public Works, under the authority and sanction of His Excellency the Governor General in Council, and the suppliants was, upon the 22nd day of September, 1871, entered into making provision for the use by the suppliants of the *Windsor* and *Branch Trunk Line* upon certain terms therein provided, by which agreement it was provided that the same should take effect on the first day of January, 1872, and continue for 21 years, and be then renewed upon like conditions as in the said agreement mentioned or upon such other conditions as might be mutually agreed upon. That in pursuance of such agreement of the 22nd September, 1871, and upon the 1st of January, 1872, the Government of *Canada* delivered to the suppliants, and they thereupon entered into the exclusive use and possession of the said branch line, with the stations, etc., in use thereon, subject, however, to the right of the Dominion Government to have access thereto for the purpose of maintaining the railway and works as provided in the said agreement, and the government likewise gave to the suppliants, and they thereupon took and exercised such use of the said trunk line and the accommodation specified in connection therewith in Article 3 of the said agreement of the 22nd of September, 1871, as they were under such agreement entitled to have and exercise; and that from the time when such use and possession of the said premises respectively were so given to them as aforesaid the suppliants continued to hold and enjoy the same and to work and operate their own railway line from *Windsor* to *Annapolis*, and the said branch and trunk lines from *Windsor* to *Halifax* until the first day

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of August, 1877. The petition then alleges, and herein is involved the gist and gravamen of the suppliants' complaint, that on day, namely, the 1st day of August, 1877, one *Charles John Brydges*, then being, and acting as, the superintendent of Government Railways, and acting on behalf of the Government of *Canada*, forcibly ejected the suppliants and their servants and railway stock from, and afterwards forcibly prevented them from coming upon or using or passing over the said trunk and branch lines, and he continued in possession thereof, and to prevent your suppliants from coming upon or using or passing over either of such lines, until shortly afterwards the said Government gave over the possession of the said Branch Line to another railway company, known as the *Western Counties Railway Company*, incorporated under an Act of the Legislature of *Nova Scotia* for the purpose of making a railway from *Annapolis* to *Yarmouth* in *Nova Scotia*, and that such company thereupon took and has ever since held possession of, and excluded the suppliants from, and from any use of the said Branch Railway, and that the said government have continued to the present time in possession of the said Trunk Line and to exclude the suppliants therefrom and from any use thereof. That by being so expelled and excluded as aforesaid the suppliants have been prevented from further performing their obligations or exercising the powers and privileges undertaken by and required of them under the said agreement of the 22nd of September, 1871, of operating and using the said Trunk and Branch Lines from *Halifax* to *Windsor* in connection with their own line from *Windsor* to *Annapolis*, and that save in so far as they have been so prevented by the said government from so doing the suppliants have duly operated the said railways and done and performed all other acts and conditions required to be done and

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performed on their part under and in respect of the said agreement of the 22nd September, 1871. The petition then states the passing of an Act of the Parliament of *Canada*, 37 *Vic.*, ch. 16, for the purpose of raising the contention that it did not profess to give any authority to the Government of *Canada* to transfer the said branch railway to the *Western Counties Railway Company* otherwise than subject to the suppliants said rights, and that if the said act did purport so to do it was *ultra vires* of the Parliament of *Canada* and inoperative. The petition further alleged that by the acts so committed by the Government of *Canada* as aforesaid in forcibly expelling and excluding the suppliants, and by their breach of and failure to perform the said agreement of the 22nd of September, 1871, they had caused to the suppliants great injury, loss and damage, and the suppliants submitted that they had no effectual remedy in the premises against Her Majesty's government but by petition of right, but that they had been advised that they are entitled to recover possession of the said Branch Line from the *Western Counties Railway Company*, and that they had accordingly commenced a suit against them for the purpose in the Supreme Court of Equity in *Nova Scotia;* and the suppliants, among other things, prayed that the sum of one hundred and fifty thousand pounds sterling, or such sum as might be reasonable, might be paid to them in compensation and by way of damages for the breach and losses occasioned to them by the breach and failure of the Government of *Canada* to perform the said agreement of the 22nd of September, 1871.

"The judgment of the Privy Council, on the appeal of the *Western Counties Railway Company* from the judgment of the Supreme Court of *Nova Scotia* in the suit in Equity brought against that company by the *Windsor & Annapolis Railway Company*, has established that the

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latter company had a good title to the possession of the *Windsor Brauch Railway* under the agreement entered into with them by the Government of *Canada*, dated the 22nd day of September, 1871, and the result of the success of the *Windsor & Annapolis Railway Company* in that suit has been to restore to them the possession of that branch railway from which they had been wrongfully evicted. The judgment has further decided that the agreement of the 22nd September, 1871, was an implement of the obligation to make a traffic arrangement which was contained in the agreement of November, 1866, and which was incorporated into and made part of the act incorporating the *Windsor & Annapolis Railway Company*. The Government of *Canada* therefore, which by the *British North America Act* became owners of the *Windsor Branch Railway*, subject to the rights and interest of the *Windsor & Annapolis Railway Company* therein, under the agreement of November, 1866, and their act of incorporation, specifically performed the agreement entered into with the *Windsor & Annapolis Railway Company* by the government of the old Province of *Nova Scotia* prior to Confederation and perfected the title of that company to the use, possession and enjoyment of the *Windsor Branch Railway*, under the agreement of the 22nd September, 1871, for the term of 21 years from the 1st day of January, 1872, unless that term should sooner become forfeited or extinguished by due process of law or determined by contract between the parties. The judgment of the Privy Council also determined that the Dominion Act 37 *Vic.*, ch. 16, did not extinguish the right and interest which the *Windsor & Annapolis Railway Company* had in the *Windsor Branch Railway* under the agreement of the 22nd September, 1871, even if the Dominion had under

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the circumstances power so to do, a point which is not determined.

"The consequence is that at the time of the committal of the acts of trespass complained of by the suppliants, and which are made the foundation of the claim for indemnity in damages relied upon in this petition of right, the suppliants had full statutory right and title to maintain their possession of the *Windsor Branch Railway*, and had therefore ample power in the law, and the same power as all other owners of property have, to protect themselves against the wrongful acts of all persons whomsoever, whether such persons assumed to act in an official capacity as servants or agents to the Dominion Government or otherwise; the act therefore alleged to have been committed by Mr. *Brydges*, although he was invested with the character of superintendent of Government Railways, was, as indeed it is upon this petition charged to have been, a plain act of trespass for which he was liable to an action, so likewise the *Western Counties Railway Company* upon their entering and taking possession were equally wrongdoers, and as such responsible to the suppliants, and liable to indemnify them in damages for the injury which the latter thereby sustained, and they have been adjudged so to be by the judgment of the Supreme Court of *Nova Scotia*, which judgment has been affirmed by the Privy Council. Now what is sought to be obtained by this petition of right in addition to restitution of the property is merely compensation in damages to be paid by Her Majesty for the trespass and eviction so committed by persons acting under the authority of the Government of *Canada*, or professing so to do, in taking possession of the *Windsor Branch Company*, evicting the suppliants from the possession thereof and putting the *Western Counties Railway Company* into possession thereof, and for the mesne profits received by

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the *Western Counties Railway Company* during their possession. For the damages sustained by the suppliants by this trespass and eviction, the judgment recovered by the suppliants as plaintiffs against the *Western Counties Railway Company* renders that Company responsible, but the suppliants nevertheless claim the right to recover the same damages by a judgment to be rendered against Her Majesty upon the petition of right.

"To this petition the *Western Counties Railway Company* have been made parties under the provisions of the 6th section of the Dominion statute, 39 *Vic.*, ch. 27, which is similar in its terms to the 5th section of the Imperial statute 23rd and 24th *Vic.*, ch. 84, and the company have filed a statement in defence under the provisions of the statute, whereby they assert title to the property in dispute upon the same grounds as were unsuccessfully urged by them in the suit brought against them in the Supreme Court of *New Brunswick*, that is to say, under the provisions of an Act of the Dominion Parliament, 37 *Vic.*, ch. 16. Her Majesty's Attorney General for the Dominion of *Canada* has also under the provisions of the statute 39 *Vic.*, ch. 27, filed an answer to the suppliants' petition, wherein, while admitting the agreement of the 22nd November, 1866, referred to in the petition, and the execution of the instrument of the 22nd September, 1871, disputing however its validity and effect, and setting up a resolution of the House of Commons and certain resolutions passed by His Excellency the Governor-General in Council upon certain reports of the Minister of Public Works relating to the property in question, and setting up also the Dominion Act 37 *Vic.*, ch. 16, proceeds to say in the 12th paragraph of such answer—that on or about the 25th July, 1877, the Government of *Canada* having completed arrangements with the *Western*

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Counties Railway Company for giving to them possession of the said branch, a minute of His Excellency the Governor General in Council was passed ordering and directing that the arrangements then existing with the suppliants with respect to the said branch should be terminated on the 1st day of August, 1877, and the Minister of Public Works on behalf of Her Majesty was directed to resume possession of the said branch on that day and to put the *Western Counties Railway Company* in possession thereof, pursuant to the said Act 37 *Vic.*, ch. 16.

"That in pursuance of the said minute of council and of the said act the officers of Her Majesty did on or about the said first day of August, upon the refusal of the suppliants to give up the possession of the said branch, take possession thereof and afterwards gave possession of the same to the *Western Counties Railway Company*, which is the ejection and giving over of possession complained of in the fifth paragraph of the said petition.

"And he submitted (14th) that in taking possession of the said branch, in giving over such possession to the *Western Counties Railway Company*, no wrong was committed against the suppliants which entitles them to any relief against Her Majesty by petition of right; and he denied (15th) that the suppliants were excluded by the government from the trunk line between *Halifax* and *Windsor* or from any use thereof, but he submitted that no relief could be decreed against Her Majesty upon the said petition with respect to the said trunk line, inasmuch as the instrument of the 22nd September, 1871, upon which the suppliants base their claim to relief, if ever binding, was based upon a single and indivisible consideration, viz: One-third of the gross earnings from all traffic carried over the *Windsor Branch* and the Trunk Line; and that if the said instrument can-

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not, and he submitted that it cannot, under the circumstances referred to in his answer, be enforced with respect to the said branch, neither can it be enforced with respect to the Trunk Line; and submitted (16) that the relief prayed for in the first and second paragraphs of the prayer of said petition cannot be decreed against Her Majesty, nor can any injunction for the purposes prayed for be ordered by the court; and he submitted, lastly, that it should be declared that the suppliants are not entitled to any portion of the relief sought by their petition and that they should be ordered to pay the costs incurred by Her Majesty in the matter.

"Now the case of *Tobin* v. *The Queen* (1), decides that the Imperial statute 23rd and 24th *Vic.*, ch. 34, alters only the form of procedure to be adopted by suppliants resorting to petition of right, and does not alter the laws relating to the subject for which the petition can be maintained.

"The Attorney General in that case, the present Lord *Selborne*, argued that the proceeding authorized by the statute, requiring a party in possession under title derived from the Crown of property claimed by a petition of right to be made a party thereto, was in the nature of bill of interpleader, wherein the party claiming the right to the possession and the party in actual possession can assert their respective rights.

"The case which has been already decided in the Supreme Court of *New Brunswick*, and in the Privy Council at the suit of the *Windsor & Annapolis Railway Company* against the *Western Counties Railway Company*, has decided that the right of former company to the possession of the property in question could as against the latter company be effectually adjudicated upon and determined in a suit instituted and conducted according to the ordinary practice of the

(1) 16 C. B., N. S., 310 & 10 Jur. N. S. 1032.

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courts of justice between subject and subject; and that redress can be thus obtained against the *Western Coun'ies Railway Company* for the wrongs complained of by the suppliants, and the damages occasioned to them thereby. It was not suggested upon the hearing before me of this petition of right, that the judgment rendered in that case was not sufficient for the purpose of establishing as against the Crown the rights of the suppliants to the restitution and possession of the property under the agreement of the 22nd of September, 1871. It seemed rather to have been assumed to be sufficient for that purpose; for the only question, as I have already said, which was opened and discussed before me was as to the right of the suppliants to have a judgment in this case for the recovery from Her Majesty of the damages occasioned to the suppliants by the wrongs complained of.

"The case of *Tobin* v. *The Queen* establishes that a petition of right cannot be maintained to recover unliquidated damages for a tort.

"It does lie to obtain restitution of property wrongfully taken on behalf of the crown, or wrongfully withheld, but the judgment in favor of the suppliant upon such a petition only enabled him to recover possession of the specific property, or the value of it if it had been converted to the Sovereign's use. As against the Sovereign, the only redress to be obtained is restitution. If damages are sought they are to be obtained from the individual who did the wrong. In the present case the suppliants have already obtained a judgment against the *Western Counties Railway Company* entitling them to an account of the receipt from traffic, which but for their wrongful possession of the suppliants' property the latter would have received, and this was the nature of the damages claimed before me, but there is no pre-

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tence that any sum of money from such source ever came to the possession of Her Majesty.

"The case made by the petition is that what was done, although professed to be done under the authority of an Act of Parliament, was not authorized by the Act, and was in fact a trespass unlawfully and forcibly committed: now when public servants of whatever rank commit an act of trespass in the erroneous belief that the act is authorized by an Act of Parliament, *Tobin* v. *The Queen* is an express authority that the Sovereign cannot be made responsible on a petition of right for such an act for two reasons: 1st. because in such case the act is not done by command of the Sovereign but under the assumed authority of an Act of Parliament; and 2nd, if it were done by command of the Sovereign, the command to commit a trespass being unlawful, it is no command in law, so that, as is decided in that case, the doctrine of *respondeat superior* does not apply to the Sovereign. I have no doubt therefore that under the circumstances which are relied upon by the suppliants a petition of right could not be maintained in *England* to recover damages from Her Majesty, and that therefore by the express provisions of the Act. 32 *Vic.*, ch. 27, sec. 19, no damages can be recovered against Her Majesty upon this petition In so far therefore as this petition claims compensation in damages from Her Majesty, the petition must be dismissed with costs, leaving the suppliants to pursue their remedy for such compensation against the *Western Counties Railway Company* under their judgment already recovered against that company.

"If the suppliants think it necessary that they should have a declaration of their rights, upon the petition, upon the basis upon which they have been established by the judgment in the suit in the Supreme Court of *Nova Scotia* affirmed by the Privy Council, the case may

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be set down to be spoken to before me upon the minutes. As the question of damages was all that was opened or discussed before me, I have confined my judgment to that question."

This appeal was from the refusal of Mr. Justice *Gwynne* to grant a rule for a new trial.

The case in appeal was first argued before five judges, Mr. Justice *Taschereau* being absent, but was subsequently re-argued before the full bench.

Mr. *Dalton McCarthy*, Q.C., and Mr. *H. McD. Henry* Q.C., for appellants:

The acts complained of are distinctly admitted to have been done by Her Majesty, and therefore the argument need not be complicated by any questions as to the responsibility of the Sovereign for acts of her servants.

These acts must be regarded as constituting a breach of contract and not as a "mere tort," or indeed as a tort in any sense; not a "mere tort," because a breach of contract was also effected; and not a tort at all, seeing that since the "Queen can do no wrong" what was done must be regarded as a breach of contract only.

There is no decided case nor any authority for the position (involved in the judgment appealed from) that the act or acts complained of are to be regarded as wrongs properly so-called. In other words, there is no authority for the position that where a clear and direct breach of contract happens also to involve an element which in some respects might be regarded as tortious, the Crown shall be protected in its breach of agreement by the maxim that "the Queen can do no wrong;" and it is further submitted that there is no good reason why such a result should follow.

The theory of the judgment appealed from in this behalf involves the anomalous result that, while

petition might lie if the Queen had simply refused to let the suppliants into possession under their agreement, yet they are remediless where, after being in possession for a time, they are, in breach of the agreement, prevented from continuing that possession.

But even if the expulsion from the *Windsor Branch* could, upon true principles, be regarded as a "mere tort," the refusal of Her Majesty to execute her part of the contract as to the running powers over the Trunk Line can be nothing but a breach of contract. In that there was no trespass, no invasion of property right. There was in law nothing but a refusal to perform Her Majesty's part of the agreement in that behalf.

It is a mere coincidence that Her Majesty, in breaking the agreement, did what might have been characterized as a tort if it had not been a breach of agreement.

So far as the present subject of discussion is concerned, the judgment appealed from is based on the case of *Tobin* v. *The Queen* (1).

Now, the case of *Tobin* v. *The Queen* is distinguishable from the present in the following important particulars, and it cannot, therefore, govern the rights of the suppliants in this petition.

In *Tobin* v. *The Queen* there was no contract nor even a pretence of the existence of a contract, much less any breach of contract. The act complained of constituted nothing but a tort. It was not only unauthorized by the Crown, or any department of Government, but was expressly repudiated in the answer as being so unauthorized. The benefit to the Crown of the seizure was remotely contingent upon the vessel in question being condemned in the Admiralty Court, and that never occurred, so that nothing of the suppliants, or arising from his property, ever came to the Crown. In the

(1) 16 C. B. N. S. 310.

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present case, on the other hand, there was a breach by the Crown of a contract made with the Crown.

Her Majesty has admitted in Her answer that the act which constitutes the breach of contract was done for Her.

The property in question was actually used by Her Majesty for nearly two months, the proceeds received by Her, and the rights and privileges of the suppliants were then let to third parties, who held them under and for the Crown, until they were restored to the suppliants.

With regard to the portion of the judgment appealed from, which suggests that redress for the suppliants is available against the *Western Counties Company* we submit it is erroneous for the following reasons :

1st. Because in no view can the *Western Counties Railway Company* be held answerable for the loss to the suppliants represented by the period during which the Crown actually received the profits of the property in question, that is, from 1st August to 24th September, 1879.

2nd. Because this case cannot be regarded merely as practically giving rise to an interpleader between the suppliants and the *Western Counties Railway Company* joined as claiming under the Crown, inasmuch as the claim is for compensation for a specific breach of a contract of the Crown, for part of which compensation, at least, the *Western Counties Railway Company* can in no view be held liable.

3rd. No such defence has been pleaded, nor was any such defence urged at the trial of the petition.

4th. No compensation has ever been decreed or recovered from the *Western Counties Railway Company*. This portion of the judgment appealed from would indeed appear to involve a mere speculation as to the effect of the equity suit brought in the Supreme Court of *Nova Scotia*, the judgment in which still remains

entirely without form, as will appear by reference thereto.

On the re-argument the following cases were cited: *Rigby* v. *The Great Western Railway* (1); *Manly* v. *St. Helens Canal and Railway Co.* (2); *Wall* v. *The City of London Ry. Pro. Co.* (3); *Wigsell* v. *The Corporation of the School for the Indigent Blind* (4); *McMahon* v. *Field* (5); *Taylor* v. *Dunbar* (6); *Lock* v. *Furze* (7); *Earl of Warwick* v. *Duke of Clarence* (8); *Banker's Case* (9); *The British Columbia and Vancouver's Island Spar, Lumber and Saw Mill Co. (Limited)* v. *Nettleship* (10).

Mr. *Lash*, Q.C., for the respondent, Her Majesty's Attorney General:

The Petition of Right Act does not give to a suppliant any additional remedy against the Crown which would not have existed in *England* prior to the Imperial Act 23 and 24 *Vic.*, ch. 34, but merely relates to the form of procedure, and in *England* the relief prayed for against the Crown in this matter could not have been granted upon a petition of right.

The petition in this matter in effect seeks to recover from the Crown damages for trespasses unlawfully and forcibly committed by servants of the Crown, contrary to the well established doctrines laid down in the case of *Tobin* v. *The Queen* (11); *McFarlane* v. *The Queen* (12); *MacLeod* v. *The Queen* (13); and cases therein referred to.

The suppliant's rights to the possession of the property in question and to the damages for the wrongs complained of could have been established and adjudi-

(1) 14 M. & W. 811.
(2) 2 H. & N. 357.
(3) L. R. 9 Q. B. 249.
(4) 8 Q. B. D. 357.
(5) 7 Q. B. D. 591.
(6) L. R. 4 C. P. 210.
(7) L. R. 1 C. L. 441.
(8) P. 9 Hen. 6, fol. 4, p. 7.
(9) Howell's State Trials 1.
(10) L. R. 3 C. P. 499.
(11) 16 C. B. N. S. 310.
(12) 7 Can. S. C. R. 216.
(13) 8 Can. S. C. R. 1.

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cated upon in a suit or suits instituted and conducted according to the ordinary practice of the courts of justice between subject and subject. And so far as relates to the connection of the *Western Counties Railway Co'y* with the matter, their rights were so established and adjudicated upon in the suit brought against that company. The only ground upon which judgment was or could have been given in the suppliants' favor in the last mentioned suit is that the acts complained of were torts, which rendered all persons concerned in them liable to the suppliants in unliquidated damages; such being the case, it follows, under the authorities above mentioned, that such acts cannot be relied on in support of a claim against the Crown by petition of right.

The petition of right, in addition to seeking damages, prays for specific performance of the agreement of 22nd September, 1871, and for an injunction to restrain Her Majesty's officers and servants from doing certain acts. No such relief can be given against the Crown.

[The learned counsel relied principally upon the judgment of the Exchequer Court, and the reasons therefor given by Mr. Justice *Gwynne*, and on the reargument cited *Bird* v. *Randall* (1); *Gosman, in re* (2), and *Woodfall* on Landlord and Tenant (3).]

Mr. *Gormully* was present on behalf of the *Western Counties Railway Company*, but was not heard.

RITCHIE, C.J.:—

In discussing this question I am free to admit to the fullest extent the doctrine that a petition of right, founded on a tort in the legal sense of that term, cannot be entertained against the Crown, and also that the Crown cannot be prejudiced by the misconduct, laches, or negligence, of any of its officers, either with respect to the rights of persons or of property.

(1) 3 Burr. 1354.
(2) 17 Ch. D. 771.
(3) 11th Ed. 629.

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But I think it clear that matters of contract and grant made on behalf of the Crown are within a class of subjects legally distinct from wrongs, such as those from which the Crown is exempt by reason of the maxim that the Crown can do no wrong, and, therefore, with all respect, it does not seem to me that *Tobin* v. *The Queen* (1), relied on by the learned judge in the Exchequer Court, is any authority for applying the maxim invoked to this case, the great distinction being that that was not a case of a claim against the Crown, for acting by its servant in the assertion of a supposed legal right, but it was a claim for compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty.

On the contrary, *Erle*, Chief Justice, at page 355, very clearly propounds a doctrine so consonant with common sense that I should long hesitate before repudiating it, viz.:

That claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs.

So in *Seddon* v. *Senate* (2):

Lord *Ellenborough*, C. J., observed that the argument of the defendant's counsel, [which he repudiated,] went further; that the defendant having conveyed all interest in the subject-matter out of himself, the plaintiff had no remedy on the covenant, but only the same remedy as against any wrong-doer. That if one sold and covenanted to another an estate with the common covenants, and afterwards went on it to sport, the purchaser could not maintain covenant.

LeBlanc, J., says:

And that brings it to the question, whether, when it appears that the defendant had agreed to part with his whole interest in the medicines, and he does convey in terms large enough to cover his whole interest, the law will not imply a covenant that he shall not himself vend that for his own profit which he had agreed to sell and had sold to another; and it appears to me that the breach assigned

(1) 16 C. B. N. S. 310.

(2) 13 East 71.

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against him in that respect is not like a mere tort committed by a stranger; but is a breach of that right which he had conveyed to another. He has done that which is the exercise of an assumed right over a subject-matter which he had before covenanted to convey and had conveyed to the plaintiff; and I also think that the manner in which that breach is assigned is not merely as in the case of a tort by a stranger, but as of a right conveyed to the plaintiff by the deed of the defendant.

Bayley, J, says:

A covenant is nothing more than an agreement, in construing which we have only to look to the fair meaning of the parties to it; and if the agreement were in substance and effect that the defendant would sell and assign to the plaintiff the sole right of making and vending the medicine for his profit, and that the defendant would not interfere with him in making and vending it, that raises an implied covenant on the part of the defendant that he would not make and vend it; and if he do afterwards make and vend it, it is a breach of that implied covenant.

* * * * * *

It appears, therefore, by the language of the third deed alone, that the defendant contracted with the plaintiff that he should have the sole exercise of the right of making and selling these medicines for his own benefit; and then the question is, whether the conduct of the defendant, in interfering with that right which he had before conveyed to the plaintiff, be not a breach of his covenant. As in *Pomfret* v. *Ricroft* (1) *Twysden*, J., (who differed from the rest of the court upon the case in judgment) agreed that the grant of a water course implies a covenant by the grantor not to disturb, by any act of his own, the grantee in the enjoyment of it; and, therefore, that a subsequent act of disturbance by the grantor in stopping the water course would give the grantee an action of covenant against him. And if one make a lease of a house and estovers, and afterwards cut down all the wood out of which the estovers were to be taken, the lessee shall have his remedy by action of covenant against him; it being a misfeasance in him to annul or avoid his grant. So in *Russel* v. *Gulwel* (1) it was agreed that if one make a lease of lands, reserving a right of way, or common, or other profit a prender, if the lessee disturb him in the enjoyment of the way, &c., covenant will lie for such disturbance. To apply the same principle to the present case: the defendant assigns by deed all his right, title, and interest in the making and vending of a certain medicine to the plaintiff, and afterwards he disturbs him in the enjoyment of it by making and

(1) 1 Saund. 322.

selling it on his own account; that, therefore, is in breach of his covenant.

Lord *Ellenborough*, C.J., afterwards observed that no argument could be drawn from the opinion delivered by the court to authorize the extension of the doctrine to the wrongful act of a stranger.

So in *Jones* v. *Hill* (2), an action on the case in the nature of waste, which is an action founded on tort:

The declaration stated that the defendant held certain messuages, as tenant to the plaintiff, for the remainder of a term of years, upon a general condition to repair and leave the premises in as good plight and condition as the same were in when finished under the direction of a surveyor.

Breach for not repairing during the term and yielding up the premises in much worse order than when the same were finished under the direction of the surveyor.

Lord Chief Justice *Gibbs* says:

Where there is an express stipulation or contract between two parties, this species of action is not maintainable, for such contract is a total waiver of tort, and it therefore ceases to bear the character of waste.

That a petition of right is the suitable and proper remedy for the subject, when by misinformation (as in this case) or inadvertence the Crown has been induced to invade the private rights of any of its subjects, or where the Crown has in its hands property to which the subject has a legal title, ancient and modern authorities, in my opinion, unquestionably establish.

As to the ancient authorities.

Petition says *Staundeforde*, Prerog., is all the remedy the subject hath when the King seizeth his land or taketh away his goods from him, having no title by order of his laws so to do, in which case the subject for his remedy is driven to sue unto his sovereign lord by way of petition only; for, other remedy hath he not; and, therefore, is his petition called a petition of right, because of the right the subject hath against the King by the order of his laws to the thing he sueth for.

* * * * * *

That petitions did lie for a chattel as well as for a freehold, does

(1) Cro. Eliz. 657. (2) 1 Moore 100.
(3) Ch. 22, p. 72.

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appear 37 Ass. pl. 11, Bro. Abr. Petition, 17. If tenant by statute, merchant be ousted, he may have a petition, and shall be restored; vide 9 H. 4, Bro. Petition, 9. If the subject be ousted of his term, he shall have his petition; 9 H. 6, fo. 21, Bro. Petition, 2. Of a chattel real, a man shall have his petition of right, as of his freehold; 7 H. 7, fo. 11. A man shall have a petition of right for goods and chattels; and the king indorses it in the usual form: 34 H. 6, fo. 51. Bro. Petition, 3. He adds: It is said, indeed, 11 H. 7, fo. 3, Bro. Petition, 19, that a petition will not lie of a chattel.

The whole tenor of Lord *Somers'* argument in the *Banker's* case shows that he was clearly of opinion that a petition of right would lie for a chattel, and even for unliquidated damages.

In 4 Ins. 241 Lord *Coke* says:

It is holden in our books that in restitutions the king himself has no favor nor his prerogative any exemption, but the party restored is favored.

In *Manning's* Exchequer practice (1), it is said:

By the law of *England*, no personal wrong can, for obvious reasons, be imputed to the sovereign. But, when the property of the subject is invaded or withheld, the prerogative does not prevent the injured party from obtaining restitution or payment. Where, however, a right is sought to be established against the crown itself, it would be absurd, as well as indecent, to adopt the mandatory forms of common process. The course, therefore, prescribed by the common law, is, to address a petition to the King in one of his courts of record, praying that the conflicting claims of the crown and the petitioner may be duly examined. * * * * * * * It is called a petition of right, and is in the nature of an action against the King, or of a writ of right for the party, though chattels real or personal, debts or unliquidated damages may be recovered under it.

In *Blackstone's* Commentaries, p. 254, it is said:

That the King can do no wrong, is a necessary and fundamental principle of the English constitution, meaning that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the Sovereign, nor is he, but his ministers, accountable for it to the people; and, secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice. When

(1) Ch. 10, s. 1, p. 84.

ever, therefore, it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign (*Jenkins*, 78) (for, who shall command the King?) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the Crown of the true state of the matter in dispute; and, as it presumes, that to know of any injury and to redress it are inseparable in the royal breast, it then issues as of course, in the King's own name, his orders to his judges to do justice to the party aggrieved. * * * *

The common law methods of obtaining possession or restitution from the Crown of either real or personal property are:—1. By petition *de droit*, or petition of right, which is said to owe its origin to King *Edward the First* (1); 2. By *monstrans de droit*, manifestation or plea of right; both of which may be preferred or prosecuted either in the Chancery or Exchequer. The former is of use where the Sovereign is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the Crown, or otherwise the petition shall abate; and then, upon this answer being indorsed or underwritten by the king *soit droit fait al partie* (let right be done to the party), a commission shall issue to enquire of the the truth of this suggestion; after the return of which the king's attorney is at liberty to plead in bar, and the merits shall be determined upon issue or demurrer, as in suits between subject and subject.

As to the more modern authorities.

In delivering the judgment of the Court of Queen's Bench in Baron *de Bodes* case (2), Lord *Denman* says:

There is nothing to secure the Crown against committing the same species of wrong, unconscious and involuntary wrong, in respect of money, which founds the subject's right to sue out his petition when committed in respect to lands or specific chattels; and there is an unconquerable repugnance to the suggestion that the door ought to be closed against all redress or remedy for such wrong.

Erle, C.J., in *Tobin* v. *The Queen*, says:

We come now to the authorities showing where the petition of right will and where it will not lie. We pass the class of claims founded on contracts and grants made on behalf of the Crown with

(1) Bro. Abr. T. Prerogative, 2. (2) 8 Q. B. 208, 273.

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brief notice, because they are within a class legally distinct from wrongs.

* * * * * *

Again:

We pass from the class of claims on contract, in all systems of law distinguished from claims founded on wrong, and proceed to the more numerous class of claims where petitions of right have been brought in respect of property either wrongfully taken on behalf of the Crown, or wrongfully withheld.

As a general principle, property does not pass from the subject to the Crown without matter of record. In the time of feudal tenures, rights in property accrued to the Crown on very many occasions, and officers had the duty of enforcing the rights of the Crown. The right accrued on some of these occasions by matters of record, and on other occasions powers existed for the making the right matter of record by office found. The officers seized, or justified seizures, under these records; and their right to seize was a subject of frequent contest, tried either by petitions of right, *monstrans de droit*, or traverse of office found.

But, whatever was the form of procedure, the substance seems always to have been the trial of the right of the subject as against the right of the Crown to property or an interest in property which had been seized for the Crown; and, if the subject succeeded, the judgment only enabled him to recover possession of that specified property, or the value thereof, if it had been converted to the King's use. The form for trying this question has gone through several changes. Traverse of office found, *monstrans de droit*, and petition of right were the forms in most frequent use. Amendments of the procedure were made by the statutes 34 E. 3, c. 14, 36 E. 3, c. 13, and 2 E. 4, allowing many questions to be raised by traverse, in cases where theretofore a petition of right was necessary; and much learned discussion is to be found in the books relating to these different forms. Lord *Coke* has much learning thereon, both in his commentary on the statutes of substituting traverse for petition (1), and in his judgment in the case of *The Saddlers' Company* (2). In *Conyngsby* and *Mallom's* Case (3) all the judges gave separate judgments of much research, to the effect that a *monstrans de droit* was wrong in that case, and that the plaintiffs ought to have had a petition.

In *Feather* v. *The Queen* (4) *Cockburn*, C. J., says:

How can you distinguish between the seizure of goods by a servant

(1) 2 Inst. 68.
(2) Temp. H. 8, Keilway, 154.
(3) 4 Rep. 58.
(4) 6 B. & S. at p. 282.

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of the Crown where it is admitted a petition of right lies and the improperly interfering with his liberty.

And at page 293, *Cockburn*, C. J., delivering judgment of the court says:

We think it right to state that we can see no reason for dissenting from the conclusion arrived at by the Court of Common Pleas (in *Tobin* v. *The Queen*). We concur with that court in thinking that the only cases in which the petition of right is open to the subject are where the land, or goods, or money of a subject have ound their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given compensation in money, or where a claim arises out of a contract as for goods supplied to the Crown or to the public service. * * * *

In considering this case let us start with the now unquestionable proposition that for breach of contract unliquidated damages can be recovered against the Crown by petition of right. This was clearly established in *Thomas* v. *The Queen* (1) in which *Blackburn*, J., thus states the principle:

Contracts can be made on behalf of Her Majesty with subjects, and the Attorney General suing on her behalf can enforce those contracts against the subjects, and if the subject has no means of enforcing the contract on his part there is certainly a want of reciprocity in such cases.

The controversy in this case has never, that I can discover, as between the Crown and the suppliants, been, whether its officer, who evicted the suppliants, was or was not guilty of a tort, and therefore the Crown on that ground not liable for his act; no such defence is set up by the answer of the Attorney General, nor any evidence offered on the part of the Crown in support of such a defence. It would appear to have been stated at the hearing in this case and adopted by this court, but in my opinion it is entirely opposed to the whole action of the Government and the line of defence on record, where the real substantial true matter in

(1) L. R.10 Q. B. 33.

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controversy between the suppliants and the Crown is clearly put forward by the Attorney General; the suppliants claiming that the contract of 22nd September, 1871, is valid and binding, in full force and effect, and under which they were by the agreement of the Crown entitled to the continuous enjoyment and possession of the *Windsor Branch* and running privileges over the trunk line from *Windsor* junction to *Halifax* for a period of 21 years from the 1st day of January, 1872, and that the Crown in breach of this agreement evicted the suppliants, took possession of the *Windsor Branch* and prevented them from exercising running powers over the trunk line. The Crown, on the contrary, contending that it had the legal right to put an end to the agreement, avers that it did so, and therefore the agreement, being thus terminated, the eviction and taking possession was lawful, and so no breach thereof.

The Crown, by the answer of the Attorney General, does not attempt to get rid of their liability by setting up that the act of taking possession and evicting the suppliants was a wrongful act of trespass by the manager of the railway, for which the Crown is not responsible; on the contrary, the Crown admits the doing of the act and justifies it on the ground that the legal right existed in the Crown to put an end to the contract and resume possession, and that a minute of the Governor in Council was passed ordering that the agreement with the suppliants should terminate on the 1st August, 1877, and directing the Minister of Public Works, on behalf of Her Majesty, to resume possession; in pursuance of which minute the officers of Her Majesty did, upon refusal of the suppliants to give up possession, take possession thereof and afterwards gave possession to the *Western Counties Railway*, which taking possession the Crown submits was no wrong

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committed against the suppliants. The words of the Attorney General's answer are as follows :

11. I submit that the said instrument of 22nd June, 1875, was not and is not binding upon Her Majesty in so far as the same purported to confer upon the suppliants any rights with respect to the said branch other than such as were determinable by further order of the Governor in Council, and in so far as the same purported to confer upon the suppliants any right with respect to the said branch beyond the time when arrangements might be completed for giving possesssion thereof to the Western Counties Railway Company, as referred to in the second section of the said Act of May, 1874. I say that the insertion of any clause in said instrument ot 22nd June 1875, purporting to confer upon the suppliants rights other than such as were determinable by further order of the Governor in Council was an error on the part of the person who prepared said instrument, and the same was signed by the said Minister of Public Works in error and without knowledge on his part that such clause was contained therein.

12. I say that on or about the 25th of July, 1877, the Government of *Canada*, having completed arrangements with the *Western Counties Railway Company* for giving to them possession of the said branch, a minute of His Excellency the Governor General in Council was passed ordering and directing that "the arrangements then existing "with the suppliants with respect to the said branch should be ter- "minated on the first day of August, 1877," and the Minister of Public Works on behalf of Her Majesty was directed to resume possession of the said branch on that day and to put the *Western Counties Railway Company* in possession thereof pursuant to said Act of May, 1874, all of which the suppliants had notice.

13. In pursuance of the said minute of council and of the said act of 1874 the officers of Her Majesty did, on or about the said first of August, upon the refusal of the suppliants to give up possession of the said branch, take possession thereof and afterwards gave possession of the same to the *Western Counties Railway Company*, which is the ejection and giving over of possession complained of in the fifth paragraph of the said petition.

14. I submit that in taking possession of the said branch, and in giving over such possession to the *Western Counties Railway Company*, no wrong was committed against the suppliants which entitles them to any relief against Her Majesty by petition of right.

Here the Attorney General does not say the possession was taken by force, or in any way tortiously, no tortious act is set up for which the Crown claim not

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to be liable, but the exact opposite, The Attorney General puts forward that upon the construction of the agreement and the statutes bearing thereon, the Crown claims it had a right to put an end to the contract, and they did so, and claim that the action of the Crown and its officers being lawful and not tortious, they were justified, and, therefore, the suppliants are not entitled to claim damages. The Crown does not and never has repudiated the act of its officer, but the very reverse. The Courts, however, having decided that the ground taken by the Crown was not tenable in law, that the Crown was misinformed as to its supposed rights, that the agreement was still a continuous, valid and binding agreement to which they had no right to put an end, this defence entirely fails. And therefore the Crown by its officers having thus acted on a misconception of, or mis-information as to, the rights of the Crown, wrongfully, because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong, by such breach became possessed of the suppliants property, and for restitution of which and damages indemnity is now sought, and this is the only real substantial matter that I can discover in controversy in this petition.

To go outside of this agreement, of this litigation, and of this answer and defence of the Crown, and the legal decision on the rights of the parties, and declare this *bonâ fide* action of the Government, based on what the Government believed to be the true construction of the agreement and the just rights of the Crown to be nothing more nor less than a personal wrong, a simple act of trespass committed by *Mr. Brydges*, for which he and he only is legally responsible, conflicts, in my opinion, with every principle of law and justice. It must be admitted that the maxim that the Queen can

do no wrong does not apply to breaches of contract entered into by the Crown. To turn, then, the deliberate and advised action of the Crown on its construction of this agreement into a simple tort by an officer of the Crown would be to make the maxim applicable to breaches of contract as well as torts, and in my humble opinion to enable a salutory prerogative to be used for the perpetration of the greatest injustice. In a proper case no one will be more ready or willing to uphold and maintain this maxim than I, as I have on several occasions shown in this Court, but to apply the maxim to a case such as this would, in my opinion, be wholly unjustifiable, and supported by no authority that I am aware of, the suppliants seeking compensation and indemnity for a simple breach of a contract which the Crown wholly independent of tort deemed it had a right to put an end to.

What is then the true construction of this agreement, entered into between the *Windsor and Annapolis Railway Company, limited*, and the Government of *Canada* (approved and ratified by His Excellency the Governor General of *Canada*, in Council, on the 22nd day of September, A.D. 1871), and which provides *inter alia*, as follows:—

2. The Company (meaning the plaintiffs) shall expect, for the purpose of the authorities, (meaning the Government of *Canada*) in maintaining the railway and works have the exclusive use of the *Windsor Branch*, with all station accommodation, engine sheds and other conveniences (but not including rolling stock and tools for repairs) now in use thereon.

3. The Company shall also use, to the extent required for its traffic, the trunk line with the station accommodation thereon, including engine shed accommodation for fire engines, water supply, fuel stages, turntables, signals, telegraphs, wharves, sidings and other conveniences, but not including machine shops and other shops, buildings and appliances for repairs of rolling stock.

21. This agreement shall take effect on the 1st day of January,

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1872. and continue for 21 years, and be then renewed on the same conditions or such other conditions as may be mutually agreed on.

It must be construed so as to make it operate according to the intention of the parties.

I think the true construction of this agreement or grant is, and the clear intention of the parties as indicated thereby was, that the suppliants should have the full, beneficial and continuous enjoyment of the privileges thereby granted for a continuous period of 21 years, and that they should not be disturbed by the Crown in such enjoyment, and as a consequence, to enable the agreement to operate according to the intention of the parties, there is an implied undertaking on the part of the Crown not to do anything to derogate from its grant so to enjoy, the Crown, in my opinion, being no more entitled to act in derogation of its grant or to defeat its own act and not be liable for a breach of its agreement, expressed or implied, than a subject.

If parties agree that it shall be lawful for one to hold the other's property for a certain time, this is, on the one hand, an agreement that the owner shall not, during that time, interfere with such holding, and on the other, that the holder shall not detain it for a longer time, and in either case, if the one during the time interferes, or the other detains beyond the time specified, it is a breach of the covenant or agreement.

It cannot be denied that the Crown by this agreement contracted with the suppliants for, and granted to them, the continuous right. This, then, is a contract in which quiet enjoyment during the continuance of the agreement is necessarily implied as against the act of the Crown ; in other words, that the Crown will do nothing in derogation of its grant, nor disturb the suppliants in the enjoyment of that which the Crown agreed they should have, and, therefore, any interference with the possession of suppliants by the Crown is

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a breach of the contract, express and implied, and in no way resembles a mere tort committed by a stranger.

The suppliants complaining, therefore, of no act of tort committed by the Crown or its servants, but simply in effect alleging that the Crown, on the assumption that the contract was at an end, evicted the suppliants and resumed possession of the road, and so broke the agreement with the suppliants by preventing them from having what they were entitled to under the agreement, and the Crown having thus come into possession of property belonging to the suppliants, they, by this their petition of right, seek to be restored to such possession and indemnified for the damages sustained by such breach on the part of the Crown, or, in the words of the petition: "the Government of *Canada* by "the breach and failure to perform the said agreement "of 22nd September, 1871, and 22nd June, 1875, have "caused to your suppliants great injury, loss and "damage," for which they seek indemnity.

I think the action of the Crown under the minute of the Governor in Council, amounts to no more than an eviction by a landlord, whose tenant has a covenant express or implied for quiet enjoyment, in other words, simply equivalent to an eviction where the lessee is ousted by the lessor, in which case it is clear an action of covenant lies against the lessor on the implied covenant in law upon the word "demise." In this case we are not to look to the manner of the eviction, that is not the point in controversy, the right to evict is what we have to deal with, and therefore this case should be treated as if a copy of the minute of the Governor in Council, had been served on the suppliants and possession demanded thereon by the Crown, and the suppliants, knowing that they could not successfully or forcibly resist the action of the Crown, had, under protest, without requiring physical force to be used,

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permitted the Crown to resume possession, relying on their protest and contract; and as if now by legal means they sought restitution of the possession and redress and indemnity, for an alleged breach of their agreement, under which they were entitled as against the Crown to have the continuous possession and quiet enjoyment of the premises, for the period therein stipulated; and must not, as has been done, be treated as solely a question of tort committed by an officer of the Crown. This then appears to me to be peculiarly a case to which the petition of right is applicable. The Crown, acting in the assertion of its supposed rights, has broken its contract, by reason whereof property and the increase and proceeds of property belonging to the suppliants have found their way into the hands of the Crown to the detriment of the suppliants.

In the view taken adverse to suppliants' right to recover, in so dealing with the case there seems to me to be an entire ignoring of the privity of contract both express and implied between the suppliants and the Crown, and of the nature of claims on contract as distinguished from the class of claims founded on wrong, and also of the fact that the act done was under the authority of an order of the Governor in Council under a claim of right and in assertion of that right.

This act of the Government in endeavouring to put and end to the contract, or, in other words, to cease to continue it, was no act done with a tortious intent, it was an act which the Government deemed they had legal authority to perform, on the assumption that the contract was, by the legal act of the crown, at an end, and that the Government could, therefore, legally resume possession of the road. Neither the Government nor its officers entered, or professed to enter on or take possession of the road as trespassers, but under a claim of legal right; therefore neither the

Crown nor its servants committed a tort in the legal sense of that term, or an act which can be set up as against the suppliants as a tort to defeat the claim of the suppliants on their contract; the crown, as Lord *Denman* expresses it, committed an unconscious and involuntary wrong, which, though not legal by reason of the contract being a continuous subsisting contract, was simply a breach of that contract. This taking possession under a claim of right, as opposed to a tortious taking by the officer has, as has been shown, never been repudiated by the crown, but, on the contrary, the Crown affirmed it in this suit and ask this court to affirm that, so far from the act of taking possession being tortious, it was lawful and right because the agreement was at an end. The crown treats it, and properly treats it, as a claim founded on contract and grant made on behalf of the Crown, which, *Erle*, C. J., says, are a class legally distinct from wrongs. The possession taken on the part of the Crown was therefore nothing more than a claim of title.

If this is mere matter of tort for which a petition of right could not be brought, but an action would lie only against Mr. *Brydges*, who, it is alleged, committed the tort, if Mr. *Brydges* died this action would die with him, *actio personalis moritur cum personâ*; and it that the Crown, having no right to put an end to the agreement, and it being valid and binding on the Crown, could direct its servant to take possession, accept the possession obtained by the act of its servant, and so most effectually, not only break but put an end to the agreement, and, contrary to its terms, keep in its own possession the property of the suppliants (for it need not have handed the possession over to the *Western Counties*,) and receive the profits and emoluments of the road, which belonged not to the Crown but to the suppliants, and the suppliants be remediless in the premises, as would be the practical result of the

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decision in the Court of Exchequer, is, I think, a doctrine principles of law and justice will not tolerate. If this is to be treated simply as a matter of tort as between the suppliants and the Crown the same principle, I presume, must have effect as between party and party. Suppose then, *A* owned this road and entered into a similar agreement with *B*, and *A*, assuming, as did the Crown in this case, that the contract was at an end, when in fact and in law it was in full force and effect, entered and evicted as of right the grantee or lessee, and continued in possession and received the rents and profits and died, in an action against *A*'s executors for breach of contract by the deceased in his lifetime would it be competent for them to reply, "no "action for indemnity or damages for breach of "contract by deceased can be brought against us, for "though true *A* did make this agreement and "though true, on the assumption that the agree-"ment was at an end, when in truth it was sub-"sisting, he did, contrary to the agreement, enter "and evict, and died, and though he has taken from you "all the privileges, profits and advantages, which by "his contract he agreed you should have, his doing "so is no breach of the agreement; his entry "eviction and resumption of possession was simply a "tort, not a breach of his contract, and therefore the "maxim *actio personalis moritur cum personâ* applies, "and so no action for such tortious act or its con-"sequences can be maintained against us; therefore, "as we have done nothing whatever since his death in "connection with the property, you are remediless." This, in my humble opinion, is an exact illustration of the present case.

I am pleased to think that in my view of the law I am not constrained to a conclusion, in my opinion, so unreasonable and unjust.

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These suppliants honestly contracted with the Government; there has been no breach of this agreement on their part that has not been satisfactorily arranged; it is not pretended that the suppliants have been guilty of any wrong whereby they have forfeited their rights under the agreement, or whereby they have debarred themselves from claiming the benefit of the contract. When the Crown therefore, disregarding the agreement, became possessed of that which, by virtue of the act of the Crown, had become the property of the suppliants, on no principle that I am aware of can relief be denied. Law, justice, common honesty, not to say the honor of the Crown alike demanded that there should be restitution of the property of the suppliants, and indemnity for the proceeds thereof which have come to the hands of the Crown, and of which the suppliants have been deprived by the wrongful, though unconsciously wrongful, act of the Crown.

This to my mind is peculiarly and emphatically a case in which one may, as *Lord Denman* did in *Baron de Bodes'* case declare an unconquerable repugnance to the suggestions that the door ought to be closed against all redress and remedy.

Had there been no contract in this case, and the seizure of this property had been wrongfully made by the Crown officers and came to the possession of the Crown, then it may be questionable how far the suppliants could, beyond a judgment of restitution, obtain redress for unliquidated damages for the wrongful seizure.

In such a case it well may be that having obtained restitution from the Crown of the property wrongfully seized, if damages are sought they should be obtained, if at all, from the officer who did the wrong.

Mr. Justice *Gwynne* says:

Now what is sought to be obtained by this Petition of Right, in

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addition to restitution of the property, is merely compensation in damages to be paid by Her Majesty for the trespass and eviction so committed by persons acting under the authority of the Government of *Canada* or professing so to do in taking possession of the *Windsor Branch Railway*, evicting the suppliants from the possession thereof and putting the *Western Counties Railway Co.* into possession thereof, and for the mesne profits received by the *Western Counties Railway* during their possession. For the damages sustained by the suppliants by this tresspass and eviction, the judgment recovered by the suppliants as plaintiffs against the *Western Counties Railway* Company renders that Company responsible, but the suppliants nevertheless claim the right to recover the same damages by a judgment to be rendered against Her Majesty upon the Petition of Right.

But this, I submit, is not so. How could the *Western Railway* be made responsible for the act of the Government in evicting and dispossessing the suppliants and for the resumption of possession by the crown, acts to which they were in no way parties? On the contrary, it appears from the case that the possession was taken on behalf of the Crown on the 1st August, and the road operated by the Crown from that period until the 24th September, and not till then was possession transferred to the *Western Counties Railway*. Who, but the Crown, can be liable for taking possession and keeping the suppliants out of possession, from the 1st August until 24th September? On what principle can the Crown be absolved from its liability, and the burthen of indemnifying suppliants cast on the *Western Counties Railway Company*, and so the suppliants bound to look to them instead of the crown for redress? Surely until the *Western Counties Railway Company* got the possession, in the absence of the slightest evidence to show that they had till then in any way interfered with the road, or the suppliants in connection with the possession thereof, they can in no way be made responsible.

Then, again, with reference to the trunk line. The result of the decision of the Privy Council is that when the Government resumed possession of the *Windsor*

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Branch, and consequently excluded the suppliants from the use of the trunk line of railway from *Halifax* to its junction with the *Windsor Branch* line, suppliants had the unquestionable right and title to the possession of the *Windsor Branch Railway*, and the use of the trunk line. Now, as to the trunk line from *Halifax* to *Windsor*, there can be no doubt that the suppliants were excluded from enjoying the uses of this road, and yet there is no pretence that there was any tortious act by the Crown or any of its servants—the suppliants, without any acts of force, were simply in defiance of their agreement excluded, and the reason assigned is thus put by Her Majesty's Attorney General in answer to suppliants' claim:

15. I deny that the suppliants were excluded by the Government from the trunk line between *Halifax* and *Windsor* or from any use thereof, but I submit that no relief can be decreed against Her Majesty upon the said petition with respect to the said trunk line inasmuch as the instrument of 22nd September, 1871, upon which the suppliants base their claim to relief if ever binding was based upon a single and indivisible consideration, viz.: one-third of the gross earnings from all traffic carried over the *Windsor* branch and the trunk line, and if the said instrument cannot, as I submit it cannot, under the circumstances above referred to, be enforced with respect to the said branch, neither can it be enforced with respect to the trunk line.

Inasmuch as it has been decided that the instrument of 22nd September, 1871, is valid and binding, this defence necessarily fails. What answer is there to suppliant's claim as to this? Nothing whatever, that I can discover; and how can it be denied that the Crown was guilty of a breach of this portion of the agreement for which suppliants are entitled to an indemnity; and what had the *Western Counties Railway* to do in reference to this?

But while I have little difficulty in arriving at the conclusion that this was a proper case for a Petition of

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Right. I have had much difficulty as to the amount of damages to which the appellants are entitled.

The concluding prayer of suppliants in the suit of the *Windsor and Annapolis Railway Co.* v. *The Western Counties Railway Co.*, is as follows:—

"The plaintiffs also pray that the defendant company may be ordered and decreed to deliver up possession of the said *Windsor Branch Railway* to the plaintiffs, and that they may be restrained by order or injunction from this honorable court from further keeping possession of the said railway and running trains thereon, and that an account may be taken of the full amount of the moneys received by the defendant company for freight or passengers on said road since the same came into their possession. And that until a final decree shall be made in this suit a receiver shall be appointed by this honorable court to take and receive all moneys earned or to be earned by the defendant company or any other company or persons whomsoever. And that such further or other relief in the premises may be granted to the plaintiffs as shall be in accordance with justice and equity, and as to this honorable court shall seem expedient."

On which the judgment of the Judge in Equity was in their favor upon the whole case. A judgment subsequently sustained by the Supreme Court of *Nova Scotia* and afterwards by the Privy Council on the appeal by the *Western Counties Railway*, and in this court on the appeal of the Attorney-General of *Canada*.

The suppliants having thus elected to sue the *Western Counties Railway Company*, not only for the recovery of the possession of the *Windsor* branch, but also by way of damages for the moneys received by the *Western Counties* Railway for the freight or passengers on said road since the same came into their possession, and having recovered judgment for the same, I, as at

present advised, do not think they can now recover another judgment for the same moneys against the Crown and thus have two judgments—one in contract against the Crown, and the other in tort against the *Western Counties Railway*, in two different courts for the same damages.

It is clear this action against the *Western Counties Railway* could only be against them as tort feasors, for it cannot be contended there was any contract or privity of contract between them and the suppliants for breach of which the suppliants could have an action. The suppliants then having elected to treat the dealings of the *Western Counties Railway* with the *Windsor* branch as a tort, and having recovered a judgment for such tort, suppose the officers of the Crown were (for the Crown could not be) joint tort feasors. the case of *Rex* v. *Hoar* (1) conclusively shows that after such judgment no action could be brought against such joint tort feasors.

If this is so it would seem necessarily to follow that the suppliants, having recovered judgment for all the damages sustained by reason of the tortious acts of the *Western Counties Railway Company* in reference to the property after it passed into their possession, the suppliants can only recover for the consequences of the breach of contract on the part of the Crown for the net freight and passage money which actually came to the hands of the Crown while the property was in the possession of and worked by the Crown, and that they cannot claim as damages for breach of contract what they claimed and had judgment for as damages for a tort committed by the *Western Counties Railway*, and which was proved on a hearing by the record in this court, which affirmed the judgment of the Supreme Court of *Nova Scotia*, and which, affecting

(1) 13 M. & W. 494.

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only the amount of damages in this case, did not require to be pleaded.

But wholly independent of and in addition to which it may be observed that had no action been brought against the *Western Counties Railway Co.*, after the Crown passed the property over to the *Western Counties Co.*, it is difficult to see how, for their occupation, a petition of right could be maintained. In such a case the cause of complaint against the Crown is removed or ceases, and the company, not the Crown, being in possession, they are in of wrong, and an action lies against them, and therefore no petition against the Crown, and this is very clearly put in *Staumford's* Exposition of the King's Prerogative, before referred to, at fol. 740, where it is said:—

> Also, whereas the king doth enter upon me, having no title by matter of record or otherwise, and put me out, and detains the possession from me, that I cannot have it again by entry without suit, I have then no remedy but only by petition. But if I be suffered to enter, my entry is lawful, and no intrusion. Or if the king grant over the lands to a stranger, then is my petition determined, and I may now enter or have my assise by order of the common law against the said stranger, being the king's patentee. When his Highness seizeth by his absolute power contrary to the order of his laws, although I have no remedy against him for it, but by petition, for the dignity's sake of his person, yet when the cause is removed and a common person hath the possession, then is my assise revived, for now the patentee entereth by his own wrong and intrusion, and not by any title that the king giveth him, for the king had never title nor possession to give in that case.

STRONG, J.:—

I am of opinion that we ought to dismiss this appeal for reasons which are substantially the same as those given by the learned judge before whom the Petition of Right was heard in the Exchequer Court.

Modern decisions have conclusively settled the law to be that the Crown cannot be made liable for wrong-

ful acts committed by its officers to the prejudice of a subject.

This question was discussed with great learning and very fully considered by the Courts in the cases of Lord *Canterbury* v. *The Attorney General* (1), *Tobin* v. *The Queen* (2), and *Feather* v. *The Queen* (3), with the result mentioned, it being held that the doctrine of *respondeat superior* which in the case of a subject is applied to make a principal or master liable for the wrongful or negligent act of his agent or servant, done within the scope of his authority, is not applicable to the Crown; and this principle has already been acted on in this Court in the cases of *McFarlane* v. *The Queen* (4) and *McLeod* v. *The Queen* (5). It follows, therefore, that if the acts complained of in this Petition of Right were mere torts the suppliant is not entitled to recover damages, and the conclusion of the Court below was perfectly correct and ought to be adhered to. The fact that the acts complained of were done under the special authority of the order in council of the 25th July, 1877, by which it was ordered in supposed conformity to the act 37 Vic., cap. 16, (though, as it has since been determined by the Privy Council, upon an erroneous construction of that Statute,) that possession of the *Windsor Branch Railway* should be given to the *Western Counties Railway Company* on the 1st of August, 1877, can make no difference; and that this is so even upon the assumption that the order in council is to be construed as a direct command by the Crown to its officers to take possession, as they did, of the *Windsor Branch Railway*, and to exclude the suppliant from the use of the Trunk line, is apparent from the authorities already quoted In *Tobin* v. *The Queen*, Lord Chief Justice *Erle* says:

(1) 1 Phill. 306.
(2) 16 C. B. N. S. 310.
(3) 6 B. & S. 257.
(4) 7 Can. S. C. R. 216.
(5) 8 Can. S. C. R. 1.

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That which the Sovereign does by command to his servants cannot be a wrong in the Sovereign because, if the command is unlawful, it is in law no command and the servant is responsible for the unlawful act the same as if there had been no command.

And the Chief Justice adds a quotation from *Hale's* Pleas of the Crown to the same effect. In *Feather* v. *The Queen* the Court of Queen's Bench say:—

For the maxim that the King can do no wrong applies to personal as well as political wrongs and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by authority of the Sovereign. For from the maxim that the King can do no wrong it follows as a necessary consequence that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong, inasmuch as the wrongful act when done becomes in law the act of him who authorized or directed it to be done.

And both the cases just quoted from show that the only remedy for a wrong done in obedience to express orders emanating from the Crown is by an action against the officer who performs the act, and that to such an action the orders of the Sovereign constitute no defence. In *Feather* v. *The Queen* the case of *Buron* v. *Denman* (1) was relied on by the suppliant as an authority against this proposition; but that case, as explained by the court, was shown to have no application as the injury there complained of, and which by the ratification and adoption of the Lords of the Admiralty became an act of state, was done without the dominions of the Crown and to the prejudice of a foreigner, and being by reason of the adoption of the Admiralty to be considered as an act of state, was only remediable according to the rules and usages of international law, upon the reclamation of the government of which the party complaining was a subject to the government of the United Kingdom.

Another and distinct reason for holding that the Crown is not liable under the circumstances of the pre-

(1) 2 Exch. 167.

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sent case is that the Governor General and the Ministers of the Crown who advised him, in the making of the order in council of the 25th of July, 1877, did not assume to act under the authority of the Crown, but in pursuance of the Act of Parliament. This appears upon the face of the order in council itself, which adopts the report of the Minister of Public Works, who in his report: "Recommends that possession of the said *Windsor Branch Railway* be given to the *Western Counties Railway Company* on the 1st of August, 1877, under the terms of the Act of May, 1874, entitled An Act to authorize the transfer of the *Windsor* branch of the *Nova Scotia* railway to the *Western Counties Railway Company*." *Tobin* v. *The Queen* is a direct authority for the Crown upon this point also. It was there held that the officer, for whose act in destroying a vessel which he had seized, assuming to act under powers conferred by certain statutes for the suppression of the slave trade, although he erroneously supposed the statutes in question gave him authority so to deal with the property seized, when in truth they did not do so, was nevertheless for that reason not to be deemed an agent of the Crown. In the present case the possession of the railway was taken from the suppliants and transferred to the *Western Counties Railway Company* by the officers of the Crown, upon the supposition that they were acting in obedience to the paramount authority of parliament, an assumption for which it may be said, though it can make no difference in principle, they had much better grounds than had the officer for whose acts it was unsuccessfully sought to make the Crown liable in *Tobin* v. *The Queen*. If the interpretation of the statute acted on by the Governor General in council had been the correct construction, instead of an erroneous one, as the Judicial Committee of the Privy Council has held that it was, there could have been no doubt

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that the act of taking possession of the *Windsor Branch Railway* would have been attributable to the statute, and defensible as a proper mode of carrying its provisions into execution. The order in council then was not intended to be made in the exercise of the general executive powers of the Crown, but for the sole purpose of carrying into execution the supposed requirements of the Act, and for this reason the order in council is not to be considered as an act of the Crown, but rather as an act of the officers and ministers of the Crown, not intended to be done as being within the scope of the prerogative powers of the Crown, delegated generally to the Governor General, but with the object and intention of acting as the mandataries of parliament, in carrying out the provisions of the statute with which, according to the construction they assumed to be the correct one, they had been charged by parliament. The first point decided in *Tobin* v. *The Queen* is, therefore, a direct authority against the suppliants, and the order in council cannot be considered as a command of the Crown nor can anything done under it be imputed to the Crown. The suppliants are consequently not entitled to recover damages, if the injuries complained of are to be treated as mere wrongful acts on the part of the officers and servants of the Crown.

The suppliants, however, now say that the wrongs in respect of which they seek indemity were not merely tortious acts, but breaches of contract for relief in respect of which they insist they have a remedy by petition of right. And if they can show that there were contracts with the Crown of which the acts complained of constituted breaches they no doubt bring themselves within the authority of the *Banker's* case (1) and of that of *Thomas* v. *The Queen* (2). In the *Banker's* case, although there was great difference of opinion

(1) 14 St. Trials 39.

(2) L. R. 10 Q. B. 34.

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whether the form of proceeding adopted in that case—a petition directly to the barons of the Exchequer—was the regular one, there seem to be a general consensus of opinion that whenever a sum of money was due by the Crown to a subject *ex contractu* a petition of right will lie. This was recognized to be the law in *Tobin* v. *The Queen*, and in *Feather* v. *The Queen*, *Cockburn*, C. J., says:

> We concur with that court (the Common Pleas) in thinking that the only cases in which a petition of right is open to the subject are: where the land or goods or money of a subject have found their way into the possession of the Crown and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or when the claim arises out of contract for goods supplied to the Crown or the public service.

In *Thomas* v. *Queen*, it was expressly held that a petition of right could be maintained for the recovery of damages for the breach of an executory contract entered into by a responsible minister of the Crown with the suppliant for the payment of money in an event which the petition alleged had happened. In the case of *McLean* v. *The Queen* (1), in this court, the same principle was adopted and the suppliant recovered damages for the breach by the Crown of a contract to employ them as printers at certain contract prices. In *Churchward* v. *The Queen* (2) also, although the case did not call for a decision on this point there are numerous dicta to the same effect, and, indeed, the Attorney General who argued that case on behalf of the Crown did not dispute the general principle that a petition of right will lie to recover damages for non-performance of a contract to pay money.

The petition itself seems rather to put the case of the suppliants as one entitling them to damages for tortious acts than as grounded on contract; its allegations, however, are not very clear in this respect. The ma-

(1) 8 Can. S. C. R. 210. (2) L. R. 1 Q. B. 201.

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terial paragraphs are the 5th and 11th. The fifth paragraph is as follows:

5. In pursuance of the aforesaid agreement of the 22nd September, 1871, and on the 1st January, 1872, the date named therein, the Government of *Canada* delivered to your suppliants, and they thereupon entered into the exclusive use and possession of the said ranch line with the stations, sheds and other conveniences in use thereon (subject, however, to the right of the said authorities to have access thereto for the purpose of maintaining the railway and works), and the Government likewise gave to your suppliants, and they thereupon took and exercised such use of the trunk line and the accommodation specified in connection therewith in article 3 of the said agreement of the 22nd Sept'r, 1871, as they were under such agreement entitled to have and exercise. And from the time when such use and possession of the said premises respectively were so given to them as aforesaid, your suppliants continued to hold and enjoy the same, and to work and operate their own railway line from *Windsor* to *Annapolis*, and the said branch and trunk lines from *Windsor* to *Halifax* until the 1st day of August, 1877. On that day one *Charles John Brydges*, then being and acting as the superintendent of government railways and acting on behalf of your Majesty's government of *Canada*, forcibly ejected your suppliants and their servants and railway stock from and afterwards forcibly prevented them from coming upon or using or passing over the said trunk and branch lines, and he continued in possession thereof, and to prevent your suppliants from coming upon or using or passing over either of such lines, until shortly afterwards the said government gave over the possession of the said branch line to another railway company known as the *Western Counties Railway Company*, incorporated under an Act of the Legislature of *Nova Scotia* for the purpose of making a railway from *Annapolis* to *Yarmouth* in *Nova Scotia*. Such company thereupon took and has ever since held possession of, and excluded your suppliants from, and from any use of, the said branch railway. The said government have continued to the present time in possession of the said trunk line and to exclude your suppliants therefrom and from any use thereof.

This seems clearly to rest the right to recover on the ground that the acts of the government superintendent of railways were tortious acts. But in the 11th paragraph the suppliants charge that they have suffered damages by reasons of breaches by the Crown of what is called the agreement of the 22nd September, 1871.

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The prayer is for a specific performance of the agreement of the 22nd September, 1871, and *inter alia:*

That the sum of £150,000 sterling or such sum as may be reasonable may be paid to the suppliants in compensation, and by way of damages for the injuries and losses which have been occasioned to them by the breach and failure of your Majesty's government of *Canada* to perform the said agreement of the 22nd September, 1871.

The first question which arises on this branch of the case is, was there in the legal sense of the term a contract by the Crown to give the *Windsor* and *Annapolis Railway Company* the exclusive use of the *Windsor* branch, and the running powers over the branch line, or was not the agreement of the 22nd September, 1871, rather in the nature of a performance of an obligation which had been previously created by statute. By the agreement of November, 1866, by which Messrs. *Punchard, Barry & Clark* contracted with the government of *Nova Scotia* for the construction of the *Windsor* and *Annapolis Railway* it was provided that before the new line, which was to be the property of the contractors, was opened a traffic arrangement was to be made between them and the Provincial Government of *Nova Scotia* for the mutual use and enjoyment of the respective lines of railway between *Halifax* and *Windsor*, and *Windsor* and *Annapolis*, including running powers,or for the joint operation thereof, on equitable terms to be settled by two arbitrators to be chosen by the parties in case of difference.

By the *Nova Scotia* Act, 30 *Vic.* ch. 36, passed on the 7th May, 1867, *Punchard, Barry* and *Clark* were constituted a corporation under the name of the *Windsor and Annapolis Railway Company* and the stipulation contained in the contract of 1866 already stated was (among the provisions of the contract) declared "to be incorporated into and made parcel of the act." On the 1st of July, 1867, the Government Railways in

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Nova Scotia, including the *Windsor* Branch and Trunk line, became, by the operation of the 108th section of *British North America* Act, 1867, the property of the Dominion Government, and it has been determined by the judgment of the Privy Council in the case of the *Western Counties Railway Company* v. *The Western and Annapolis Railway Company* (1), that this transfer—

> Had not the effect of vesting in *Canada* any other or larger interest in these railways than that which belonged to the Province at the time of the statutory transfer, and that accordingly the Dominion took the property of the *Windsor Branch Railway* subject to the same obligation by which the right of the Provincial Government was affected, viz.: to enter into a traffic arrangement with the respondent company in terms of the agreement confirmed by the Provincial statute of the 7th May, 1867, and that it was in pursuance of that obligation that the Dominion Government entered into the agreement of the 22nd September, 1871.

It seems, therefore, that there is a good foundation for the argument that we ought to regard the agreement of 1871, not as an executory contract by the Crown, but rather as an ascertainment of the terms on which the suppliants were to enjoy the rights for which their promoters had stipulated by the original agreement of November, 1866, and which had been afterwards assured to them by the provincial statute. Again, can that be said to be a contract by the Crown which it had no option to refuse to enter into but with the alternative of being compelled to submit to such terms as the arbitrators might think fit to impose. A contract implies a voluntary act on the part of those who enter into it, and here the Crown was not free but was bound by the statute. It having been already determined by the highest authority that this agreement of September, 1871, was "in implement of the obligation to make a traffic arrangement," is it not rather to be regarded and treated as a performance of a statutory obligation by which the

(1) 7 App. Cases 187.

Crown was bound, and which it could not afterwards, by declining to carry it out, be said to break, as it might be said to break a contract for the payment of money which had been freely entered into independently of any statutory requirement? To put it in another form, were not the rights of the suppliants to the exclusive use of the branch and to the running powers on the trunk line dependent upon the statute and not upon any contract with the Crown? On the other hand the agreement certainly took the form of a contract, and it may be said that it was none the less such because it was entered into by the Government under the compulsory powers of the statute.

In the entire absence of any authority showing how far the Crown can be made liable by this form of remedy in respect of obligations *ex contractu*, and considering the rather fine distinction upon which, as I suggest, the suppliants rights are to be imputed to the statute rather than to a contract, I should not like to rest my judgment on this ground.

If however the memorandum of September, 1871, is to be considered a contract by the Crown, it certainly is not one analogous to those for the non-performance of which a Petition of Right was held to lie in the *Banker's* case (1) and in *Thomas* v. *The Queen*, nor one of the class pointed out by *Cockburn*, C.J., in *Feather* v. *The Queen*, as entitling the party contracting with the Crown to a remedy by petition of right. Even if it be conceded that this arrangement of 1871 did constitute a contract binding on the Crown, it was not an executory contract of which it could be said that either the order in council or acts done under its authority by the superintendent of railways were breaches.

So soon as the suppliants were let into possession of

(1) 14 St. Trials 39.

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the branch line and permitted to enjoy the running powers on the trunk line they were in under the statute, and the agreement was executed and performed just as much as a covenant to pay money is satisfied by the payment of the money. There remained no longer any contract to be performed, the statute and agreement together gave them a complete title to the rights which the agreement had fixed and ascertained, and their continuous enjoyment of their rights was guaranteed, not by any contractor agreement, but by the statute. Had a statute empowered the Crown to make an absolute grant of the branch line and its franchises to the suppliants, and had a grant been accordingly made under the great seal, no one would pretend that if the Crown officers afterwards took possession of the railway their acts, although authorized by the Crown, would be in law anything other than mere tortious acts of the officers of the Crown; it could not in such a supposed case be pretended that there was any breach of an obligation springing from contract; any intermediate contract by the Crown between the statute and the grant would have been executed and performed by the grant. Then it appears to me that the statute imposing upon the government the obligation of conceding the rights which the agreement conferred upon the suppliants, vested those rights in them just as effectually as a formal grant would have done if a mere enabling power to make a grant had been given to the Crown. In the case of *Feather* v. *The Queen*, which was a petition of right to recover damages from infringement by the officers of the Crown of a patent for an invention, although the case was ultimately determined upon the ground that such a patent did not bind the Crown, it is still worthy of remark that the court pronounced an opinion upon what would have been the rights of the suppliant upon the assumption that the Crown was bound by the

patent, in which case it was considered that the infringement would have been a tort for which the Crown could not have been made liable. It was not even attempted in argument to put the case of the suppliant upon the ground of contract, though it would seem that if the Crown in the present case can be said to have broken a contract it might have equally been said to have done the same in the case presented by *Feather* v. *The Queen*. It results, therefore, from this case of *Feather* v. *The Queen* that a violation of a right in itself amounting to a tort is not to be considered a breach of contract for which the Crown is to be held liable, merely because the title to the right of property violated is to be ascribed to a contract with the Crown executed by grant.

For these reasons I am unable to consider the acts complained of here as breaches of an obligation springing from contract, as in the case of non-payment of money and other analogous cases; they are rather violations of a *jus in re*, of a statutory right of property, and therefore this is to be classed with such cases as *Tobin* v. *The Queen* and not with those in which, like *Thomas* v. *The Queen*, it has been held that an obligation to pay money arising from contract may be enforced by petition of right.

Further, the ground already adverted to in considering the liability of the crown for torts seems also to afford an answer to the suppliants, even granting that they are entitled to maintain that there was a contract binding on the Crown. As already stated, it was one of the grounds of the decision in *Tobin* v. *The Queen*, that when the officers of the Crown assume to act in pursuance of a statute they are not to be regarded as acting within the scope of their authority as agents of the Crown. And this principle applies as well to cases in which the authority which the officer assumes to exer-

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cise is not upon a proper construction of the statute conferred at all, as to those in which the acts are strictly within the terms of the statute and susceptible of being justified by it. Whatever may be said of mere non-performance or non-feasance there can be no reason for making any distinction in this respect, so far as positive acts are concerned, between acts which are in breach of contracts and those which are bare torts, acts violating rights of property. The acts relied on as being in breach of the contract which the Crown is said to have been bound by were the order in council and the taking possession of the branch line under its authority, and the exclusion of the suppliants from the use of the trunk line. Now, all these things were done, as already stated, expressly with the intention of acting in pursuance of the statute of 1874, and for the purpose of carrying out of the provisions of that statute, a duty which Parliament had imposed on the executive government. It is true that just as in *Tobin* v. *The Queen* it was erroneously supposed that the statute conferred powers which by a proper construction of its terms it did not give, but that is not material, the point is that the Governor General in Council was not acting as the officer or agent of the crown but as the mandatary of Parliament, and for this reason neither the order in council itself, nor the act of any officer in enforcing it, can be imputed to the Crown, and therefore, if we are to regard the Crown as being bound by a contract to continue the suppliants in the undisturbed enjoyment of their rights, there never has been any breach of that contract. It cannot be maintained in answer to this objection that the acts complained of are not to be attributed to the Crown, that the act of the Governor in Council was in itself an original and direct exercise of the power of the Crown, and in this respect equivalent to an order of the Queen in Council. The cases of

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Cameron v. *Kyte* (1), and *Musgrave* v. *Pulido* (2), have determined that the Governor of a colony is not, as incidental merely to his office, invested with the powers of exercising the Royal prerogative, that he is not, as it is expressed in those cases, to be considered a Viceroy, but that he only possesses such powers as have been delegated to him by his commission from the Crown. The British North America Act, 1867, makes no difference in this respect, for the 9th section is as follows :

> The Executive Government and authority in *Canada* is hereby declared to continue and be vested in the Queen.

Acts of state performed by the Governor General in Council are therefore ordinarily to be referred to the powers expressly or impliedly delegated to him by Her Majesty's commission, and consequently, if the Governor General assumes to act, not in exercise of the powers so delegated, but exclusively for the purpose of executing the provisions of an Act of Parliament, he can in that case no more be said to act as an agent or officer of the Queen than the naval officer in *Tobin* v. *The Queen* could have been said to have been acting within the scope of his authority as an officer of the Crown, and the high dignity of the office of Governor General of the Dominion and the magnitude and importance of the functions with which he is entrusted can make no difference in applying the principle of law that the Crown is not liable for the acts of any of its functionaries which are performed, not with the intention of exercising authority conferred by the Crown, but only for the purpose of complying with the mandates of Parliament.

This conclusion would not leave the suppliants without remedy, for they have not only a right of action against the officers of the Crown, if they acted upon an order unwarranted by law, but they have the further

(1) 3 Knapp, 332. (2) 5 App. Cases 102.

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right of petitioning Parliament for an indemnity which it is to be presumed will not be withheld from them.

The suppliants have already been restored to their rights as regards the possession of the railway, under the decision in the action against the *Western Counties Railway Company* and they therefore require no relief in that respect.

I am of opinion that the appeal should be dismissed with costs.

FOURNIER, J.:

Le 22 septembre 1871, le gouvernement du *Canada*, représenté par le Ministre des Travaux Publics, agissant avec la sanction de Son Excellence le Gouverneur Général, en vertu d'un ordre en conseil, fit avec la compagnie appelante un arrangement par écrit pour l'usage du chemin de fer connu sous le nom de *Windsor Branch Railroad*,—s'étendant depuis la jonction de *Windsor* sur le chemin de fer Intercolonial jusqu'au chemin de fer de la dite appelante qui conduit de *Windsor* à *Annapolis*. Les principales conditions de cet arrangement sont ainsi qu'il suit:

2. The Company shall, except for the purposes of the Authorities in maintaining the Railway and Works, have the exclusive use of the *Windsor* Branch, with all station accommodation, engine sheds and other conveniences (but not including rolling stock and tools) now in use thereon.

3. The Company shall also use, to the extent required for its traffic, the Trunk Line, with the station accommodation thereon, including engine shed accommodation for five engines, water supply, fuel stages, turn tables, signals, telegraphs, wharves, sidings and other conveniences, but not including machine shops and other shops, buildings and appliances for repairs of rolling stock."

* * * * * * * * *

10. The Company shall pay to the Authorities monthly, one-third of the gross earnings from all traffic carried by them over the *Windsor* Branch and Trunk Line.

* * * * * * * * *

19. In the event of the Company failing to operate the Railways

between *Halifax* and *Annapolis*, then this Agreement shall terminate, and the Authorities may immediately proceed to operate the Railway between *Halifax* and *Windsor* as they may deem proper and expedient.

20. The termination of this Agreement, under the preceding clause, is not to prejudice any rights which the Company may now have.

21. This Agreement shall take effect on the 1st day of January, 1872, and continue for twenty-one years, and be then renewed on the same conditions, or such other conditions as may be mutually agreed on.

L'appelante prit en vertu de cet arrangement possession de l'embranchment de *Windsor* et l'exploita jusqu'au 1er août 1877, époque à laquelle l'appelante fut dépossédée par *C. J. Brydges*, surintendant des chemins de fer du gouvernement, agissant par ordre de ce dernier qui, peu de temps après, mit la compagnie intimée en possession du même chemin (*Windsor Branch*).

L'appelante se trouvant lésée par cette dépossession et le refus du gouvernement d'exécuter l'arrangement ci-dessus cité, demanda par pétition de droit à sa Majesté, une compensation pour les dommages lui résultant de la violation de l'arrangement en question. En vertu des dispositions de la 6me section, 39 *Vict.*, ch. 27, la compagnie *Western Counties Railway* à été mise en cause et a produit une défense. Après contestation liée et audition des preuves, cette cause fut plaidée devant l'honorable juge *Gwynne*, qui, par son jugement, rejeta la pétition de l'appelante pour deux raisons: 1o. Parce que Sa Majesté n'était pas responsable des conséquences des voies de faits (*trespasses*) commises par ses employés. 2o. Parce que l'appelante ayant poursuivi la compagnie *Western* pour avoir accepté du gouvernement la possession du *Windsor Branch*, et la faire condamner à rendre compte des recettes du dit chemin de fer, la condamnation qui a été prononcée avait eu l'effet d'éteindre le droit de demander les mêmes dommages contre Sa

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Majesté. C'est de ce jugement qu'il y a maintenant appel à cette cour.

La principale raison invoquée de la part de Sa Majesté contre le présent appel est exprimée dans le factum de son savant conseil, comme suit :

Because the Petition of Right Act does not give to a suppliant any additional remedy against the Crown which would not have existed in *England* prior to the Imperial Act 23 and 24 *Vic.*, c. 34, but merely relates to the form of procedure, and in *England* the relief prayed for against the Crown in this matter could not have been granted upon a Petition of Right.

The petition in this matter in effect seeks to recover from the Crown damages for trespasses unlawfully and forcibly committed by servants of the Crown, contrary to the well established doctrines laid down in the cases of *Tobin* v. *The Queen*, (1); *McFarlane* v. *The Queen*, Supreme Court of *Canada*; *MacLeod* v. *The Queen*, Supreme Court of *Canada*, and cases therein referred to.

Les autres moyens de défense de Sa Majesté, fondés sur les résolutions de la Chambre des Communes du Canada ; sur le défaut d'exécution de la part de l'appelante des conditions pécuniaires de l'arrangement du 22 septembre 1871 ; sur la 37me *Vict.*, ch. 16, ayant formé le sujet d'un procès décidé en dernier ressort par l'honorable Conseil Privé qui a donné gain de cause à l'appelante, doivent être laissés hors de considération comme ayant été finalement jugés D'après ces décisions l'arrangement du 22 septembre, 1871, doit être considéré comme légal et obligatoire.

On ne peut nier que cet arrangement forme entre les parties contractantes un contrat régulier obligeant chacune d'elles à en exécuter les conditions. La seule question à décider est donc de savoir s'il y a lieu de réclamer par pétition de droit des dommages (*unliquidated damages*) pour la violation d'un contrat (*breach of contract*). Cette question ne saurait souffrir de difficulté après la décision de cette cour dans la cause de *McLeod* vs. *La Reine*.

(1) 16 C. B. N. S. 310.

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Ayant eu plusieurs fois déjà l'occasion d'exprimer mon opinion sur cette question, je ne crois pas qu'il soit utile de le faire ici de nouveau. Je me contenterai de référer aux autorités citées dans la cause d'*Isbester* v. *La Reine*, décidée en cour d'échiquier, et à celles que j'ai citées dans la cause de *McLeod* v. *La Reine* (1), en ajoutant que s'il pouvait y avoir encore un doute à cet égard, les nombreuses autorités citées et les arguments si habilement développés dans les savantes dissertations de l'honorable juge en chef sur cette question auraient l'effet non-seulement de faire disparaître ce doute, mais aussi de démontrer que cette question est réglée par la jurisprudence établie.

L'hon. Juge *Gwynne* ayant considéré la dépossession opérée par M. *Brydges* comme une voie de fait commise par un employé, a déclaré, en se bâsant sur la cause de *Tobin* v. *La Reine*, qu'il n'y avait pas lieu à la pétition de droit.

L'appelante se plaint, il est vrai, dans sa pétition d'avoir été évincée par force (*forcibly*) du chemin de fer à l'usage duquel elle avait droit et d'avoir aussi été empêchée par force de s'en servir. Mais elle se plaint de plus qu'après s'en être emparé, le gouvernement en est demeuré en possession et qu'il en a ensuite remis la possession à la compagnie intimée. Quoique le fait de dépossession par force soit mentionné, il n'est toutefois reclamé aucun dommage pour cette considération, les dommages demandés ne sont que pour la privation de l'usage du chemin. D'ailleurs l'allégation que le gouvernement après la voie de fait de *Brydges* a continué en possession du chemin et l'a ensuite remis à la compagnie intimée, forme une allégation suffisante par elle-même du refus du gouvernement d'exécuter son contrat. En outre ce refus de la couronne a précédé la voie de fait commise par *C. J. Brydges*, car c'est en

(1) 6 Can. S. C. R. 1.

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vertu d'un ordre en conseil en date du 25 juillet, 1877, que le gouvernement a déclaré mettre fin à ses arrangements avec l'appelante, tandis que ce n'est que le 1er août suivant que l'appelante a été dépossédée.

L'allégation de la défense à cet égard mérite d'être citée.

12. I say that on or about the 25th July, 1877, the Government of *Canada* having completed arrangements with the Western Counties Railway Company for giving to them possession of the said branch, a minute of His Excellency the Governor General in Council was passed ordering and directing that the arrangements then existing with the Suppliants with respect to the said branch should be terminated on the first day of August, 1877, and the Minister of Public Works on behalf of Her Majesty was directed to resume possession of the said branch on that day and to put the Western Counties Railway Company in possession thereof pursuant to said Act of May, 1874, all of which the Suppliants had notice.

13. In pursuance of the said minute of Council and of the said Act of 1874, the officers of Her Majesty did on or about the said first of August, upon the refusal of the Suppliants to give up possession of the said branch, take possession thereof and afterwards gave possession of the same to the Western Counties Railway Company, which is the ejection and giving over of possession complained of in the fifth paragraph of the said petition.

On voit par cette citation que c'est le gouvernement lui-même qui, par une résolution solennelle, a décidé de mettre fin au contrat en question. La voie de fait de Mr. *Brydges* est donc tout à fait sans importance, et d'ailleurs l'appelante ne s'en plaint pas et n'a rien demandé pour ce motif.

Il est évident que les faits de la présente cause sont tout à fait différents de ceux de celle de *Tobin*. Le principe sur lequel est fondé le jugement dans cette dernière cause, quoique parfaitement correct, n'est pas applicable à la présente cause. Ce n'est pas pour les conséquences d'une voie de fait, mais pour l'exécution d'un contrat (*breach of contract*) que l'appelante réclame une compensation. La pétition de droit dans

la cause de *Tobin* n'avait pas d'autre bâse que la voie de fait.

L'existence du droit de pétition dans le cas actuel étant admise, il ne devrait rester maintenant pour disposer de la cause telle qu'elle a été présentée par les plaidoiries des parties, qu'à déterminer le montant de la compensation à accorder ; mais l'Honorable Juge *Gwynne*, dans son jugement ayant décidé une importante question de droit que les plaidoiries des parties n'avaient point soulevé, une ré-audition de la cause a été ordonnée pour les entendre sur la question de savoir : jusqu'à quel point la poursuite intentée par l'appelante réclamant de la compagnie intimée un compte des recettes perçues par elle pendant son exploitation du *Windsor Branch* peut affecter son recours contre le Gouvernement.

Ni de la part de la Couronne, ni de celle de la compagnie intimée, le fait de l'existence de cette poursuite n'a été invoqué comme moyen de défense dans la présente cause. Ce n'est que lorsque le conseil de l'intimée a produit une copie du dossier d'appel (*Appeal Book*), au Conseil privé dans cette première cause, qu'il a déclaré que ce dossier faisait voir que l'appelante avait déjà obtenu jugement contre l'intimée pour une partie des dommages qu'elle réclamait en cette cause de la Couronne. L'appelante s'est opposée à cette production pour deux raisons : 1o. parce que le fait d'un premier jugement sur les mêmes causes d'action n'avait pas été plaidé ; 2o. que s'il eût été plaidé la preuve aurait dû être faite légalement, par la production d'une copie authentique du dossier, qu'il aurait fallu compléter par la preuve de l'identité des parties ainsi que de l'identité des causes d'action.

Ces objections sont bien fondées et suffisantes pour faire écarter la question soulevée par l'honorable juge *Gwynne* comme n'ayant été ni plaidée ni prouvée. De

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plus, il est clair que le principe de responsabilité n'est pas le même dans les deux causes,—dans celle-ci la responsabilité de la Couronne découle d'un contrat, mais dans l'autre, contre la Compagnie intimée, la responsabilité est basée sur une voie de fait pure et simple (*a common trespass*), qui, de plus, n'a été commise que plus d'un mois après la violation du contrat par le gouvernement. Les deux actions sont donc fondées sur des causes différentes, puisque la Couronne ne peut être tenue responsable d'une voie de faits. Cependant, si le premier jugement ordonnant à la compagnie intimée de rendre compte des recettes qu'elle avait perçues, eût été suivi d'un compte et d'une condamnation au paiement d'une somme déterminée et que cette somme eût été effectivement payée, je n'hésite pas à admettre que ce paiement aurait eu l'effet de diminuer d'autant le recours de l'appelante contre la Couronne. Cette doctrine paraît bien établie, mais l'ordre de rendre compte n'ayant été suivi d'aucune exécution,—aucun paiement n'ayant été fait, peut-on considérer que cet ordre a eu l'effet d'opérer pour autant l'extinction du droit d'action de l'appelante contre Sa Majestée? Ce principe ayant été admis par deux des hon. juges qui composent la majorité de la cour, un autre étant d'avis de renvoyer la petition *in toto*, la conséquence en a été que Sa Majesté a été exonérée de tous les dommages soufferts par l'appelante pendant le temps que la compagnie intimée a exploité le *Windsor Branch*.

Peut-on appliquer aux faits de cette cause le principe invoqué par l'hon juge *Gwynne* et soutenu par deux autres hons. juges de cette cour, viz: qu'un *former recovery*, avait éteint le droit d'action contre la Couronne? La référence aux dates principales des procédés de cette cause et à ceux de la cause de l'appelante contre le *Western Co.* fera voir le contraire.

L'action de l'appelante pour obtenir un compte de

la compagnie *Western Co.* a été intentée devant le juge d'Equité de la *Nouvelle-Ecosse*, *Halifax* le 10 août 1877, Son décret ordonnant une reddition est en date du 1er mars 1880, confirmé par la Cour Supêrme de la *Nouvelle-Ecosse*, 5 avril 1881, et par l'hon. Conseil Privé, le 22 février 1882.

Le 18 août 1878, un an seulement après l'institution de l'action devant le juge d'Equité, l'appelante prévoyant sans doute les longueurs de cette contestation qui a duré environ cinq ans, obtint un *fiat* lui permettant de produire sa pétition de droit contre Sa Majesté. Il n'y avait alors aucun jugement ou ordre dans sa poursuite contre la compagnie *Western Co.*, et ce n'est qu'environ 15 mois après le 1er mars 1880, que fut rendu le décret ordonnant un compte, confirmé deux ans plus tard par l'Honorable Conseil Privé. Lorsque la pétition de droit fut présentée, le droit d'action de l'appelante existait dans toute son intégrité ; il n'était pas possible de prétendre qu'il avait été éteint ou transformé par ce jugement qui n'existait pas alors. Tout au plus la compagnie intimée aurait-elle pu plaider une exception de litispendance en supposant que ce plaidoyer fût fondé dans les circonstances de la cause ; mais comme elle n'a pas jugé à propos de le faire, rien ne pouvait donc arrêter le cours de la procédure. Si le fait d'un jugement subséquent à l'institution de la pétition de droit pouvait affecter le droit d'action de l'appelante, n'aurait-il pas dû former le sujet d'un plaidoyer connu dans le droit anglais sous le nom de *puis darien continuance* ? Mais ni dans l'un ni dans l'autre de ces deux cas, on n'aurait pu empêcher l'appelante d'obtenir son jugement en cette cause, car l'existence de plusieurs jugements contre différentes personnes responsables des conséquences de voies de fait n'est pas illégale, comme le font voir les autorités citées ci-après.

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En outre est-il bien établi d'après la loi anglaise que la condamnation non suivie de paiement de l'une de deux parties également responsables des conséquences d'une voie de fait a l'effet d'éteindre la dette et d'opérer la décharge de la partie qui n'a pas été condamnée? Cette question est controversée et la jurisprudence ne semble pas encore être définitivent fixée. Il n'a jamais été prétendu avant la cause de *Brown* v. *Wootton*, que la simple existence d'un jugement fût une de fin non recevoir (*a bar*) contre l'action qui pourrait ensuite être dirigée contre une autre partie responsable au même degré.

Dans la cause de *Locke* v. *Jemner*, (1) bien qu'il semble été décidé qu'un jugement contre l'un des deux *trespassers* opérait la décharge de l'autre, et devait être considéré comme équivalant au paiement (*satisfaction*), le rapport de la cause nous laisse cependant sous l'impression que la cour était d'opinion que plusieurs jugements pouvaient être obtenus, mais que le paiement seul pouvait empêcher de procéder contre tous ceux qui étaient responsables. La cause de *Corbett* v. *Barnes*, tout en décidant qu'un seul paiement (*satisfaction*) peut être exigé, fait clairement voir par induction que plusieurs jugements peuvent être rendus contre ceux qui sont conjointement responsables d'une voie de fait. Ces causes font voir qu'avant comme après la décision de *Brown* v. *Wootton*, plusieurs des plus éminents juges d'*Angleterre* ont pensé que la loi était contraire au principe qui fait la base de cette décision. La cause de *Buckland* v. *Johnson*, en 1854, est la première dans laquelle cette décision a été considérée comme une autorité. Deux raisons sont invoquées au soutien de cette doctrine; la première, que la réclamation pour dommages, d'incertaine qu'elle est avant le jugement, devient, par l'effet du principe *transit in rem judicatam*,

(1) Rapportée par *Hobart*, 66 (*Trinity* Term, 12 James. 1.)

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(*is merged*), absorbée et confondue dans le jugement qui constitue une obligation d'un ordre supérieur. Si cette proposition est vraie quant à celui contre lequel un jugement a été prononcé, elle ne l'est certainement pas contre celui qui n'a pas été poursuivi ; le droit existant contre lui n'a été nullement transformé, et les intérêts du demandeur n'en sont pas plus avancés par ce jugement, et le recours devrait par conséquent exister encore contre lui. C'est la règle suivie dans le cas de personnes obligées conjointement et solidairement en matière de contrat—et comme en matière de voies de fait commises par plusieurs personnes, il y a également responsabilité solidaire, il est difficile de comprendre pourquoi dans ces cas-là l'on ne ferait pas aussi application du même principe. La remarque de Lord *Ellenborough*, dans la cause de *Drake* v. *Mitchell*, appuie fortement cette manière de voir :

A judgment recovered in any form of action, is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore till then, it cannot operate to change any other collateral concurrent remedy which the party may have.

Quoique les autorités du droit français aient peu de force dans un cas comme celui-ci, je ne puis m'empêcher de faire observer qu'elles sont conformes sur ce point à la doctrine énoncée par Lord *Ellenborough*.

Larombiere (1) :

Le jugement passé en force de chose jugée opère novation dans le droit ou l'obligation dont il déclare l'existence ; *novatur judicati actione prior contractus* (2). Un droit et un engagement nouveaux se substituent à ceux qui sont ainsi reconnus, plutôt ces derniers empruntent un nouveau caractère à leur reconnaissance en justice. Il en résulte une obligation qui a pour cause la chose jugée, *quæ ex causa judicati descendit* ; ou, mieux encore, une obligation qui n'est autre que le lien de droit produit par la chose jugée. Car, ainsi que le dit *Ulpien*, (3) ; on contracte en jugement de même qu'en convention, *nam sicut stipulatione contrahitur ita judicio contrahit.*

(1) Obligations, art. 1351, No. 144. (2) Loi 3 l., *De usur. rei. jud.*
(3) Loi 3, § 11 D. *ibidem.*

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Mais cette novation ne ressemble point à celles des articles 1271 et suivants. Elle ne produit point l'extinction de l'obligation, loin de là, elle la confirme. Car, dit *Paul*, (1), en exerçant une action en justice, nous ne faisons pas notre condition pire, mais nous la faisons meilleure ; *neque enim deteriorem causam nostram faciemus actionem exercentes, sed meliorem.* Cette novation a donc seulement pour résultat de faire que le jugement constitue désormais la cause de l'obligation, et que la chose jugée tient elle-même lieu de cause.

L'argument fondé sur le principe que ce qui était incertain auparavant est devenu certain par le jugement, et passé en force de chose jugée, est sans doute vrai, mais a-t-il d'autre effet que d'ajouter, comme le dit Lord *Ellenborough*, une sûreté de plus à la cause originaire d'action ? (*Is still but a security for the original cause of action, until it be made productive in satisfaction to the party*). Serait-il logique d'en conclure qu'il a aussi l'effet d'éteindre le droit d'action quant à ceux qui n'ont pas été poursuivis ? Est-ce la vaine recherche de la certitude de son droit que la partie lésée est venue demander à la justice, ou une indemnité réelle par un paiement effectif des dommages qu'elle a soufferts ?

Si la jurisprudence était bien établie, lors même que je la considérerais comme peu fondée en principe, je n'hésiterais pas à m'y conformer ; mais comme elle ne me paraît ni fixée, ni fondée sur des raisons satisfaisantes, je crois devoir en venir à la conclusion que l'ordre obligeant la Compagnie intimée à rendre compte à l'appelante, n'a nullement affecté le recours de cette dernière contre Sa Majesté. Je dois ajouter de plus, que je concours dans les arguments et les autorités citées par l'honorable juge *Henry* sur cette question. Comme lui, je suis d'avis que Sa Majesté est responsable de tous les dommages soufferts par la Compagnie appelante comme conséquence de l'inexécution de l'arrangement du 22 septembre 1871.

(1) Loi 29 D. *De novat.*

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The main subject of controversy in this case has, within the past five or six years, been adjudicated upon twice, by the Judge in Equity and the Supreme Court of *Nova Scotia;* and it was to some extent finally decided by Her Majesty's Privy Council in the suit of the appellant company against the *Western Counties Railway Company.* The right of the appellant company to the possession and use of what is known as the *Windsor Branch Railway*, under an agreement with the Dominion Government, was by all the judgments maintained. The company having been ejected from it by the Government of the Dominion in violation of its agreement and contract on the 1st of August, 1877, and kept so ejected for nearly three years, the question now before this Court is as to the right of the appellant company to damages for the losses sustained by it during the time it was so expelled and kept out of possession.

The appellants in this petition pray:

1. That the said agreement of the 22nd September, 1871, as confirmed by the said agreement of the 22nd June, 1875, may be specifically performed by Your Majesty, or by the Government of *Canada* on Your Majesty's behalf, and in particular, that in performance thereof, the Government may give and afford to your suppliants such a right to use the said trunk line from *Halifax* to *Windsor Junction*, with all station, engine, and other accommodation and conveniences thereto belonging, as provided by article 3 of the said agreement of the 22nd September, 1871, and also that in case Your Majesty's Government shall of any arrangement with the *Western Counties* Railway Company, or otherwise resume the possession and control of the said *Windsor* Branch Line, possession thereof with all station accommodation, engine sheds, and conveniences, may be given to your suppliants in conformity with the provisions of article 2 of the said agreement.

2. That an injunction may be awarded to restrain any of your Majesty's officers and servants from doing any act at any time hereafter during the continuance of the said agreement of the 22nd September, 1871, to interfere with or obstruct or disturb, or which may interfere with or obstruct or disturb your suppliants in taking

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and holding possession of, and in the exclusive use of the said branch railway and appurtenances, as provided by article 3 of the said agreement of the 22nd September, 1871.

3. That the sum of one hundred and fifty thousand pounds sterling (£150,000) or such sum as may be reasonable, may be paid to your suppliants in compensation and by way of damages, for the injuries and losses which have been occasioned to them by the breach and failure of your Majesty's Government of *Canada* to perform the said agreement of the 22nd September, 1871.

4. Such other relief in order to secure to your suppliants the full and undisturbed enjoyment by them of their rights under the said several agreements of the 22nd November, 1866, the 22nd September, 1871, and the 22nd June, 1875, and their said Act of Parliament, as the circumstances of the case may require and to your Most Excellent Majesty shall seem meet.

The petition, amongst other things, claims damages for the losses sustained; and it is for us now to consider if the claim is well founded, and to what extent?

The charge of ejection by the Government, as stated in the petition, is admitted by the answer, and was attempted to be justified under an Act of the Parliament of *Canada*, as is shown by the twelfth and thirteenth paragraphs of the answer of the Attorney General, on behalf of Her Majesty the Queen, as follows:—

12. I say that on or about the 25th July, 1877, the Government of *Canada* having completed arrangements with the Western Counties Railway Company for giving to them possession of the said branch, a minute of His Excellency the Governor General in Council was passed, ordering and directing that the arrangements then existing with the suppliants with respect to the said branch should be terminated on the first day of August, 1877, and the Minister of Public Works on behalf of Her Majesty was directed to resume possession of the said branch on that day and to put the Western Counties Railway Company in possession thereof pursuant to the said Act of May, 1874. all of which the suppliants had notice.

13. In pursuance of the said minute of Council and of the said Act of 1874, the officers of Her Majesty did on or about the said first of August, upon the refusal of the suppliants to give up possession of the said branch, take possession thereof and afterwards gave possession of the same to the Western Counties Railway Company, which is the ejection and giving over of possession complained of in the fifth paragraph of the said petition.

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The wrong was fully admitted, and, as I before stated, attempted to be justified. The legal result should, and must, therefore, follow. We are told, however, that what is complained of was but a trespass of the subordinate officers of the railway department, who ejected the appellant company, and that the Queen is not answerable for the trespass of such officers, and the case of *Tobin* v. *The Queen* has been cited to sustain the position. The two cases are in no respect alike. The one before us is not in the nature of an action for trespass as was the other. The act of the officers was no doubt a trespass; and they could have been held personally answerable in damages; and so we are also told was the case with respect to the *Western Counties* Railway Company. If no other redress can be obtained for a wrong, the consequences of which are comparatively enormous if not ruinous, than to seek it from the mere servants of a government or from a bankrupt company, to whom the property of the appellants was handed over by the Government, it might be at once said there is none. It would be monstrous if no redress could be had in such a case. The Government enter into a solemn agreement for certain substantial considerations to lease and permit a party to have the use of a Government railway for a term of years. The lessee fulfils his part of the contract, but the Government, without the slightest reason, sends parties to eject the lessee and take possesion of the railway. The contract is violated by the Government and damages were sustained by means of the ejection by the Government through its railway officers under its orders. Damages for the breach of the contract are sought, and it is claimed that no liability attaches to the Government, because the breach of the contract included an act of trespass. Does it render it any less a breach of contract because the officers who executed the orders of

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their Government under the minute of Council were guilty of a trespass? As well might one say who had had given a covenant for quiet enjoyment of real estate, to the party to whom he conveyed, and the covenant having been broken and an action brought for such breach: "I decided to eject you and employed "my servant to do it, but as he was guilty of a trespass "in ejecting you although by my orders I am not "answerable for trespass committed by him, and there- "fore I am relieved from my covenant, and you must "seek the only redress open to you which will be "in the shape of damages from him."

I am not unmindful of the distinction that exists as regards liability for torts between the Sovereign and a subject, and of the immunity of the Sovereign; but as the fact of a trespass having been committed could not be received as a defence to a charge of a breach of covenant the fact of the alleged trespass in this case cannot be received as a defence for the breach of an agreement. It would appear to me to be paralleled by a case of trover for a horse taken by defendant's orders by his servant from the owner who was pulled off the horse and beaten by the servant. The defendant denied liability on the ground that he only ordered his servant to take the horse; but as he had gone beyond orders and assaulted and beaten the plaintiff, for which latter act he the defendant was not liable, the fact of the servant having so exceeded his orders released him from the consequences of what was done within his orders. Such is in substance the defence to the claim of the appellants in the case. The government having ordered the officers to take possession of the railway, can they be permitted to say, that because their officers committed a trespass in doing so, the government is released from liability for the breach of contract involved. That posi-

tion is fully sustained by the evidence; but why need we look to that when the answer fully admits it; and the respondent is estopped from now denying it. That issue being the only one I thus briefly dispose of, and adopt, to that extent, the views of the learned Chief Justice, whose exhaustive judgment I have had the priviledge of reading and whose arguments and authorities quoted fully sustain the position I have taken.

The remaining matter to be considered is in respect of the amount of damages.

Is the appellant company entitled to have awarded damages for the losses sustained for the whole period during which, by the act of the government, the company was deprived of the use of the railway; or only for the time it was held and operated by the government before handing it over to the *Western Counties Railway Company*?

It is urged, that as the appellant company commenced an action in the Equity Court in *Nova Scotia* against the other company in consequence of their alleged illegal acts in taking over the railway from the Government, and holding possession of it, and obtained a favourable decision from the learned judge in Equity before whom the case was tried—which decision was affirmed by the Supreme Court of *Nova Scotia* and also by Her Majesty's Privy Council—the respondent is not liable for damages for losses sustained after the road was handed over to that other company; and that to the latter the appellant must look for damages.

To appreciate properly the merits of that contention it becomes necessary to refer to dates.

The appellant company was ejected on the 1st day of August, 1877, and the other company put in possession of it on the 24th of September following.

The action against the other company was brought on the 10th of October following.

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The defendants demurred to the plaintiff's bill, which was argued; and on the 8th March, 1878, judgment was pronounced by the judge in Equity overruling the the demurrer with costs. An appeal was had from that judgment to the Supreme Court in *Nova Scotia*; and, in May, 1878, a judgment of that court was given, dismissing the appeal, and confirming the judgment of the judge in Equity.

An answer was on the 13th of May, 1878, put in by the defendants, and evidence taken; subsequently the case was heard by the judge in Equity and on the 1st of March, 1880, he delivered judgment; and concluded it by saying:—

> After having given the fullest consideration to the whole case, I am of opinion that the plaintiffs are entitled to the judgment of the court in their favor, with costs.

An appeal was taken from that judgment to, and heard by, the Supreme Court of *Nova Scotia* and in April, 1881, judgment was given simply dismissing the appeal, with costs.

From the latter judgment an appeal was taken to her Majesty's Privy Council, and, after argument, an order of the Queen in council dated the 27th of February, 1882, was passed, on the report of the Judicial Committee of the Council of the 22nd February, 1882, affirming the judgment of the Supreme Court of *Nova Scotia*, and dismissing the appeal with costs No further step or proceeding was taken in that cause; and no decree was made in it, either by the judge in Equity, or either of the appellate courts before whom it was heard.

The present action was commenced by the filing of the petition of right on the 19th of September, 1878. The answer was put in on the 18th of October, 1878, and the case was tried in the Exchequer Court of *Canada* during the summer or autumn of 1882, several months subsequent to the judgment of the Privy Coun-

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cil in the other case. What effect, if any, can the proceedings or judgment in that case have upon the amount of damages to be awarded in this? I have already quoted the several prayers in the petition of right herein, and by them the court is asked to decree the specific performance of articles 2 and 3 of the agreement of 1871, for an injunction to restrain any of the government officers or servants, from doing any act, to the prejudice of the company, in the use of the railway as provided by article 2 of the agreement; or in using the trunk line of railway from *Halifax* to its junction with the branch railway, as provided by article 3, and also for damages, for the injuries done to and losses occasioned by the company through the breach of, and failure of the government to perform, the agreement. The prayers of the appellant company in their bill against the other company is as follows:—

"The plaintiffs therefore pray that it may be decreed "and declared by this honorable court, that the said "agreement of the 22nd day of September, A.D. 1871, is "a valid and binding agreement, in no way cancelled or "vacated by an order in council or other act of the gov- "ernment of *Canada*, but that the same is still in full "force and effect. And that it may be further declared "that the said Act of the Dominion parliament, passed "on the 26th day of May, A.D. 1874, in no way affected "the rights of the plaintiffs in, to, and over the said "*Windsor Branch Railway*, but only affected the rights of "the Government of *Canada* in such road, subject to the "plaintiffs' rights, under the said agreement and under "the act of incorporation, passed by the legislature of "*Nova Scotia*; and that if the said act of the 26th of May, "A.D. 1874, purports to do more than to convey the rights "of the Government of *Canada*, subject to the plaintiff's "rights, and to affect the plaintiffs under the said agree- "ment and act of incorporation, then that the said Act

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"of the 26th day of May, A D. 1874, may be declared to "be *ultra vires* of the Parliament of *Canada*. Also, "that under any view of the said Act of the Parlia- "ment of *Canada*, and under the facts disclosed in "this bill, the running powers of the plaintiff over the "said *Windsor Branch Railway* are still in force and effect "The plaintiffs also pray that the defendant company "may be ordered and decreed to deliver up possession of "the said *Windsor Branch Railway* to the plaintiffs, and "that they may be restrained by order or injunction from "this honourable Court from further keeping possession "of the said railway and running trains thereon, and that "an account may be taken of the full amount of the "monies received by the defendant company for freight "or passengers on said road since the same came into "their possession. And that until a final decree shall be "made in this suit a receiver shall be appointed by this "Honourable Court to take and receive all monies earned "or to be earned by the defendant company or any other "company or persons whomsoever. And that such "further or other relief in the premises may be granted "to the plaintiffs as shall be in accordance with justice "and equity, and as to this honourable Court shall seem "expedient."

The first prayer merely asks for a declaration of the law as to the rights and interests of the appellant company.

The second, is for an order or decree for the possession of the railway, and an injunction against the further keeping of the possession of it, by the defendant company—for an account of the monies received by the latter for freight or passengers, since the road came into their possession; and for the appointment of a receiver, until a final decree should be made. It will then be seen, that the objects sought to be attained in the two actions are not identical—and a judgment for the

appellant company, in the action against the other company, could not afford the extent of relief prayed for in this suit. No claim for damages was made in the former—a decree for an account is asked for, but, if given, would not necessarily be a gauge by which to measure the damages of the appellant company. Who can, under the evidence we have, say the road was operated as successfully pecuniarly by the one company as it would have been by the other?

The branch line adjoining the line of the appellant company and being seventy or eighty miles from that of the other company, would, no doubt, be capable of yielding a much larger profit to the former. Besides the management and upholdence may have been larger in the one case than in the other. It is in evidence that in consequence of the change of possession and working of the branch railway, through traffic arrangements for passengers and freight were broken up and the revenue was thereby largely decreased. The profit of the other company was therefore much less than it otherwise would have been. Again, no decree was made in the action against the other company; and who can assume what, if made, it would have been. It is quite possible that if the account had been decreed and taken there would have been little or nothing to be awarded to the appellant company.

The parties in this suit have submitted it under issues raised by the pleadings; and by them we are to be governed and decide. In the answer, we find nothing pleaded as a defence on the ground of any recovery against the other company. There is no pleading necessary as to damages merely, but if there was a recovery of judgment for a part of the time damages are sought in this action, a plea thereof would not be one as to damages merely. We are asked to decide as to the breach of the agreement in question; and, in case

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of liability found for the injury done to the company, to say what damages the company are entitled to for the time which, by the act of the government, they were kept out of the use and possession of the railway.

The minutes of the trial of this suit show that a certain book, called the appeal book, on the appeal from the Supreme Court of *Nova Scotia* to this Court, in the suit of the appellant company against the other company, was tendered by the counsel of the respondent herein; and his lordship, before whom the trial was had, reports that the counsel who so tendered it said:

> It showed the present rights of the plaintiff company as against the Western Counties Railway Company; and that they were claiming against the latter company for the same damages as in the present action. The appeal book was offered as a substitute for the record of the proceedings, being instead of evidence by exemplification, and was, of course, subject to all just exception. (The appeal book received subject to all just exceptions and marked exhibit "A.")

The object of the counsel in tendering the book was, as reported, to show that the appellant company against the other company "the same damages as in the present action. The book, however, does not do so, as I have already shown. With all due deference, I cannot conceive how such could have been received under the issues being tried; and even had a plea of former recovery for the same cause of action been pleaded, evidence from the record was alone receivable; and even that would have required evidence of identity as to the parties and causes of action. Rules of evidence, long and well established, as necessary for the due and proper administration of justice, are not to be set lightly aside, or frittered away; and we are bound to observe them.

If legitimate evidence of a former recovery has been tendered, it would not have been receivable unless by an amendment of the pleading, which was not either asked for or ordered. We have then no issue before us

to which such evidence is applicable; and if we had, the evidence tendered cannot be received in respect of it. I consider it my duty therefore to decide as to the damages in this suit in the same manner as if that appeal book had not been tendered or received, as it was subject to all just exceptions.

The mere pending of another suit against other parties cannot be pleaded either in abatement or bar; but the recovery in a suit against another person for the same cause of action may, in some cases, be pleaded. By what I consider the ruling authorities, however, the mere recovery of judgment, without satisfaction, has been considered insufficient.

This suit was not tried until many months after the judgment of the Privy Council was given in the suit against the other company; and the respondent had ample time, and would have been no doubt permitted, to add to his answer, a defence as to the damages whilst the other company had possession of the railway; but such was not done; and the trial of the issues, raised by the petition and answer, took place. Had, however, such an addition to the answer been made, I cannot see any effect it could have had. There was no decree against the other company for anything; none for the payment of any money; and how can it be claimed there was any former recovery? We are told that the appellant can still proceed and get a decree; but, as I before said, they have not, and cannot, get any decree, to cover the damages claimed in this suit. They might obtain an account, and had that been done, and a decree founded on it, there might be a question if the amount, so decreed, should not be deducted from the amount of damages to be awarded in this case; although without satisfaction being shown it is very doubtful. The mere opinion of the judge, when deciding a case before him, is no part of the record, from which alone

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evidence can be derived, and we have, in this court, held that we would not hear an appeal from the opinions of judges but have always required the formal judgment of the court, evidenced by a certified copy of the rule or order or in some other necessary manner. In one case we declined to hear an appeal, although it was shown that there was no rule for judgment filed; and postponed the argument until a rule was filed and certified. How then can we with any consistency receive the opinion of a judge in evidence to affect the rights of parties when no formal judgment has ever been entered, or decree made. It may be said that a decree might have been obtained and that the appellant company should have moved for, and obtained one; but we are not trying that matter. The defence as to the damages rests on the fact of a former recovery; and how can we find that, in the case in question, there was any recovery at all, by which the damages in this suit would be affected?

In the case of the *Vestry of Bermondsey* v. *Ramsey* in the Common Pleas (1) in 1871, I find it held that:—

An unsatisfied judgment recovered by a vestry, for the expenses of paving a street, under the Metropolis Local Management Act, against a former owner of tenements, is no bar to an action for these expenses against a tenant under a succeeding owner of the tenements.

Montague Smith, J., with whom were *Miller* and *Brett*, JJ., in delivering the judgment of the court, said:

In the present case the judgment recovered against the owner has created a change of remedy *quoad* him; but we think it does not operate to affect the collateral concurrent remedy against the occupier. The priciple is illustrated by the familiar instance of actions against the several parties to a bill of exchange; and by the cases, which have a close analogy to the present, of principals and sureties, in which the recovery of judgment against one party is no bar to actions against the others.

(1) L. R. 6 C. P. 247.

He also says:—

No doubt in a case of joint liability, giving a joint cause of action against several, the recovery of judgment against one of the obligees is a bar to an action against the others, but this is not so where the liability is joint and several, or where several parties are independently and collaterally bound to the same obligation. The principle is well expressed by Lord *Ellenborough*, C.J., in *Drake* v. *Mitchell* (1). Lord *Ellenborough* said: "I have always understood the principle of transit *in rem judicatum* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party; and, therefore, till then it cannot operate to change any other collateral concurrent remedy which the party have."

It is said in *Woodfall* (2):

That if a lessee enter into a covenant which runs with the land, for himself and his assigns, and then assigns the term, and the assignee be guilty of a breach, an action on covenant lies, either against the lessee or against the assignee, but execution shall be taken against one of them only.

And again at page 209:

That the lessor may, at the same time sue the lessee upon his express covenant, and the assignee upon the privity of estate, but he can have execution against one only.

It is well settled that for a breach of contract or covenant an action can be maintained and damages recovered against the Sovereign by petition of right. It was so decided in *Thomas* v. *The Queen*. The appellant company is, in my opinion, entitled to damages in this suit for the time they were by the action of the government deprived of the possession, use and profits of the railway in question, from the 1st day of August, 1877, being the date of their expulsion, to the date of the filing of their petition of right on the 19th of September, 1878, and to our judgment for such damages to the amount of fifty-six thousand five hundred dollars with costs.

(1) 3 East 251. (2) Ed. 1867 p. 204.

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TASCHEREAU, J.:—

It was not and could not be denied by the appellant that no petition of right lies against the Crown to recover damages for a tort, and it was not and could not be denied by the Attorney-General that a petition of right does lie against the Crown to recover damages for a breach of contract. Is it for a tort, or for a breach of contract, that the appellants claim damages in this instance, is then the question to be first decided? That there is not a little difficulty in the solution of it is amply shown by the diversity of opinions amongst my brother judges. As the Court stood divided, after a first hearing, in which I had not sat, no judgment could be given and a re-hearing had to be ordered. I need hardly say that as the result of the case now depends upon the view I take, I have given to it more than ordinary consideration. I have come to the conclusion, for the reasons given by the Chief Justice in his elaborate judgment, that the damages claimed here are for a breach of contract, and not for a tort, and that consequently the appeal should be allowed, and the petition of right of the appellants maintained. The Privy Council has finally decided that under the contract of the 22nd September, 1871, the appellants became legally possessed of and were entitled to retain the possession of the railway in question. Now, it is admitted by the Attorney-General's statement of defence (No. 12) that it was by an order of, under, and in obedience to His Excellency the Governor General in Council that Mr. *Brydges* took possession of the said railway. The Attorney General further admits that the Minister of Public Works and his officers were ordered by the said order in council to take possession of the said railway in her Majesty's name, and it was in her Majesty's name, they evicted the suppliants. Now His Excellency the Governor General in Council's orders are surely the

orders of the Crown, the orders of the Sovereign. The executive authority is vested in the Sovereign. The Sovereign acts upon the advice of and through her responsible ministers, who, in turn, have her Majesty's orders put into execution by the officers of the state. To say that the appellants only recourse was against *Brydges*, as for a tort, is to say that a petition of right would never lie against the Crown for a breach of contract, as it is always by its officers that any order of the Crown authorizing and commanding a breach of contract must be executed.

In this case the Crown, under the advice of its constitutional advisers, was led to believe that it had the right to evict the suppliants.

The judgment of the Privy Council has determined that this was an error, and that the suppliants had a right to this railway. It does seem to me that the Crown must be held responsible to the suppliants for the consequences of this eviction.

This railway was actually used and the proceeds thereof received by the Crown for nearly two months.

I am of opinion that the Crown is responsible for the damages suffered by the suppliants during this period.

That there was an Act of Parliament on the matter, under which the Crown acted, or thought it could so act, does not alter the case. Parliament makes the laws, but does not execute them. This belongs to the executive power.

Parliament cannot convey its orders or directions to the meanest executive officer in relation to the performance of his duty (1).

Then the Privy Council have settled that this eviction was not authorized by any Act of Parliament.

GWYNNE, J.:—

By the Dominion statute, 39 Vic, ch. 27, sec. 19, it is

(1) May, Cor. Hist. Vol. 1, 430, 1st Ed.

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enacted that nothing in the act contained shall give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy in *England* under similar circumstances by the law in force there, prior to the passing of the Imperial Statute 23rd and 24th *Vic.*, ch. 34.

The sole question raised and argued before me was as to the right of the suppliants to recover from Her Majesty damages by way of compensation for the wrongs in the petition of right complained of. And by force of the above clause of the Dominion Act that question is whether by the law of *England*, as it stood prior to the above Imperial Act, such damages were recoverable in *England* under like circumstances.

So long as the law of *England* is as it has been held to be in *Tobin* v. *The Queen* (1) and in *McFarlane* v. *The Queen* (2), decided in this Court, I am unable, notwithstanding the two arguments which this case has undergone upon this appeal, to see upon what principle the claim for damages asserted against Her Majesty upon this petition of right can be sustained.

The third ground enunciated in *Tobin* v. *The Queen*, upon which the judgment in that case proceeded, is that a petition of right cannot be maintained to recover unliquidated damages for a trespass. The main foundation upon which this principle rests is said to be the maxim that the Sovereign cannot be guilty of a wrong, and so cannot be made liable to pay damages for a wrong of which he cannot be guilty. *Erle*, C. J., in delivering the judgment of the Court there, says, (3):

> The maxim that the King can do no wrong is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the Sovereign does personally the law presumes will not be wrong: that which the Sovereign does by command to his servants cannot be a wrong in the Sovereign, because, if the

(1) 16 C. B. N. S. 311. (2) P. 354.
(3) 7 Can. S. C. R. 216.

command is unlawful it is in law no command and the servant is responsible for the unlawful act the same as if there had been no command.

And citing Lord *Hale* in his pleas of the Crown (1) he continues:

Lord *Hale* says the law presumes the king will do no wrong, neither, indeed, can do any wrong, and therefore if the king command an unlawful act to be done the offence of the instrument is not thereby indemnified. But although the king is not under the coercive power of the law, yet in many cases his commands are under the directive power of the law, which consequently makes the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law.

He cites also Lord *Coke*, who says:

The king being a body politique cannot command but by matter of record for *Rex præcipit* and *Lex præcipit* are all one, for the king must command by matter of record according to the law, and *Bracton* says: *Nihil aliud potest, Rex; quam quod de jure potest.*

To the same effect he adds is *Blackstone* (2):

The king can do no wrong, which ancient and fundamental maxim is not to be understood as if every thing transacted by the government was, of course, just and lawful, but means only two things —first, whatever is exceptionable in the conduct of public affairs, is not to be imputed to the king, nor is he answerable for it personally to his people, for this doctrine would destroy the constitutional independence of the Crown; and, secondly, that the prerogative of the Crown extends not to do any injury.

Having made these quotations, the learned Chief Justice concludes thus:

This maxim has been constantly recognized, and the notion of making the king responsible in damages for a supposed wrong tends to consequences that are clearly inconsistent with the duty of the Sovereign.

From this judgment and the reasoning in support of it, it is apparent that the principle upon which rests the doctrine that a petition of right cannot be maintained to recover unliquidated damages for a trespass is that

(1) P. 43. (2) 3 Bl. Com. 246.

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the act complained of being unlawful cannot in law be imputed to the Sovereign. In the eye of the law it is not the act of the Sovereign at all.

When the unlawful act is committed by an officer or servant of the Crown, it is, of course, not the personal act of the Sovereign, and the principle of *respondeat superior* cannot be applied to the Sovereign in such a case, for the Sovereign cannot command an unlawful act to be done. If the command is unlawful, it is in law no command, and moreover the Sovereign can, in the eye of the law, command only by matter of record.

Now the act upon which the suppliants in this case rest their claim for damages against Her Majesty is a plain act of trespass. The suppliants case is, that while in legal possession of the *Windsor Branch Railway* under the provisions of an Act of Parliament, and a valid contract, dated the 22nd of September, 1871, made in pursuance thereof with the Government of *Canada*, acting by and through the Minister of Railways, whereby it was agreed that the suppliants, performing the terms of the said contract in all things to be performed by them, should continue in such possession for the period of twenty-one years from the first day of January, 187?, one *Charles John Brydges* then being, and acting as, the superintendent of government railways, and acting on behalf of the Government of *Canada*, forcibly ejected the suppliants and their servants and railway stock from, and afterwards forcibly prevented them from coming upon, or using or passing over, the said trunk and branch lines, and he continued in possession thereof; and to prevent the suppliants from coming upon, or using, or passing over, either of such lines until shortly afterwards the said government gave over the possession of the said branch line to another railway company, known as the *Western Counties Railway Company*, incorporated under an Act

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of the Legislature of *Nova Scotia* for the purpose of making a railway from *Annapolis* to *Yarmouth*, in *Nova Scotia*, and that such company thereupon took and has ever since held possession of and excluded the suppliants from, and from any use of, the said branch railway; and the said Government of *Canada* have continued in possession of the said trunk line and to exclude the suppliants therefrom, and from any use thereof. And the petition further alleges, that notwithstanding that the suppliants had duly performed all acts and stipulations on their part to be performed under and by virtue of said agreement, nevertheless that the officers of Her Majesty's Government of the Dominion of *Canada* have, in violation and in breach of the provisions and agreements therein upon the part of Her Majesty contained, refused, and they continue to refuse to perform and abide by the terms and provisions of the said agreement on their part, and on behalf of Her Majesty with respect to the said trunk and branch lines, and to exclude the suppliants from possession thereof and from the use thereof; and further, that—

By the acts so committed by the Government of *Canada* in forcibly expelling and excluding the suppliants, and by their breach of and failure to perform the said agreements they have caused to the suppliants great injury, loss and damage, and the suppliants submit that they have no effectual remedy against her Majesty's government, except by petition of right; but that they have been advised that they are entitled to recover possession of the said branch line from the said *Western Counties Railway Company*, and they have accordingly commenced a suit against them for the purpose, in the Supreme Court of Equity in *Nova Scotia*, which suit is now pending.

At the time that the present petition of right was brought to a hearing the above suit against the *Western Counties Railway Company* had been conclusively determined by the Judicial Committee of the Privy Council in favor of the suppliants, and it was admitted that the suppliants had been restored to their possession of the

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Windsor Branch line, and that all that the suppliants now sought was to recover from her Majesty compensation in damages for the injury sustained by the suppliants by the wrongful conduct set forth in the petition of right, which damages were therein prayed for as follows:

That the sum of one hundred and fifty thousand pounds sterling, or such sum as may be reasonable, may be paid to the suppliants in compensation by way of damages for the injuries and losses which have been occasioned to them by the breach and failure of Her Majesty's Government of *Canada* to perform the said agreement of the 22nd September, 1871.

It is apparent that what is relied upon in the petition of right as a breach by the Government of *Canada* of the agreement contained in the instrument of the 22nd September, 1871, and as establishing a failure upon the part of that government to abide by the terms of that instrument, wholly consisted in the illegal act of trespass and eviction committed by Mr. *Brydges*, acting as chief superintendent of government railways, and in the alleged wrongful continuance of that act of trespass done to the line when the possession was restored to the suppliants. Now the judgment of the Judicial Committee of the Privy Council in the case of *The Windsor & Annapolis Railway Co.* v. *The Western Counties Railway Co.* establishes that the instrument of the 22nd September, 1871, operated in implement of, and as specific performance of the agreement entered into with the *Windsor & Annapolis Railway Co.* by the Government of *Nova Scotia*, under and in the terms of an act of the legislature of that province prior to Confederation, subject to the provisions of which act the *Windsor Branch Railway* became by the *British North America* Act, vested in the Government of the Dominion of *Canada* Upon the execution therefore of the instrument of the 22nd September, 1871, the *Windsor and Annapolis Railway Company* became and were

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possessed of the *Windsor Branch Railway* by a good, sure, perfect and indefeasible statutory title, subject only to the conditions stated in that instrument, nothing further was required to be done to complete their title, which then became and thenceforth was sufficient in law to have enabled the suppliants to have maintained their possession against all trespassers and disseisers whomsoever and to obtain satisfaction in damages from all persons whomsoever and all corporations guilty of and parties to any trespasses committed upon such their possession. They had full power to have resisted the trespass alleged in the petition to have been committed by Mr. *Brydges*, and to have prevented the wrongful eviction which is therein complained of, and to have obtained complete satisfaction in damages from him and all persons by whose direction and authority he acted, for such his illegal entry upon the property whereof the suppliants were so legally possessed.

It is now contended, that although it is admitted that no petition of right can be maintained for the purpose of recovering damages against Her Majesty by way of compensation for the trespass and eviction, which was in fact a disseisin committed by Mr. *Brydges*, and the continuance thereof by the *Western Counties Railway Company* after they were, as stated in the petition, put into wrongful possession of the *Windsor Branch Railway*, still that the damages consequential upon those trespasses may be recovered from Her Majesty, by treating the wrongful and illegal acts of Mr. *Brydges* and other officers of the Dominion Government as constituting a breach of contract by Her Majesty. This contention, I confess, appears to me to be utterly fallacious and unsound, for, if a petition of right cannot be maintained for the purpose of recovering from Her Majesty, damages by way of compensa-

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tion for the trespasses, because the acts complained of were trespasses and illegal, and for that reason cannot be imputed to, (or in law be regarded as the acts of,) her Majesty, to whom the doctrine of *respondeat superior* does not apply, I am quite unable to see how those same illegal acts of trespass can be imputed to, and be regarded as the acts of, her Majesty for the purpose of making her responsible in damages as for a breach of contract. In *The Queen* v. *McFarlane* (1) I have expressed my opinion of the fallacy involved in this species of argument, which cannot, in my opinion, be supported upon any principle or by any authority.

Mr. *McCarthy* in his able argument for the suppliants admitted that if there is not in the instrument of the 22nd September, 1871, an implied contract that the suppliants shall have quiet enjoyment of the *Windsor Branch Railway* free from any interruption by or on behalf of her Majesty, that is to say, that if the instrument does not operate as a demise by her Majesty of the *Windsor Branch Railway* for the term of 21 years, the suppliants have no *locus standi in curiâ*. But that instrument neither is nor professes to be a lease by her Majesty of the *Windsor Branch Railway*. Neither in its frame nor its manner of execution is it a lease, and the assumption that the present case is analogous to an action of covenant against a lessor for breach of an implied covenant for quiet enjoyment against the acts of the lessor and of those claiming under him, even if well founded, would not place the right of the suppliants to recover in any clearer light; for there can not be an implied covenant for quiet enjoyment contained in the instrument of the 22nd September, 1871, any more than there is a like covenant by Her Majesty in letters patent of land granted in fee simple. Yet it

(1) 7 Can. S. C. R. 244.

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has never been heard that a petition of right lies to recover damages from the sovereign, as for a breach by the sovereign of a covenant for quiet enjoyment founded upon a wrongful entry and disseisin committed by a grantee claiming under a subsequent grant of the same land, or by an officer of the government in putting such second grantee in possession of the land previously granted to another. In the present case all idea of her Majesty having given any directions personally to Mr. *Brydges* to commit the acts complained of, is out of the question. In committing those acts he was not acting or professing to act in any sense by the command or authority of Her Majesty, nor otherwise than under the command and authority of the members of the Dominion Privy Council, or of some of them, who neither acted nor professed to act under the command or authority of Her Majesty but under an order in council professed to be passed under the provisions of and upon the authority of an Act of the Parliament of the Dominion of *Canada*. It appears now by the judgment of the Privy Council in the case of the *Windsor* and *Annapolis Railway Company* v. *The Western Counties Railway Company* that the construction put upon that act of Parliament by the Privy Council of *Canada* was erroneous, but such erroneous construction of the act while it may make the members of the Privy Council themselves individually responsible for any act, by them done or commanded to be done upon the assumed authority of the act of Parliament, and of the order in council professed to be passed also upon its authority, cannot make their acts, or the acts of Mr. *Brydges* under their direction, to have been acts committed under the authority of and by the command of Her Majesty, nor can Her Majesty be made responsible in damages for such acts as being in breach of a covenant entered into by her. To a Petition of Right,

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seeking to recover damages from Her Majesty for the act complained of as constituting a breach of a covenant entered into by Her, the answer is precisely the same as it would be to a petition seeking to recover damages from Her Majesty by way of compensation for the trespass and disseisin, treating it as a trespass: namely, that the acts constituting the alleged breach of covenant being illegal cannot be regarded as being the acts of the Sovereign at all for any purpose, whether it be for the purpose of establishing a trespass or a breach of covenant committed by the Sovereign; as the acts were the unlawful acts of the person or persons actually engaged in committing them or who commanded them to be so committed, but cannot in law be regarded as the acts of Her Majesty.

If this, which appears to me to be the undoubted law of *England*, appears to be too technical a construction of the law and does not coincide with public opinion in the present day as to what should be the law in cases of trespasses committed by officers of the Dominion Government upon the property of individuals or corporations, application must be made to the Dominion Parliament to provide other means for redressing such wrong than the law of *England* by which we must be governed in this matter, at present affords. The appeal in my opinion should be dismissed with costs.

Appeal allowed with costs.

Solicitor for appellants: *H. McD. Henry.*

Solicitors for respondents: *O'Connor and Hogg and J. J. Gormully.*