1882

*Jan'y 14.

*May. 13.

THE QUEEN ..... APPELLANT;

AND

JOHN McFARLANE, *et al* ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of right—Non-liability of the Crown for the negligence of its servants—Crown not a common carrier—Payment of Statutory Dues.

Held: 1st. That a petition of right does not lie to recover compensation from the Crown for damage occasioned by the negligence of its servants to the property of an individual using a public work.

2nd. That an express or implied contract is not created with the Crown because an individual pays tolls imposed by statute for the use of a public work, such as slide dues for passing his logs through government slides.

3rd. That in such a case Her Majesty cannot be held liable as a common carrier.

APPEAL from a judgment rendered by Mr. Justice *Henry* in the Exchequer Court of *Canada*, on a demurrer to the petition of right of *John McFarlane* and *Duncan McFarlane*, the above named respondents.

The petition of right sets out:—

1. That under the Consolidated Statutes of *Canada*, ch. 28, Dominion Act, 31 *Vic.*, ch. 12, her Majesty the Queen owned, as public works of the late province of *Canada*, and of the Dominion of *Canada*, "certain slides, dams, piers, booms and other works on the *Ottawa* river, and the river *Madawaska*, one of its tributaries."

2. That under said statutes the Governor-General

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

in Council was empowered by Orders in Council to impose and collect tolls and dues on such public works, for the proper maintenance thereof, and "to advance the public good" to enact such regulations as might be deemed necessary for the management, proper use and protection of such works, and for collection of the tolls, &c., and might impose fines—not exceeding in any one case one hundred pounds for any infraction of such orders.

3. That the Governor in Council made orders authorizing the collection of the tolls or dues.

4. That the orders provided works "should be under the control and management of the superintendent of the works, slide master, deputy slide master, or other officer duly appointed by the Commissioner of Public Works, and that these officers, and no others, should have the power of regulating the supply of water required for the passage of timber, of alloting the space for rafting or mooring of timber, of determining the quantity of timber that might pass daily through the slides or booms, of collecting the slidage dues, of awarding the amount that might be due by the owner or owners of timber," &c., for damages done to works or penalties for violation of regulations, of seizing the timber and selling same, and recovering the dues, penalties or damages when the owners of timber or persons in charge thereof should refuse or neglect to pay same.

5. That the orders provided that the order of said superintendent, &c., duly appointed should be obeyed by owners, &c., and if refusing to obey to be subject to fines and penalties.

6. That no timber should enter any slide without the owner, &c., giving notice to superintendent, &c., under penalty.

7. Any interference by owners with certain works

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under control of deputy slide master at *Arnprior* station, or with duties of that officer, to subject owner not duly authorized to a penalty of not less than one hundred dollars nor more than two hundred dollars over and above amount awarded by Superintendent of *Ottawa* works for any damage arising from such interference or violation of orders.

8. That at time of damage and loss sustained by suppliants, they were lumbering on *Madawaska* river, owned licenses to cut timber on crown lands bordering on that river, had cut logs there which it was necessary to float down that river to *Ottawa* river, on way to *Quebec*, in usual manner.

9. That such timber in course of transit passed over certain slides, booms and river improvements belonging to Her Majesty, viz: the retaining boom at *Arnprior*, the slide at *Arnprior* and the main retaining boom at the mouth of the *Madawaska* river in the river *Ottawa*, (*Chat's* lake).

10. That suppliants had notified slide master, obtained permission to pass the timber and performed all conditions on their part to entitle them to have timber passed.

11. That one *John Harvey* was duly appointed slide master, and had control and management of works over which timber passed.

12. That the said timber and logs were passed from the retaining boom at the village of *Arnprior* over the said timber slide at said village into the main retaining boom in the *Ottawa* river (*Chat's* lake) by the said *Harvey*, whose duty it was, under the said orders, to direct and control the passage of the same, and by other servants of the Crown under his directions; and by reason of the unskilful, negligent and improper manner in which this duty was performed by the said *Harvey* and

the said other servants of the Crown, a larger quantity of timber and logs than the said main boom was capable of holding was allowed to pass over the said slide into the said main boom, and in consequence thereof the said boom broke away, and the timber and logs of the suppliants floated out of the same.

13. That the suppliants repeatedly objected to so much of the timber and so many of the logs being passed over the said slide by the said slide master, and frequently warned the said slide master that the consequence would be that the boom would break away, as it did; but the said slide master ignored and refused to heed the objections and warnings of the suppliants.

14. The suppliants also charged that the said boom at the mouth of the *Madawaska* was negligently and unskilfully constructed, and was wholly insufficient for the purpose it was designed to serve.

15. The suppliants charged that the said slide master was incompetent to discharge the duties he was employed to discharge in connection with the said works, by reason, as well of his want of knowledge of the duties required of him in his said capacity of slide master, as at the said time and for some time preceding, of his intemperate habits, as was well known to Her Majesty, and that Her Majesty did not exercise due and proper care in the employment of the said slide master, and in continuing to employ him.

The petition then alleged that a great many of the pieces that floated away were lost to suppliants, they suffered loss on collecting those not lost; many of the pieces were injured and depreciated in value, and by reason of the delay of getting timber not lost to the market, they suffered a heavy loss, and they claimed $5,967.04 and interest.

19. The suppliants submitted, that under the said statutes, the said Orders in Council, and the facts as

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above set forth, Her Majesty was and should be declared to be liable for the losses sustained by the suppliants, and for the labor and expense they were at by reason of the unskilful, negligent and improper conduct of the said slide master in passing the said timber and logs, the particulars of which were set forth in the paper thereto annexed marked "A."

The suppliants therefore prayed that Her Majesty might under the said statutes, Orders in Council, and the facts as above set forth, be declared to be liable to the suppliants for the losses sustained by the suppliants, and for the labor and expense they were at by reason of the unskilful, negligent and improper conduct of the said slide master as aforesaid.

To this petition the Attorney-General, on behalf of Her Majesty, demurred on the following grounds:—

1. That no liability existed on the part of Her Majesty towards the suppliants, in respect of which a petition of right could be maintained for the losses alleged to have been sustained through the negligence of the persons mentioned in said petition, the Crown not being liable for the negligence of its servants.

2. That no contract with the suppliants on the part of Her Majesty was shewn, and a petition of right does not lie to recover damages not arising under a contract with the Crown.

3. That no liability on the part of Her Majesty towards the suppliants existed by reason of the insufficiency of the boom referred to in the said petition.

4. That no liability on the part of Her Majesty towards the suppliants exists by reason of any want of care in the selection or employment of the slide master referred to in said petition.

5. That under the statute in that behalf, the public works referred to in the petition were placed under the control and management of the Minister of Public

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Works, and Her Majesty was not liable for the negligence of the persons having charge of said works.

The demurrer was argued in the Exchequer Court for the suppliants by Mr. *Hector Cameron*, Q. C., and Mr. *McIntyre*; and for the Crown by Mr *Lash*, Q. C.

On the 25th of May, 1881, the following judgment overruling the demurrer, was delivered by *Henry*, J.:—

"This is an action brought by the plaintiffs by a petition of right to recover damages for losses sustained by them through the breaking of a boom in the *Ottawa* river situated below the timber slides at or near to *Arnprior*, by means of which several logs of the plaintiffs were wholly lost and the plaintiffs put to trouble and expense in recovering others, all, as alleged, through the improper and negligent conduct of *John Harvey*, who then was, and had been for some years before, slide master at that place duly appointed by the government, under the provisions of ch. 28 of the Consolidated Statutes of *Canada* and of the Act 31st. *Vic.*, ch. 12.

"To this petition a demurrer was filed and served on behalf of the Attorney-General, setting out as causes of demurrer in substance,

"1st. That Her Majesty is not liable for the losses sustained through the negligence of the Slide Master under the circumstances as alleged in the petition.

"2nd. That no contract with the suppliants is shown.

"3rd. That no liability on the part of Her Majesty exists by reason of the insufficiency of the boom referred to in the petition.

"4th. That Her Majesty is not liable by reason of any want of care in the selection or employment of the Slide Master.

"5th. Because the public works in question were placed by the statute under the control and management of the Minister of Public Works, Her Majesty is

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not liable for the negligence of the persons having charge of said works under him.

"The demurrer admits all the allegations contained in the petition.

"The first cause of demurrer would, in my opinion, be sustainable if the action was founded solely on a tort. That it is a defence in this case largely if not altogether depends upon the fact whether the dealing with the logs in question created a contract. That I will now proceed to consider. The property in the public works in question is vested in the Queen as the head of the government and legislature of the Dominion. Public moneys were spent to erect and maintain the works. Tolls for the use of them were imposed. A slide master always managed and controlled the use of them. When logs reached the retaining boom at *Arnprior* above the slides, he assumed the possession of them and the conduct of them through the slides and into the boom below them, from which they were re-delivered to the owners. By Orders in Council, under the acts, tolls were levied and collected and paid into the public treasury. No logs could get down the river without coming through the slides, and the legislature by the acts before referred to, provided the slides and the other works connected with them as the only means of passage for logs. To obtain the use of such works it became necessary for the owners of logs to transfer the actual temporary possession and control of them to the slide master to be retained by him until he re-delivered them out of the lower boom. There was in this case not only a voluntary, but under the circumstances an absolutely necessary transfer of the logs to the slide master for the purposes of transit. All control over the direction of the operation was out of the owners and in the slide master, and the suppliants complain that, whilst so, through the improper and negligent conduct of the

slide master and the insufficiency of the lower boom, the loss complained of was occasioned.

"To test the objection that no contract existed, let a private individual or chartered company occupy the place of Her Majesty. Suppose the works in question to be private property, and the owner of logs by causing them to enter the retaining boom for transmission virtually delivers them to the agent or the owner of the slide for that purpose.

"By the act he impliedly agrees that if they are so transmitted he will pay the accustomed charges for the service, and if the other takes possession of them he adopts the offer and enters into a contract to transmit them in a proper manner and re-deliver them to the owner from the lower boom.

"If then through the improper conduct of the owner of the slides his agents or servants he is prevented from so re-delivering them, can it be contended there was no contract, and therefore no breach or liability. If then the legislature has thought proper to invest the government with carrying powers for the transmission of logs by water why should not a private individual have a remedy for a failure to perform obligations and duties in the exercise of such powers as he would have against a private contractor, and why should he not have redress in the same mode and on the same principle that he might do for the breach of duty in regard to the carriage of goods by means of a government railway? If, for instance, goods for transmission from one place to another are delivered to and received by the proper officers of the Intercolonial Railway, there arises a contract to deliver them accordingly, and if lost or destroyed would it not be evidence of an improper state of the law if the government would not be bound to make good the loss by means of a petition of right, there being no statutory exemption from such liability.

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The principles of the common law, which provide that where parties enter into a contract they are in every case bound by its terms express or implied, are applicable.

"A good many cases were cited at the hearing to establish the position that an action by petition of right cannot be maintained for negligence not arising out of a contract, but for damages arising from breaches of duty otherwise; but I need not refer to them as the claim here arises from the alleged failure to perform a contract. The English cases to which my attention has been turned give little aid in the determination of this one, as none that I can find is exactly applicable. The property in the public works in question was by the acts vested in the Queen—not as personal to her, but in trust for the dominion—the management and control being vested in the government of the dominion and the operations to be conducted by persons appointed by the government, or what is the same, by the Minister of Public Works. The funds for their erection and maintenance were provided to come from the public chest and the earnings to be paid into it. It is not necessary to enquire whether the investment has been found profitable or otherwise. An examination of the profit and loss account might shew either result, but it would not affect the liability. The erection of the slides and connecting works was no doubt principally undertaken as an improvement of the river for the public benefit, and if they were of such a character that they might be utilized by the public without charge and without being obliged to transfer the custody and care of private property in the course of transmission to the government's agents there would be then good reason to contend that if losses occurred they should be borne by those who suffered them without any recourse, but when, on the contrary, the

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government, through its appointees and agents, take charge of property for a special purpose, there is an implied contract to provide the necessary means to effect that purpose, in the same way as a private party would be required to do. It is therefore answerable in my opinion in this case, for the improper and negligent conduct of the slide master and for any negligence in keeping in use imperfect and insufficient booms or other appliances.

"The petition of right is founded on a violation of some right in respect of which, but for the immunity from all process with which the laws surrounds the sovereign, a suit at law or in equity could be sustained. The petition must shew on the face of it some ground of complaint which but for the inability of the subject to sue the sovereign may be made the subject of judicial procedure.

"In *Feather* v. *The Queen* (1), it was held that the 'cases in which the petition of right is open to the subject, are where the lands 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 where the claim arises out of a contract, as for goods supplied to the Crown or to the public service.' According to the doctrine just cited a petition of right will lie for the breach of the contract in this case.

"By section 58 of the Supreme and Exchequer Court Act, it is provided that this court 'shall have exclusive jurisdiction in all cases in which the demand shall be made or relief sought in respect to any matter which might in *England* be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown or any officer of the Crown.' This provision was

(1) 6 B. & S. 294.

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subsequently amended by striking out the concluding words 'or any officer of the Crown.'

"As therefore an action by petition of right founded on a contract with the government can be maintained in *England*, it is maintainable here under the provision of the statute I have just quoted. I am, for the reasons given, of the opinion that the petition of right in this case is properly founded.

"I therefore decide that the demurrer is bad and give judgment for the suppliants with costs."

On the 30th September, 1881, motion was made by the counsel for Her Majesty, pursuant to rule No. 231 of the Exchequer Court Rules and of the practice of the said court for an order *nisi* calling upon the suppliants to shew cause why the judgment rendered by this court in favor of the suppliants upon the hearing of the demurrer of the defendant to the suppliants' petition of right, should not be set aside and judgment entered for the Crown upon the following grounds :—

"1. That no liability exists on the part of Her Majesty towards the suppliants in respect of which a petition of right can be maintained for the losses alleged to have been sustained through the negligence of the persons mentioned in said petition, the Crown not being liable for the negligence of its servants.

"2. That no contract with the suppliants on the part of Her Majesty is shewn, and a petition of right does not lie to recover damages not arising under a contract with the Crown.

"3. That no liability on the part of Her Majesty towards the suppliants exists by reason of the insufficiency of the boom referred to in the said petition.

"4. That no liability on the part of Her Majesty towards the suppliants exists by reason of any want of care in the selection or employment of the slide master referred to in said petition.

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"5. That under the statute in that behalf, the public works referred to in the petition are placed under the control and management of the Minister of Public Works, and Her Majesty is not liable for the negligence of the persons having charge of said works."

This motion was refused. From this decision the Crown appealed.

Mr. *Lash*, Q.C., for appellant:

1. There is no contract shewn. Whatever duty may exist on the part of the Crown towards those using the boom, such duty does not arise out of contract and no claim for damages by reason of the breach of this duty can be enforced by petition of right. The elements of a contract are wanting. There is no *consensus*. The rights of the parties are declared by statute and Orders in Council having the force of statute.

It has been said that there is a *quasi* contract between the Crown and those using the boom, but a *quasi* contract is not a contract and has not the necessary elements of one (1).

As to the duty of a Canal Company with respect to the management of their canal, see *Parnaby* v. *Lancaster Canal Company* (2). In this case it was not suggested that the duty arose out of contract.

See also *Gibbs* v. *Trustees of the Liverpool Docks* (3), where, had the claim been treated as arising out of contract, the demurrer must necessarily have been overruled, whereas it was allowed.

In that case the defendants were a corporation owning the *Liverpool* docks and having power to impose tolls upon vessels navigating the port and using the docks, but by statute the control and management of the docks, &c., were vested in a committee. By reason

(1) Maine's Ancient law, p. 344. (2) 11 A. & E. 223.
(3) 1 H. & N. 230.

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of the improper state of the entrance to the docks, the plaintiff's vessel in endeavouring to enter was injured. Judgment was given for the defendants on the ground that they were not liable for the improper acts of the committee, the committee itself only being liable. Had the case been treated as one of contract, this decision could not have been given, as if any contract existed it was one with the trustees and not with the committee.

The above judgment was reversed in the Exchequer Chamber (1), but not on the ground that a contract existed. The defendants agreed that the plaintiff should not be required to commence another action against the defendants on the record. See judgment of Mr. Justice *Blackburn* in same case on appeal to the House of Lords (2).

The learned judge in the Court below seems to have treated the case as if the Crown were a carrier of the logs and that the possession of the logs was given over to the Crown who impliedly contracted to redeliver them to the owner after their passage through the works, and that the Crown is liable for breach of contract in not so redelivering them. It is submitted that the learned Judge is wrong in holding that there was a delivery of the logs to the Crown to be carried through the works and redelivered to the suppliants. The suppliants themselves have the right as part of the public to use the works subject to the regulation made with respect to their use and the Crown is entitled to collect tolls upon the logs passing through the work. The suppliants' right to use the works does not depend upon an implied contract, as the learned Judge holds that they will pay the accustomed charges for the services rendered by the Crown. The right to collect the charges does not depend upon contract. It is a right given by

(1) 3 H. & N. 439. (2) L. R. 1 H. L. 109.

statute to levy tolls upon certain articles quite irrespective of any contract. A Log driving and Boom Co., has been held in the *U. S.*, not to be a carrier: *Mann* and *White River L. & B. Co. Mich., S. C.*, referred to in *Albany* Law Journal (1).

It is submitted that the fallacy in the learned judge's argument in this respect consists in holding that the Crown undertook to do anything with respect to the suppliants' logs - the true position is that the suppliants themselves made use of the public work in question and had the right under the law so to do, irrespective of any consent or contract on the part of the Crown, provided that when using it they complied with the law, viz.: the regulations for its use. *Morgan* v. *Ravey* (2).

In view of the decisions of this court with respect to the claims which may be enforced by petition of right it seems hardly necessary to refer to any authorities for the position that a petition of right lies only when the claim sought to be enforced is upon contract, but for convenience of reference the following cases are alluded to: *Thomas* v. *The Queen* (3); *Tobin* v. *The Queen* (4); *Jones* v. *The Queen*, judgment of Sir *William Ritchie*, Exchequer Court of *Canada*; and *Halifax City Railway* v. *The Queen*, judgment of Sir *William Richards*, Exchequer Court of *Canada* (5).

But assuming that there is a contract in this case it is submitted that the Crown is not liable for the negligence of the boom master or other servants of the Crown. See *Viscount Canterbury* v. *Attorney General* (6).

This case is confirmed by *Thomas* v. *The Queen*, *Tobin* v. *The Queen*, *Jones* v. *The Queen*, and *Halifax City Railway* v. *The Queen*, above mentioned.

(1) Vol. 23, (1881,) p. 384.
(2) 6 H. & N. 276.
(3) L. R. 10 Q. B. 31.
(4) 16 C. B. N. S. 310.
(5) A report of these cases will be found printed as an appendix to the present vol.
(6) 1 Phill. 306, 321, 325.

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There is no pretence that any action can be maintained against the Crown by petition of right for negligence in the selection of its servants It is not pretended that any contract existed between the Crown and the suppliants, that the Crown would use care in the selection of its servants: *Viscount Canterbury* v. *Attorney General* (1).

The suppliants have alleged that the boom was unskilfully constructed and was insufficient for the purposes it was designed to serve, but the petition does not state that such was the cause of the damage, and the prayer of the petition is confined to the loss sustained by the suppliants by reason of the unskilful, negligent and improper conduct of the boom master. If, however, it might be held that the suppliants may rely upon this statement it is submitted that the general principles above alluded to, show that the duty (if any) on the part of the Crown to construct the boom skilfully does not arise out of contract.

It cannot be pretended that there was any contract with the suppliants at the time the boom was constructed, and any duty which might arise towards them by reason of the insufficiency of the boom did not arise out of contract.

There are many duties which the Crown owes towards its subjects for breach of which the Crown should in fairness make compensation, but it is one thing to say that the Crown should make compensation, and quite a different thing to say that the suppliants are entitled to enforce their claim by petition of right. The suppliants are not entirely without remedy. The Statute 33 *Vic.* (1870) ch. 23, providing for a reference to the official arbitrators of certain claims against the Crown expressly covers the claim in this case, and it is submitted that

(1) 6 B. & S. at pp. 321, 322; S. C. 1 Phill. 306.

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the suppliants have no other remedy but that provided for by that statute.

It is also submitted that the fifth ground of the demurrer is valid.

Paragraphs 4, 7 and 11 of the petition, and the Act 31st *Vic.* (1867, *Canada*) ch. 12, and the old Consolidated Statutes of *Canada*, ch. 28, show that the control and management of the boom in question were vested in the Department of Public Works.

It is contended by the suppliants that the Minister of Public Works is merely the agent of Her Majesty and that Her Majesty is liable for his acts.

It is true that the Minister of Public Works is in one sense the agent of Her Majesty, but with respect to the works placed under his control by statute he is not the agent of Her Majesty in the sense that makes Her Majesty responsible under the maxim *respondeat superior*. As the officer having the control and management of the work he is appointed by Parliament and not by Her Majesty. The statute vests the control and management of the work in the Minister irrespective of Her Majesty's desire in the premises. The Crown may refrain from appointing a Minister of Public Works, but if one be appointed he becomes by force of the statute clothed with control of the works, and so long as the statute is in force his powers under it cannot be interfered with. Therefore, deriving his powers from a statute and not because they are given to him by the Crown, Her Majesty cannot be made responsible by petition of right for the improper exercise of those powers. See *Gibbs* v. *Trustees of the Liverpool Docks* (1); *Viscount Canterbury* v. *Attorney General* (2); *Hall* v. *Smith* (3); *Duncan* v. *Findlater* (4).

(1) 1 H. & N. 439.
(2) 1 Phill. 306.
(3) 2 Bing. 160.
(4) 6 C. & F. 894; Broom's Legal Maxims, 62.

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Mr. *Bethune*, Q.C., and Mr. *McIntyre*, for respondents.

The facts alleged in the several paragraphs of the petition which are admitted by the demurrer, and are to be found summarized in the judgment of Mr. Justice *Henry*, constitute an implied contract on the part of the Crown with the respondents, for the passage of the timber and logs of the respondents over the slide at *Arnprior*, into the retaining boom in the river *Ottawa*, at the mouth of the *Madawaska* river, rendering the Crown liable, as a common carrier, upon any breach of said contract. *Smith's* Merc. Law (1); *Simpson* v. *London General O. Coy.* (2); *Richardson* v. *The Great Eastern Ry. Co.* (3).

But even if these facts did not raise a contract between the respondents and the Crown, as a common carrier, with its corresponding liabilities, they at any rate constitute an implied contract upon the part of the Crown, with the respondents, to use due and reasonable skill and care in passing the timber and logs of the respondents over the said slide into the said boom. *Addison* on Contracts (4); *Leake* on Contracts (5); *Morgan* v. *Ravey* (6); *Dugdale* v. *Lovering* (7); *Marzetti* v. *Williams* (8); *Redhead* v. *Midland Ry. Co.* (9); Mr. Justice *Blackburn's* remarks in that case citing *Brown* v. *Edgington* (10); *Addison* on Torts (11); *Brown* v. *Boorman* (12).

That a petition of right will lie to enforce an implied contract against the Crown cannot be denied.

The case of *Churchward* v. *The Queen* (13), in which

(1) 9th Eng. Ed., pp. 275, 277.
(2) L. R. 8 C. P. 390.
(3) L. R. 10 C. P. 486.
(4) 7th Eng. Ed. pp. 21-2, 649-51, 653, 717, 1048.
(5) Eng. Ed. 1867, pp. 7 & 13.
(6) 6 H. & N. judgment of Pollock C. B. p. 276.
(7) L. R. 10 C. P. 196.
(8) 1 B. & Ad. Judgments of Parke & Patteson, JJ., pp. 425-27.
(9) L. R. 2 Q. B. 433.
(10) 2 M. & G. 279.
(11) Pp. 1 & 15.
(12) 11 C. & F. 1, and Lord Campbell's judgment, p. 43.
(13) L. R. 1 Q. B. 173.

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case it is admitted in all the judgments that if the suppliant could have established an implied contract with the Lords Commissioners of the Admiralty, representing the Crown, his petition would have been successful, is an authority. *Feather* v. *The Queen* (1); *Thomas* v *Queen* (2); and this also has been held by the Exchequer Court here in *Wood* v. *Queen* and *Isbester* v. *Queen*, E. C. of *Can.*, which judgments were not appealed (3); see also secs. 58 and 61, 31 *Vic.*, c 12.

Her Majesty as the representative of the Executive Government of *Canada* is liable on the implied contract to the respondents and is properly sued for a breach of the same as the management of said works by the Minister of Public Works referred to in the 5th paragraph of the Attorney General's demurrer is the management by him as one of her superior servants. The property in these works is by the acts vested in the Queen not as personal to her, but in trust for the Dominion, the management and control being entrusted to the Minister of Public Works and other employees and servants of her Majesty; the funds for their construction and maintenance being provided to come from the public chest and the earnings to be paid into it. 31 *Vic.*, c. 12, sees. 1, 2, 3, 10, 13, 58, 61, 63, 65, 66. *Thorne* v. *Commrs. of Public Works* (4); *Churchward* v. *Queen*; *Thomas* v. *Queen*; *Wood* v. *Queen*; *Isbester* v. *Queen* (5).

The learned counsel then referred to and distinguished the case of *Parnaby* v. *The Lancaster Canal Co.* (6); *Mersey Docks Trustees* v. *Gibbs* (7).

(1) 6 B. & Sm. Argument of Mr. Bovil, p. 280, and judgment of Cockburn, C. J., p. 294.
(2) L. R. 10 Q. B. p. 33.
(3) These cases will be found reported in appendix to the present volume.
(4) 32 Beav. 490-93.
(5) Referred to above.
(6) 11 A. & E. 223.
(7) L. R. 1 H. L. 93.

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The respondents rely upon the judgment of Mr. Justice *Henry*.

RITCHIE, C J., [after reading the statement of the case proceeded as follows :]

There is, in my opinion, no analogy whatever between this case and that of private individuals or corporations owning slides and undertaking by themselves or their agents to take charge of, and to pass, for a consideration, timber through such their private property. In such a case no one can doubt that if such timber was lost or damaged by reason of the unskilful, negligent and improper conduct of the proprietors or their servants in passing such timber through their slides, they would be responsible to the owners thereof for such loss.

But this, in my opinion, is an entirely different case, governed by principles wholly inapplicable to that just suggested. The Queen, not being a private individual, is not subject to the liabilities of private individuals.

The slides, booms and property in question are not private property but public property, created by the expenditure of public money for public purposes and for the public benefit, and vested in Her Majesty, as the learned judge who heard this case justly remarks, "not as personal to Her, but in trust for Her Dominion."

The management and control of this public property is through the instrumentality of orders of the Governor General in Council, and the operations in connection therewith are conducted by persons appointed by a high officer of state, the Minister of Public Works, under whose general management the public works of the Dominion are placed. The river in its natural state was evidently unfitted for the transport of the timber in the great lumbering district through which it passed, and "to advance the public good," and to make the

river fit for the transportation of timber, so that by its improvement it might be made a great highway for the development of a great Dominion industry, public property and public works, such as these, were required; and the liability of Her Majesty in reference thereto cannot for a moment be placed on the same footing or governed by the same principles as private property in which private individuals invest their capital for their private gain.

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I am of opinion there was no contract or breach of contract to give to the suppliants any claim against the Crown, nor do the suppliants put forward their claim to relief on any such ground. The claim set forth in the petition is a tort pure and simple.

There is no allegation that the suppliants had any contract with the Crown; there is no allegation of any breach of any contract on the part of the Crown. The allegation in paragraph 12 is that *Harvey*, whose duty it was to direct and control the passage of the lumber, "by reason of the unskilful, negligent and improper manner in which this duty was performed by him," the boom broke away and the timber floated out of the same. By paragraph 15: "That the slide master was incompetent to discharge his duties, as well by reason of want of knowledge as, at the said time and for some time preceding, of his intemperate habits, as was well known to Her Majesty, and that Her Majesty did not exercise due and proper care in the employment of the said slide master and in continuing to employ him." And by section 19 the suppliants distinctly ask that Her Majesty shall be declared liable for the losses they have sustained "by reason of the unskilful, negligent and improper conduct of the said slide master in passing the said timber and logs," and they put forward no contract, breach of contract or other ground whatever. And in the prayer in like manner they pray that Her

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Majesty may be declared liable "by reason of the unskilful, negligent and improper conduct of the said slide master." So that they rest their claim solely and entirely on the negligent and improper conduct of the slide master; on his intemperate habits; on the knowledge of Her Majesty of those intemperate habits and on a charge that with such knowledge Her Majesty "did not exercise due and proper care in the employment of the said slide master, and in continuing to employ him." This last amounting simply to a charge that Her Majesty carelessly and improperly exercised Her Royal Prerogative.

Now clearly all this claim is based on an injury sustained by a wrong properly so called, and it is clear beyond all dispute that a petition of right in respect of a wrong in the legal sense of the term shews no right to legal redress against the sovereign.

But it is said that the Crown was, as to this timber in passing through the slides, a common carrier, and as such the relation of the Crown to the owners of such timber is in the nature of and to be treated as a contract between man and man. But to my mind there is not the slightest analogy between this case and a common carrier; these improvements made for the benefit and convenience of the public are vested in the Crown in trust for the public, and their management and direction is entrusted to certain officers appointed in accordance with statutory provisions.

It has been repeatedly held that there is no analogy in the case of the postmaster and a common carrier. If the post office department cannot be considered in the light of common carriers, I am at a loss to conceive how it is possible to establish in a case such as this that the Crown is a common carrier.

Lord *Mansfield*, in *Whitfield* v. *Lord Le Despencer* (1),

(1) 2 Cowper 764.

treats the post office as a branch of the revenue and a branch of police created by act of parliament; he says: as a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are trifling) under government and entrusts the management and direction of it to the Crown and officers appointed by the Crown. There is no analogy, therefore, between the case of the postmaster and a common carrier.

Lord *Mansfield* at page 765 points out that an action on the case lies against parties really offending, &c., that is, that all inferior officers are responsible for their personal negligence.

In *Rowning* v. *Goodchild* (1), an action against a deputy postmaster for non-delivery of letters, as to duty of postmaster *De Grey*, C.J., says:

> This is not to be considered in the nature of a private contract between man and man, nor is the postmaster to be looked upon (as urged at the bar) in the light of a common carrier. But the duty arises out of a great public trust since the legislative establishment of the post office by the statutes of *Charles II.* and Queen *Anne.*

Chancellor *Kent* says (2):—

> It has been the settled law in *England,* since the case of *Lane* v. *Cotton* (3), that the rule respecting common carriers does not apply to postmasters, and there is no analogy between them. The post office establishment is a branch of the public police, created by statute, and the government have the management and control of the whole concern. The postmasters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the risk and value of the letters under their charge, but only a general compensation from government. In the case referred to the postmaster-general was held not to be answerable for the loss of exchequer bills stolen out of a letter while in the defendant's office. The subject was again elaborately discussed in *Whitefield* v. *Lord Le Despencer* (4), and the same doctrine asserted. The postmaster-general was held not to be responsible for a bank note stolen, by one of the sorters, out of a letter in the post office. But a deputy postmaster or clerk in the office is still answerable in a private suit, for

(1) 2 Wm. Bl. 908.
(2) 2 Kent's Commentaries, 12 Ed. 1873, p. 610.
(3) Ld. Ray. 646.
(4) 2 Cowper 754.

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misconduct or negligence; as, for wrongfully detaining a letter an unreasonable time. The English law on this subject was admitted in *Dunlop* v. *Munroe* (1) to be the law of the *United States;* and a postmaster was considered to be liable in a private action for damages arising from misfeasance or for negligence, or want of ordinary diligence in his office, in not safely transmitting a letter (2). Whether he was liable himself for the negligence of his clerks or assistants was a point not decided; though if he were so to be deemed responsible in that case, it would only result from his own neglect in not properly superintending the discharge of his duty in his office.

The most that can be said of this case is that the legislature has improved this river and rendered it navigable, giving the public the use of it so improved on complying with certain regulations and paying certain tolls wholly independent of contract. If, in using the river and so availing themselves of the government improvements, their property should be lost or injured by the improper conduct of the servants of the government or any other person, doubtless for any such wrong the law would furnish a remedy against the party whose wrongful conduct occasioned the injury, for I suppose it will scarcely be doubted that inferior officers are responsible for their personal negligence.

If the judgment in this case is allowed to stand it would be a direct adjudication that the Crown was not only responsible in damages for wrongs done by her servants, but also responsible in damages to her subjects for not exercising due and proper care in the exercise of her royal prerogative, that is to say: in the employment of this slide master, and in continuing to employ him, well knowing his intemperate habits and consequent unfitness for the situation.

As to the first, in contemplation of law the sovereign can do no wrong and is not liable for the consequences of her own personal negligence, so she cannot be made

(1) Cranch 242. (2) *Schroyer* v. *Lynch*, 8 Watts 453.

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answerable for the tortious acts of her servants. The doctrine of *respondeat superior* has no application to the Crown, it being a rule of the common law that the Crown cannot be prejudiced by the wrongful acts of any of its officers, for as has been said long ago, no laches can be imputed to the sovereign. "nor is there any reason that the king should suffer by the negligence of his officers or by their compacts or combination with the adverse party."

As to the second, the allegation in the petition attempts to make Her Majesty amenable to her subjects in her courts for the proper exercise of her prerogatival rights and amounts to a direct and unwarrantable attack on Her Majesty's prerogative rights and is derogatory to the honor of her Crown and an imputation that ought not in my opinion to be permitted to appear on the records of this court.

And while it has been determined in the *United States* (1) that the maxim that the King can do no wrong has no place in the system of constitutional law as applicable either to the government or to any of its officers, it has been held that the restriction of the jurisdiction of the Court of Claims to cases of contract express or implied has reference to the well understood distinction between cases arising *ex contractu* and *ex delicto*, and is founded on the sound principle that while Congress was willing to subject the government to suits on valid contracts which would only be valid when made by some one vested with the authority to do so, or something done by such authority which raised an implied contract, it did not intend to make the government liable for the wrongful and unauthorized acts of its officers, however high their place, and though done under a mistaken zeal for the public good.

It is unnecessary to cite authorities to show a peti-

(1) *Langford* v. *United States*, 21 Albany Law Journal, 397.

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tion of right will not lie to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty, inasmuch as a petition will not lie for a claim founded upon a tort on the ground that the Crown can do no wrong. The cases of *Tobin* v. *Reg.* (1), and *Feather* v. *Reg.* (2), Viscount *Canterbury* v. *Attorney General* (3), sufficiently establish this if authority was needed.

In my opinion the appeal should be allowed with costs.

STRONG, J.:

I am of opinion that this appeal must be allowed. The well-known case of *Lord Canterbury* v. *The Queen* (4) establishes that the Crown is not liable for injuries occasioned by the negligence of its servants or officers, and that the rule *respondeat superior* does not apply in respect of the wrongful or negligent acts of those engaged in the public service. The case of *Lane* v. *Cotton* (5) had in effect decided this, it having there been determined that the great officers of the Crown were not liable for the acts of subordinate officers whom they might employ to assist them in the execution of their offices. That was an action against the Postmaster-General, in which the plaintiff sought to recover for the negligence of a clerk in the post office—who was the officer of the Postmaster-General and not of the Crown—in losing a letter; it was held on principles of public policy that the defendant was not liable. Lord Chief Justice *Holt* dissented from the judgment, but it was afterwards held to be law by Lord *Mansfield* and the whole Court of Queen's Bench in the case of *Whitfield* v. *Le Despencer* (6).

(1) 16 C. B. N. S. 310.
(2) 6 B. & S. 257, p.
(3) 1 Phill. 306.
(4) 1 Phill. 306.
(5) 1 Lord Raymond, 646.
(6) 2 Cowper, 754, 765.

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This exemption was founded upon the general ground that the Postmaster General was a public officer, and that the whole establishment of the post office being for public purposes, and the officers employed therein being appointed under public authority, it would be against public policy to make the head of the department liable for the acts of his subordinate officers, though employed by him and actually in his service and not in that of the Crown, since it would be impracticable for him to supervise all their acts. If, therefore, the officers of the Crown are not thus responsible, it must follow *a fortiori* that the Crown itself cannot be liable, and such has been the course of decision not only in *England*, where Lord *Canterbury's* case is decisive of the principle, but also in the *United States*, for the exemption is rested entirely on grounds of public policy. The law is well stated by Mr. Justice *Story* in the following extract from his Commentaries on the Law of Agency:

It is plain that the government itself is not responsible for the misfeasances, wrongs, negligences or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments and difficulties and losses which would be subversive of the public interests, and indeed laches are never imputable to the government.

In *Gibbons* v. *U. S.* (1), Mr. Justice *Miller*, in delivering the judgment of the Supreme Court of the *U. S.* says:

But it is not to be disguised that this case is an attempt under the assumption of an implied contract to make the government responsible for the unauthorized acts of its officers, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents.

(1) 8 Wallace 269.

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And again,

The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occuring while engaged in the discharge of official duty.

This doctrine is indeed not confined to an exoneration of the Crown from liability for the torts of its agents and servants, but is carried so far as to exonerate the Crown or government from the non-performance of contractual obligations, which in the case of private persons would be fatal to their rights, when such non-performance or negligence consists in the omissions of public officers to perform their duties (1). A strong instance of this is afforded in the case of the neglect of the officer of the Crown to give notice of dishonor of a bill or note taken under an extent, which is held not to prejudice the right of the Crown to recover against the drawer or endorser. And the reason for this is said by Sir *John Byles* in his work on Bills of Exchange to be the principle already stated, that the laches of its officers is not to be imputed to the Crown.

The learned judge who heard this case in the Exchequer Court has placed his judgment on the ground that the petition of right shows a breach of contract on the part of the Crown, that the Crown contracted to pass the suppliants' timber safely through the slides, and that, being liable for breach of contract though not for the torts of its servants, its liability in the present case is analogous to that of a carrier who can be sued for breach of contract arising from the defaults of his servants and agents. Without enquiring whether this analogy between the liability of the Crown and a private person for a breach of contract arising from the laches and negligence of an agent is correctly assumed, it

(1) *Seymour* v. *Van Slych*, 8 Wend. 403; *U.S.* v. *Kirkpatrick*, 9 Wheat. 720.

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appears very clear that there is no room for applying it in the present case, for the petition of right does not show any contract on the part of the Crown, to pass the timber safely through the slides, either expressly or impliedly entered into by the parties, as in the case of a carrier undertaking the carriage of goods, or arising by operation of law. At the most it shows a duty on the part of the slide master to take due and proper care, and alleges a state of facts which, in the case of a private owner of a slide, would make him liable for the omission of such care arising from the negligence of his servant or agent, but for which in the case of the Crown there is not, for the reasons and on the authorities already stated, any responsibility. The consequence is that the only remedy open to the suppliants for the wrong of which they complain was an action against the slide master (1).

The judgment of the Exchequer Court must be reversed with costs, and judgment on the demurrer entered for the Crown with costs.

HENRY, J., adhered to his judgment rendered by him in the Exchequer Court.

TASCHEREAU, J., concurred with the Chief Justice.

GWYNNE, J.:

It was admitted by the learned counsel for the suppliants that upon the authority of *Viscount Canterbury* v. *Attorney General* (2) and *Tobin* v. *Regina* (3), a petition of right will not lie against Her Majesty for any tort or negligence committed by any person in the employment of the Crown. The losses in respect of which the suppliants claim compensation are, in the petition in this case, alleged to have been occasioned

(1) 2 *Baker* v. *Ranney*, 12 Grant 228.

(2) 1 Phil. 306.

(3) 16 C. B. N. S. 310.

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by the "unskilful negligent and improper conduct" of a slide master, at one of the slides constituting part of the public works of the Dominion, and who is alleged to have been duly appointed to his office under the provisions of ch. 28 of the Consolidated Statutes of *Canada* and the Dominion Statute 31 *Vic.*, ch. 12. But although it was admitted that Her Majesty could not be made responsible for any injury occasioned to the suppliants by the negligence of such slide master, it was contended that indirectly Her Majesty could be made responsible for the negligence by implying a contract made between the suppliants and Her Majesty through the medium of the slide master, to the effect that in consideration of the tolls to be paid by the suppliants for their logs passing through the slide Her Majesty would become a carrier of the logs and would convey them through the slide and would deliver them safely to the suppliants after having passed through the slide. It would be sufficient in this case to say that no such case is made by the petition, which plainly rests the suppliants claim upon the alleged unskilful negligent and improper conduct of the slide master. But in truth if Her Majesty's non-liability in case of tort and negligence could be gotten over by such a novel and ingenious device, it would be idle to say that there existed that exemption which is admitted in cases of tort and negligence. No authority was cited in support of this novel proposition, nor can it be supported upon any principle. Her Majesty was not a carrier of the logs for hire and reward, nor has the slide master any authority whatever to make an express contract which would be binding on Her Majesty, either of the nature of a contract for carriage for reward or of any other nature. The petition alleges, as the fact is, that although the slide at which the alleged loss and damage to the suppliant occurred, as

a public work of the dominion, is vested in Her Majesty, it is by statute placed under the control of the Minister of Public Works, by whom, and not by Her Majesty, the slide master is appointed and removed; and he, upon his appointment, acquires, in virtue of the provisions of the statute in that behalf, and the Orders in Council made in pursuance thereof, the control and management of the slide of which he is appointed slide master or superintendent in subordination to the Minister. He is not a servant or agent of Her Majesty at all. The Minister of Public Works himself comes within the description mentioned in 1 *Ph* 323–4 of a public officer appointed to perform certain duties assigned to him by the legislature, and the slide master is a subordinate public officer also appointed to perform certain duties in like manner attached to his office. The tolls which the suppliants pay for their logs passing through the slide are not paid as the consideration for any service or duty undertaken by Her Majesty, but by force of the statute which imposes the tolls upon all persons using the slide. The slide master has no power or authority other than such as is conferred upon him in virtue of his appointment under the authority of the statute. He has no authority to enter into any contract with any person using the slide. He is not placed in his office or appointment to make any contracts, but to perform statutory duties. If he neglect those duties he is himself responsible, but having no authority to enter into any express contract binding on Her Majesty no contract to affect her Majesty can be implied from any acts or conduct of his. The receipt therefore by him of tolls which it is his statutory duty to collect can afford no foundation from which any promise by Her Majesty can be implied. Between such a case and that of a promise being implied from the acts and conduct of

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private persons capable of entering into express contracts, either by themselves or their agents duly authorised for the particular purpose, there is not that I can see any analogy; all the acts of the slide master must come either within the class of those acts which are authorized by force of the statute, or within that of those which are not so authorized. In respect of the former, the statute is his sole authority and at the same time his justification, and her Majesty cannot be affected thereby: for such as come within the latter class he himself is alone responsible. If public opinion should think that some provision ought to be made by statute for the compensation of injuries occasioned by the misconduct of such a statutory officer, application should be made to the legislature and not to the courts. In the meantime the plaintiff must assert whatever remedy he has against the person whose misconduct causes the injury. The appeal must, in my opinion, be allowed with costs.

Appeal allowed with costs.

Solicitors for appellant: *O'Connor & Hogg.*

Solicitors for respondent: *Cockburn & McIntyre.*