

1881 THE QUEEN..... APPELLANT ;
 *April 27.
 1882
 *Jan. 12. ALEXANDER MacLEAN AND JOHN } RESPONDENTS.
 *June 19. CHARLES ROGER

AND

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA:

Petition of right—Non-liability of the Crown on Parliamentary Printing Contract—Departmental Printing contract—Mutuality.

H., in his capacity of "clerk of the Joint Committee of both Houses on Printing," advertized for tenders for the printing, furnishing the printing paper and the binding required for the Parliament of the Dominion of *Canada*. The tender of the suppliants was accepted by the Joint Committee and by both Houses of Parliament by adoption of the committee's report, and a contract was executed between the suppliants and *H.* in his said capacity.

The suppliants, by their petition, contended that the tender and acceptance constituted a contract between them and Her Majesty, and that they were entitled to do the whole of the printing required for the Parliament of *Canada*, but had not been given the same, and they claimed compensation by way of damages.

Held, (reversing the judgment of *Henry, J.*, in the Exchequer Court) that the Parliamentary printing was a matter connected with the internal economy of the Senate and House of Commons over which the Executive Government had no control; and that the Crown was no party to the contract with the suppliants and could not be held responsible for a breach of it.

Under 32 & 33 *Vic.*, ch 7, which provides that the printing, binding and other like work required for the several departments of the Government shall be done and furnished under contracts to be entered into under authority of the Governor in Council after advertisement for tenders, the Under Secretary of State advertized for tenders for the printing "required by the several departments of the Government." The suppliants tendered for such printing, the specifications annexed to the tender,

*PRESENT:—Sir William J. Ritchie, C.J., and Strong, Fournier, Taschereau and Gwynne, JJ.

which were supplied by the Government, containing various provisions as to the manner of performing the work and giving of security. The tenders were accepted by the Governor in Council, and an indenture was executed between the suppliants and Her Majesty by which the suppliants agreed to perform and execute, &c., "all jobs or lots of printing for the several departments of the Government of *Canada* of reports, &c, of every description and kind soever coming within the denomination of Departmental printing, and all the work and services connected therewith and appertaining thereto, as set forth in the said specificaton hereunto annexed, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of said several respective departments." Part of the Departmental printing having been given to others, the suppliants, by their petition, claimed compensation by way of damages, contending that they were entitled to the whole of said printing.

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Held (affirming the judgment of *Henry, J.*, in the Exchequer Court,) that having regard to the whole scope and nature of the transaction, the statute, the advertisement, the tender, the acceptance and the contract, there was a clear intention shown that the contractors should have all the printing that should be required by the several departments of the Government, and that the contract was not a unilateral contract but a binding mutual agreement. (*Taschereau* and *Gwynne, JJ.*, dissenting).

APPEAL from a judgment of *Henry, J.*, in the Exchequer Court of *Canada* on a demurrer.

The contracts for breach of which the respondents filed a petition of right, and the pleadings are fully set out in the judgment of *Henry, J.*, in the Exchequer Court and in the judgments on this appeal.

The Crown was represented in the Exchequer Court and in the Supreme Court by Mr. *Lash, Q.C.*, and the suppliants by Mr. *Bethune, Q.C.*, and Mr. *Gormully*.

The following authorities were relied on by counsel in addition to those cited in the judgments hereinafter given:—*Kilbourne v. Thompson* (1); *Chesterfield & Mid.*

(1) Albany Law Journal, 9th March, 1881.

1881 *Coll. Co. v. Hawkin* (1); *L. Southampton v. Brown* (2);
 THE QUEEN *Aspdin v. Austin* (3); *Dunn v. Sayles* (4); *Great N. R.*
 v. *Co. v. Witham* (5); *Burton v. Great Northern Ry. Co.*
 MACLEAN. (6); *Price v. Moulton* (7); *Morgan v. Pike* (8); *Broom's*
 Constitutional Law (9); *Macbath v. Haldimand* (10);
Beckham v. Drake (11); *Edmunds v. Bushell* (12); and
Clifford v. Watts (13).

The following is the judgment of—

HENRY, J. :—

This suit was commenced by a petition of right in which the suppliants set out two agreements by which they became contractors with the Government, the first for the printing, furnishing the printing paper, and the binding required for the Parliament for the period of five years from the 1st day of January, 1875—the second for 'the printing of the *Canada Gazette*, the statutes, orders in council and other books, pamphlets, blank books, forms, blanks and other printing required by the several departments of the Government and for which the tenders on the printed form issued by the Government and required to be used are headed "Departmental Printing, &c.' The first agreement is dated on the 7th July, 1874, and was executed by the suppliants of the one part, and by *Henry Hartney* of the other part, and in it he is alleged to execute it in his capacity as clerk of the joint committee of both Houses of Parliament of *Canada*. The petition shows that the agreement was prepared by the officers of the said joint committee, by whom the tender of the suppliants was

(1) 3 H. & C. 667.

(2) 6 B. & C. 718.

(3) 5 Q. B. 671.

(4) 5 Q. B. 685.

(5) L. R. 9 C. P. 16.

(6) 9 Ex. 507.

(7) 10 C. B. 561.

(8) 14 C. B. 473.

(9) Pp. 617, 713.

(10) 1 T. R. 172.

(11) 9 M. & W. 79.

(12) L. R. 1 Q. B. 97.

(13) L. R. 3 C. P. 577.

accepted and which acceptance was ratified by both Houses of Parliament, and that the advertisement for tenders was signed by *Henry Hartney* as "clerk joint committee of both houses on printing by order," and is dated: "Department of Printing of Parliament, *Ottawa*, April, 15th, 1874." The agreement is with *Henry Hartney* in his representative or subordinate character as such clerk and his successors in office. By it, the suppliants became "bound to perform in a workman-like manner all the work and furnish all the materials for the service of both Houses of the Parliament of the Dominion of *Canada* mentioned in the annexed specification as being to be performed and furnished by them (the suppliants, called the party of the first part), at the places and times, and within the period and upon the terms and conditions therein specified." The agreement sets forth that the suppliants instead of giving the ordinary security for the fulfilment of their contract had paid \$5,000 to *Henry Hartney* to deposit in his name in the Bank of *Montreal*, on account of the suppliants, under the condition, that if they performed their contract, the same, at the end of five years would be returned to them "otherwise the same shall belong to Her Majesty the Queen and be paid over to the Receiver-General by the said *Henry Hartney* for the public uses of the Dominion, the interest to be paid to suppliants, provided they perform their contract."

"The suppliants, in their petition, complain that although they, expecting to have all the work of the printing provided for in the agreement and specification given them to perform, and which they had become bound to execute "expended large sums of money in procuring the men and in purchasing and in setting up the printing presses, ruling and cutting machines, type and other plant and materials necessary and re-

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quisite for the punctual and prompt execution of the said printing services," and which they were always willing and ready and prepared to execute, large portions of the same were not given to them but to others to execute, by which they have lost, to that extent, the benefits and profits of their contract, and pray that they may be awarded such reasonable compensation in damages as they may be shewn to be entitled to. To this claim set forth more fully in the petition, the Attorney-General demurred and assigns for causes of demurrer.

1st. That the petition "discloses no claim against Her Majesty capable of enforcement by petition of right."

2nd. Substantially that Her Majesty is not accountable for the agreement signed by *Hartney* as clerk of the committee "on the printing of Parliament."

3rd. That there is no liability under the agreement for any loss sustained by the suppliants because of the giving of parts of the work contracted for by the suppliants to others.

Taking together the three causes of demurrer, they amount to two propositions:

1st. That under the agreement a petition of right cannot be maintained, because it purports to have been entered into by the two houses of Parliament as principals, and therefore the only redress, if any, in case of a breach, is by an application to those bodies, and

2nd. That even if a Petition of Right could be maintained for a breach of the agreement, there was none in this case, for the giving of portions of the work to others did not constitute a breach.

As to the first of these two propositions I have already and very recently given a decision. In the case of *McFarlane et al. v. Queen* (1), I held that in all cases of contract with the Government of

(1) 7 Can. S. C. R. 216.

Canada an action by petition of right was maintainable where an action for the same cause would lie against a private party. My judgment was founded on the law in *England*. and I cited for the position taken *Feathers v. The Queen* (1), and I have not since had any reason to change my opinion.

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I will next consider whether it was in reality a contract by and with the government?

The agreement, as already stated, was entered into by *Henry Hartney* as clerk of the joint committee of both houses of parliament, by the direction and under the authority of that committee, representing as they did the Senate and House of Commons jointly, by whom they were appointed and authorized for that purpose, and the whole proceeding was done with the sanction and approval of the government. It was founded on the estimates, moved in the House of Commons at the instance of the government by its proper officer, the Minister of Finance. The agreement provides that in case of the failure by the suppliants to perform the contract, the five thousand dollars, to be lodged in the Bank of *Montreal* as security, should belong to Her Majesty the Queen and be paid to the Receiver General for the public uses of the dominion. By the arrangement, at the instance of the government and the annual appropriation acts, the payments for the service were provided to come out of the public funds of the dominion. It was wholly in the public interest, and the amount to be forfeited by the suppliants, in case of failure in their contract, was to be paid to the proper officer and form part of the same public funds from which the payment for the service was provided to be drawn.

I think for these and other reasons not necessary to be stated that *Henry Hartney*, acting as clerk of the joint committee, had sufficient authority to bind the

(1) 6 B. & S. 294.

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government as fully as if the agreement had been executed for the government by one of its members.

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The remaining one of the two propositions I will now consider.

Admitting the agreement to have been binding as a government contract, for which an action by petition of right is maintainable, it is still contended the suppliants have no cause of action as, under it, the government was not obliged to give the whole or any particular part or portion of it to the suppliants. That contention necessarily includes the proposition that although the contract should, as it in fact did, involve the payment of some fifty or sixty thousand dollars for the service it provided for, and the necessity of the expenditure of thousands of dollars in the procuring the appliances and means to perform it, the Government was not bound to give the work agreed for to the suppliants beyond such part of it as it might from time to time think proper to give.

I cannot conclude that such was the intention of the Government, or of the two Houses of Parliament, or of those acting under them, when provision was made for the service, and the agreement entered into. If such was the intention, I must say that some intimation of it should be given to the public who were asked to tender for and provide the means for performing the service, or notice of it given to the party or parties whose tender or tenders was or were accepted, before being asked to sign an agreement "for the printing, furnishing the printing paper and the binding required for the Parliament of the Dominion of *Canada*."

Under an agreement founded on the acceptance of a tender, the contractor would be bound to perform the whole work under the three classes named that was or should "be required for the Parliament of the Dominion of *Canada*." It is not only in the advertisement calling

for tenders, but in the tender of the suppliants and the agreement that the service is stated to be for the three classes of work named "required" for the Parliament. It is therefore for all the work necessary for or needed by the two Houses. The word must be so construed and not to mean only work to be done on their requisition. It means not a part or portion of it, but the whole of it, as fully as if it had been expressly stated. But it is quite unnecessary to depend upon that construction, for in the printed tender of the suppliants, which was required to be on the blank form furnished them, as provided in the advertisement for the tenders under the heading "Conditions of the contract for printing," it is provided, that "the whole of the printing will be given to one contractor and tenders will be calculated upon the whole work to be done and not in portions;" and the agreement provides that the suppliants should perform "all the work and furnish all the materials for the service of both Houses" mentioned in the specification annexed thereto. The latter covers in the detail the whole of the work for the service provided for in the general terms of the agreement. It is in my opinion too palpable and plain that the agreement binding on both parties was not for a part but for the whole of the service, and that the one party was as fully bound to employ the other to perform the whole of it, as the latter were bound to perform it. If it was intended not to give the whole to the suppliants, why should we find as we do such provisions, as I have quoted, in the tender and agreement? If such was the intention, we should on the contrary require to find, as we fail to do in any of the documents referred to, express provision to give effect to it.

Between private parties this conclusion is irresistible, and when we are dealing with the matter of a con-

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tract. I know of no law or reason why a different rule should be applied to a contract of the Government which in my opinion should be considered as fully binding.

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To the remaining portion of the petition, the same causes of demurrer are assigned as the first and third grounds to the previous part of the petition, and with which I have just dealt. I need not repeat therefore, the views I have expressed.

The suppliants' claim, under the second contract, is, in my opinion, fully as strong, if not stronger, than that founded on the first, as to the causes of demurrer now under consideration, in every respect but in one, to which I will hereafter refer. The agreement secondly set out in the petition is for what is known as and was styled in the schedule annexed to it "Departmental Printing," and it is alleged in it to have been entered into under the provisions of the Act 32 and 33 *Vic. c. 7*, which amongst other things provides "that the printing, binding and other work to be done under the superintendence of the Queen's Printer, except as is hereinafter mentioned, be done and furnished under contracts to be entered into under the authority of the Governor in Council, in such form and for such time as he shall appoint."

The agreement recites the fact of the acceptance of the suppliants' tender by the Governor in Council.

It is alleged in the petition that no Order in Council was passed under the provision of that section, and if that be the fact, the giving out of the portions of the work to others as complained of was to all intents and purposes a violation of the Act; but although it was so, the suppliants cannot, for that reason alone, complain. If they, however, had the right under their agreement to claim that the whole of the work should have been given to them, it will not help the case on the other

side, if the breach of the agreement is found also to be a violation of the law.

For the reasons given in regard to the issues of law, as to the first agreement referred to, with those I have added, I think the suppliants were entitled under the second, now under consideration, to claim that the contract was for the whole of the work referred to in the schedule attached to it, unless the wording of the first paragraph requires a construction that would vary it.

That paragraph provides that the suppliants shall from time to time and at all times during the prescribed five years

Will faithfully and promptly do, perform or execute, or cause to be done, performed or executed, all jobs or lots of printing for the several departments of the government of *Canada*, of reports, pamphlets, circulars and blank forms of every description and kind soever coming within the denomination of Departmental Printing and all the work and services connected therewith and appertaining thereto, as set forth in the specification hereunto annexed, in such numbers and quantities *as may be specified in the several requisitions which may be made upon them for that purpose from time to time, by and on behalf of the said several departments.*

The question is, do the words I have italicized qualify and limit the general contract shown by the preceding general statement of the service, so as to limit the contract to such parts or portions of it for which requisitions were provided to be made? I cannot put that construction on the contract, when taking into consideration the object in view of either party in entering into it. We must in construing contracts at all doubtful, by taking the objects in view, and looking at the surrounding circumstances and the bearing of the whole contract, ascertain the intention of the contracting parties.

The Act referred to provided that work should be let by tender, and we find that provision was made for

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the whole service and included in one tender, made and accepted for the performance of it, by the Governor in Council, without any reservation or qualification. I feel bound to conclude that the government as well as the suppliants intended the contract to cover and include the whole service; and that the words I have italicized were inserted to bind the contractors to furnish the "numbers" and "quantities" called for by the requisitions. There was in my opinion no necessity for adding those words, as I think the departments were the judges of what was required, but they may have been added for greater caution to prevent any question as to the *numbers* and *quantities* to be furnished.

I am of opinion that these added words do not limit the contract, and therefore that the suppliants were entitled to claim that the whole work should have been given to them.

It is generally understood that there is often private and confidential printing required by a government which might not be considered expedient to submit to a contractor for the general service, but in giving the general contract the agreement should provide for such an exception. Otherwise I cannot see how it could be taken from the general contractor without compensation for its loss, as the same rules are applicable to a government as to a private contract, although we find it sometimes not so considered.

Entertaining the views I do, my judgment must be for the suppliants and the demurrer will be overruled with costs."

In the Supreme Court of *Canada* the following judgments were delivered :—

RITCHIE, C. J. :

This is an appeal on behalf of Her Majesty the Queen, from the judgment of Mr. Justice *Henry* in the

Exchequer Court, in the matter of the petition of right of *MacLean, Roger & Co.* against Her Majesty, in which the suppliants claimed damages for the breach of two contracts: one with respect to "the printing, furnishing the printing paper and the binding required for the Parliament of the Dominion of *Canada*," the other with respect to printing required by the several departments of the Government. These contracts are entirely distinct and separate, one from the other. As to the first, the petition alleges that :

1. On or about the 15th day of April, A.D. 1874, there appeared and was published in several newspapers printed and published in the Dominion of *Canada* an advertisement in the words and figures following :

"Tenders addressed to the undersigned in a sealed envelope, marked Tenders for Printing, Paper or Binding (as the case may be), will be received until Monday, the 11th day of May next, after which day no Tender will be received, for the Printing, furnishing the Printing Paper, and the Binding required for the Parliament of the Dominion of *Canada*.

"No Tender will be received except on the blank form, which can be had on application to the undersigned, and from whom all information may be obtained.

"The committee do not bind themselves to accept the lowest or any Tender.

" By order,

HENRY HARTNEY,

" Clerk, Joint Committee of both Houses on Printing.

" Department of Printing of Parliament, }
 " Ottawa, April 15th, 1874." }

That in pursuance of such notice, suppliants tendered for the said printing in the manner prescribed ; one of the conditions being that, "*The whole of the Printing will be given to one Contractor, and tenders will be calculated upon the whole work to be done, and not in portions.*" That such tender was duly accepted by the Joint Committee of both Houses of the Parliament of *Canada* on the printing of Parliament, and was afterwards duly accepted by both Houses of Parliament, by

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the adoption of the report of said committee, and the said tender and acceptance thereof suppliants submit thereby created a valid contract between Her Majesty and the suppliants; that at the request of the officers of the said Joint Committee acting on behalf of the said Joint Committee, suppliants executed an agreement with respect to said printing which is set out at length and is an

Agreement made on the 7th day of July, A.D. 1874, Between *MacLean, Roger & Co.*, that is to say, *Alexander MacLean* and *John Charles Roger*, both of the city of *Ottawa*, county of *Carleton*, province of *Ontario*, and Dominion of *Canada*, and doing business in the said city as printers, under the said name and firm as co-partners, of the first part and *Henry Hartney* of the said city of *Ottawa*, Esquire, in his capacity as Clerk of the Joint Committee of both Houses of the Parliament of *Canada*, on the printing of Parliament, of the second part:

And witnesseth that the the said party of the first part, hath agreed, and doth hereby agree with the said party of the second part, and his successors in office respectively, to perform in a workmanlike manner, all the work and furnish all the materials for the service of both Houses of the Parliament of the Dominion of *Canada*, mentioned in the annexed specification as being to be performed and furnished by him at the places and times, and within the periods, and upon the terms and conditions therein specified for and during the space and term of five years, to be computed from the 1st day of January, 1875, and fully to be completed and ended on the 31st day of December, 1879, with the right nevertheless to the said party of the second part, and his successors in office, at the option and by the direction of the two "Houses of Parliament" of *Canada*, to continue the contract during the further period of five years from the last day aforesaid; and in all things to conform to, fulfil and abide by the said specification to the full and entire satisfaction of the party of the second part, and his successors in office, and that the said party of the second part in his capacity aforesaid, and for his successors in office, has promised and agreed and does hereby promise and agree to pay the said party of the first part for the said work and materials performed for and furnished to the respective Houses of Parliament at the prices, and in the manner, and at the times, and according to the terms and conditions in the said specification mentioned, and in all things to conform to, fulfil, and abide by the said specification.

The agreement then recites that in lieu of finding

sureties for the due performance of the contract, the suppliants deposited in hands of *Hartney* \$5,000 to be made a special deposit in Bank of *Montreal* as security for faithful performance of conditions of contract, and on completion of same at end of five years, such sum to be returned to suppliants, otherwise the same shall belong to Her Majesty the Queen and be paid over to the Receiver General by said *Hartney* for the public uses of the Dominion ; in meantime, unless suppliants shall fail to perform contract, the interest allowed by the bank on said deposit to be paid over to them as received by *Hartney* ;—and it was further agreed that should suppliants fail to perform contract “ to the satisfaction of the joint committee of both Houses of the Parliament of *Canada* on the printing of Parliament, such joint committee may cancel this contract, and their resolution to that effect shall cancel the same without prejudice to the forfeit of the \$5,000, &c.”

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This agreement was signed and sealed by the suppliants and *Hartney*. The specification provided that :

Payments to be made, as the work progresses, by the Clerk of the Joint Committee on Printing, but, in all cases, 20 per cent. of the amount due the contractors will be retained by the clerk of the committee till the whole of the work pertaining to each session is satisfactorily completed.

And that “ the printer to be subject on all points to the “ Clerk of the Joint Committee on Printing.”

The suppliants contend that the tender and acceptance constituted a contract between them and Her Majesty, under which they claim that they were entitled to do the whole of the printing required for the Parliament of *Canada*, and allege that this obligation was broken and Parliamentary printing given out to be done by others, whereby they were unjustly deprived of the profits they would have derived from the execution thereof by themselves, that moneys necessary for

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the payment of the whole of said printing, works and services required for the Parliament of *Canada* were from time to time duly voted by Parliament, and they claim compensation by way of damages. To this petition the Attorney-General demurred on the following grounds :

1. Because the same discloses no claim against Her Majesty capable of enforcement by petition of right.

2. Because it appears that such contract was made with one *Henry Hartney* in his capacity as clerk of the joint committee of both Houses of the Parliament of *Canada* on the printing of Parliament, and no action upon such contract can be enforced against Her Majesty by petition of right.

3. Because it does not appear that Her Majesty contracted with the suppliants that they should do all the Parliamentary printing which might be required by Parliament, or that Her Majesty incurred any liability towards the suppliants because Parliamentary printing was done by others than the suppliants.

And as to all the remaining portion of the suppliants' petition Her Majesty's said Attorney General doth demur in law thereto.

1. Because it discloses no claim against Her Majesty capable of enforcement by petition of right.

2. Because it does not appear that Her Majesty contracted with the suppliants that they should do all the Departmental printing which might be required or that Her Majesty incurred any liability towards the suppliants because Departmental printing was done by others than the suppliants.

On behalf of Her Majesty, I submit that the suppliants' petition should be dismissed with costs.

This demurrer was argued before Mr. Justice *Henry*, who overruled the same. From this judgment the present appeal was taken.

It is in my opinion quite impossible to sustain the judgment appealed from. Her Majesty is no party to this agreement directly or indirectly. The Parliamentary printing was matter connected with the internal economy of the Senate and House of Commons over which the Executive Government had no control. The Crown could neither dictate to the joint committee

of both Houses, nor interfere, nor deal with any contract entered into by them or by their clerk under their authority. The Crown neither authorized the execution of any contract for the work contemplated, nor in any way authorized the doing of the work to be performed under this contract. The Crown neither employed the suppliants to do this work nor entered into any contract in reference thereto. The suppliants were in no way bound to the Crown or, in respect to this contract, subject to its control. The Crown could neither put an end to the contract, nor enforce it, nor in any way interfere with its execution. This contract gave the Crown no right of action against the suppliants, nor the suppliants against the Crown; in other words, the Crown was no party to the contract, and, therefore, cannot possibly on any principle I can conceive, be held responsible for a breach of it. I have examined 27 *Vic.*, ch. 27, "An Act respecting the internal economy of the House of Commons and for other purposes," to which we were referred, but I can find nothing in that Act to bind the Crown by a contract such as this or to render the Crown in any way liable for its breach.

As to the other contract it is of a very different character. The 32 and 33 *Vic.* ch. 7, provides by sec. 1 for the appointment of a Queen's printer. Sec. 2 prescribes his duties. Sec. 3, what documents shall be printed in the *Canada Gazette*. Sec. 4, in what cases copies of the *Gazette* shall be *prima facie* evidence. Sec. 5 defines the powers of the Governor in Council, as to the *Gazette*, and secs. 6 and 7 provide for the printing, and are as follows:

Whereas it is by "An Act respecting the office of Queen's Printer and the Public Printing," passed by the parliament of *Canada* in its session held in the 32nd and 33rd years of Her Majesty's reign, amongst other things in effect enacted that the printing, binding and other like work to be done under the superintendence of the Queen's Printer shall, except as is hereinafter mentioned, be done and furn-

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ished under contracts to be entered into under the authority of the Governor in Council in such form, and for such time as he shall appoint after such public notice or advertisement for tenders as he may deem advisable, and the lowest tenders received from parties of whose skill, resources, and of the sufficiency of whose sureties for the due performance of the contracts the Governor in Council shall be satisfied, shall be accepted.

The 7th sec. of the Act provides that "the Governor in Council may from time to time by Order in Council authorize for reasons to be stated in such orders, cause printing and binding for the public service to be done without tender, and such orders in Council and the expenditure under them shall be laid at its then next session."

The petition alleges that :

4. On or about the said 15th day of April, A.D. 1874, there appeared and was published in several newspapers printed and published in the Dominion of *Canada*, an advertisement in the words and figures following :

TENDERS FOR PRINTING, &c.

Sealed tenders addressed to the Secretary of State, *Ottawa*, and endorsed respectively "Tenders for Printing Paper," "Tenders for Printing," and "Tenders for Binding," will be received until noon of Monday, the 11th day of May next, for the performance during a term of five years from the 1st day of October next, of the following services.

(1). Furnishing Printing Paper for the printing of the *Canada Gazette*, the Statutes and Orders in Council; and for Pamphlets and other Jobs required by the several Departments of the Government.

(2). Printing the *Canada Gazette*, the Statutes and Orders in Council, and other Books, Pamphlets, Blank Books, Forms, Blanks, and other Printing required by the several Departments of the Government.

(3). Binding the Statutes and Orders in Council, and such other Books, or Blank Books, and such other Binding, Map Mounting, &c., as may be required by the several Departments of the Government.

Blank Forms of Tender and Specifications will be furnished on application to the undersigned on and after the 20th April, instant.

Edouard J. Langevin,

Under Secretary of State.

Department Secretary of State,
Ottawa, 15th April, 1874.

5. In pursuance of the said notices in the fourth paragraph hereof set forth your suppliants tendered for the printing of the *Canada Gazette*, the Statutes and Orders in Council, and other Books, Pamph-

lets, Blank Books, Forms, Blanks and other printing required by the several Departments of the Government, the tenders of your sup-
 pliants for the said printing being in the words and figures following:

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The first for departmental printing, which, after a schedule of prices, contained a specification in which *inter alia* it is provided that :

The contractor must be prepared to deliver work at short notice, as may be frequently required.

He will be expected to use the newest styles of type, and keep the work up to the standard of first-class workmanship.

Good and sufficient security in the sum of five thousand dollars by a bond of a guarantee company, approved by the Government, will be required from the contractor for the due fulfilment of his contract.

The second for printing of the Statutes and Orders in Council, with a schedule of prices and a specification which contained *inter alia* these stipulations :

The Statutes must be delivered by the printer at the rate of, at least, six sheets, or 96 pages per week from the date of delivery of copy therefor.

The contractor will be required to provide safe storage room for the law paper, and will be responsible therefor while in his keeping.

Two per cent. will be allowed for waste and proofs on the number of sheets ordered to be printed.

Good and sufficient security, in the sum of five thousand dollars (by bond of a guarantee company to be approved by the Government), will be required from the contractor, for the due fulfilment of his contract.

The third, for printing the *Canada Gazette*, with a schedule of prices and a specification containing *inter alia* :

A complete classified list of persons receiving the *Gazette* will be made and kept by the contractor under instructions from time to time furnished by the Queen's Printer ; and he will be held responsible for the loss of any number through insufficient address or fastening.

The contractors must be in a position to complete the *Gazette* whatever may be its size, and have it delivered or posted on the day of its issue.

Two-and-a-half per cent. will be allowed for waste on the number of sheets of the *Gazette* ordered to be printed.

1882 The contractor will furnish safe storage for at least two months' supply of *Gazette* paper, for which he will be responsible to the Government.

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The petition then alleges that—

The said tenders of your suppliants were duly accepted by His Excellency the then Governor-in-Council as prescribed by the statutes in that behalf, and on or about the 5th day of August, A. D. 1874, due notice of such acceptance was given by the officers of Your Majesty acting on behalf of Your Majesty to your suppliants, and thereby the said tenders of your suppliants in this paragraph set forth, and the acceptance thereof as aforesaid your suppliants submit constituted a valid contract binding on your Majesty and your suppliants.

6. At the request of the officers of Your Majesty acting on Your Majesty's behalf, your suppliants executed an indenture with respect to said printing.

In the words and figures set out in petition.

This purports to be an indenture made the 1st day of October, A. D. 1874, between *Alexander MacLean* and *John C. Roger*, both of the city of *Ottawa*, printers, thereafter called the contractors of the first part and Her Majesty the Queen, of the second part, after reciting the 6th sec. of the 32 and 33 *Vic.* ch. 7, and after reciting that, "whereas in pursuance thereof tenders were advertized for amongst other things the printing for the several Departments of the Government of *Canada* (commonly called the Departmental Printing,) for the term of five years to be reckoned and computed from the 1st day of Oct, 1874, and the Governor in Council has seen fit to accept a certain tender made for the performance of such service and work by the contractors." The indenture witnessed that

In consideration of the sums and prices for the several different descriptions of work, and services embraced in the said tender, to be done and performed by the "Contractors,"

in accordance with, and at the respective rates and prices mentioned and expressed in the printed schedule and specification thereof hereunto annexed and marked A, and which is to be read and construed as part and parcel of these presents, as if the same were embodied therein, they, the "Contractors," do hereby covenant, promise and agree to and with Her Majesty in manner, following, that is to say :

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1. That "the Contractors" shall, and will, from time to time, and at all times during the said term of five years, so to be computed as aforesaid, well, truly, faithfully and promptly do, perform and execute, or cause, or procure to be done, performed or executed all jobs or lots of printing for the several Departments of the Government of *Canada*, of Reports, Pamphlets, Circulars and Blank Forms of every description and kind soever coming within the denomination of Departmental Printing, and all the work and services connected therewith, and appertaining thereto, as set forth in the said specification hereunto annexed, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of the said several respective Departments. "The Contractors" being in all cases furnished the necessary supplies of paper and they furnishing the necessary inks for the purpose; such jobs or lots of work to be executed and performed in a good and workmanlike manner, in strict accordance with the terms of the said schedule and specification in every respect, and to the entire satisfaction of the Queen's Printer, and to be delivered by the said "Contractors" to the said several departments or the Queen's Printer on their behalf, as he or they may direct, within a reasonable period after receipt of the requisitions therefor respectively.

The next paragraph provided that if it should appear that the execution of the work under this contract was not carried out in a satisfactory manner, the Secretary of State might authorize the Queen's Printer to judge whether work is being done in a workmanlike manner, and in a proportionally forward state of progress, &c., and if Queen's Printer should come to a conclusion it is not, power is given him to require contractors to put on additional workmen, &c.

Paragraph 3 provides :

That in the event of any portion of the said work (contemplated by this contract) not being delivered and performed in a perfectly

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workmanlike manner, 'the contractors' shall on a requisition for that purpose from the department of the Government which shall have required such job of work to be done, or of the Queen's Printer on its behalf, cause the same to be re-executed and delivered within such period to the satisfaction of the Queen's Printer; the department so requiring the work to be done shall be at liberty if it shall be thought the exigencies of the public service require it, to employ other parties to do such work, and 'The contractors' shall pay to or for the use of Her Majesty, as well the amount which the paper shall have been used in such rejected work shall have cost Her Majesty (such amount to be ascertained and stated by the Queen's Printer), as also any sum which shall have been paid to such other parties for such work in excess of the respective prices therefor, embraced in the said schedule, and any such sums shall be recoverable against 'The contractors' as and in the nature of liquidated damages.

4 Provides that the contractors shall not assign or sublet without assent of Governor in Council.

5 Provides where notices on contractors may be served, and section 6 provides where and how the Governor in Council may require that the Departmental Printing may be taken out of the hands of the contractors and given to others, and that the Governor in Council may in such case declare contract rescinded, and the same shall be from thenceforth treated as null and void. To the contract is annexed schedule A as to prices, and a specification which requires *inter alia* that

The contractor must be prepared to deliver work at short notice as may be frequently required. He will be expected to use the newest styles of type, and keep the work up to the standard of first-class workmanship.

Good and sufficient security in the sum of 5,000 dollars by bond of a guarantee company approved by the Government, will be required from the contractor for the due fulfilment of his contract.

That the indenture was prepared by the officers of Her Majesty and was presented by said officers for execution. That from inquiries at the several departments of the government and from a perusal of public accounts, the suppliants believed there would be printing, works and services of great magnitude, and in

order to execute same punctually and promptly expended large sums of money in procuring men and purchasing and setting up the printing presses, ruling and cutting machines, type and other plant and material necessary and requisite for the punctual and prompt execution of such printing services and works.

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The suppliants readiness and willingness to do all Departmental printing and punctually and properly perform their part of the contract, and were always ready and willing to perform—

The said contracts and agreements on their part, yet the officers of your Majesty, acting on behalf of your Majesty, did not and would not observe or perform the said contracts and agreements, and broke the said contracts and agreements in this, that they did not and would not allow or permit your suppliants to do, execute and perform the whole of the printing required by the Parliament of *Canada*, and the whole of the printing of the said other Books, Pamphlets, Blank Books, Forms, Blanks, and other printing required by the several Departments of the Government of *Canada* during the periods embraced in the said respective tenders; but on the contrary, the said officers employed other persons and companies to do, execute and perform, and other persons and companies did execute and perform portions of the said printing works and services without the consent of your suppliants and without any public tender for the said works and services, and without authority of any order of His Excellency the Governor in Council, and thereby your suppliants were prevented from earning and were deprived of the moneys, gains and profits which they would have derived and acquired from doing and executing the printing works and services done and executed by the said other persons and companies, and suffered divers other great losses and damages.

That no complaint whatever was ever made to suppliants that work required to be done was unsatisfactory; but on contrary, the work executed by suppliants was satisfactory to departments. Suppliants never directly or indirectly intimated that they were unwilling to do and perform work, but were ready and willing, &c.

That so soon as suppliants had notice that other persons

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and companies were executing departmental printing, they notified the Secretary of State in writing that giving such printing to others than your suppliants was a breach of the contract, and suppliants protested against a continuance of such a breach; notwithstanding such notice, large quantities of printing were given to several individuals, newspaper offices and companies which they submit should have been done and performed by them, by reason whereof they were unjustly deprived of the profits they would have derived therefrom. That the monies necessary for payment of whole of the said printing work has been duly voted by Parliament.

Suppliants therefore prayed :

1. That it may be declared that your suppliants were under and by virtue of the contracts and agreements aforesaid, entitled to do, execute and perform all the Parliamentary and Departmental Printing required to be done during the periods embraced in the said respective tenders, save and excepting such printing as was by Orders in Council and for the reasons stated in such orders authorized by the Governor in Council to be done without tender.

2. That the sum of \$200,000 or such sum as may be reasonable may be paid to your suppliants in compensation and by way of damages for the losses which have been occasioned to them by the breach of the contracts and agreements aforesaid, and the failure of Her Majesty the Queen to have all the Parliamentary and Departmental Printing, except as aforesaid, done and performed by your suppliants between the periods aforesaid.

3. That an account may be taken of the quantity and amount of printing done by others than your suppliants and not authorized to be done as aforesaid by an Order of the Governor in Council as aforesaid.

4. That the cost of the material provided for such printing may be ascertained, and that the cost of doing and performing such printing may be ascertained upon the scale, schedule or terms specified in the contracts aforesaid.

5. That every excess over and above the cost of the material for such printing, and of doing and performing such printing as aforesaid may be regarded as profit and as the amount to be paid by Her Majesty the Queen to your suppliants as and for the estimated profits

they would have derived from the printing aforesaid if it had been done and performed by them.

6. That an account may be taken of the damages and loss sustained by your suppliants in preparing for and supplying the room, machinery and plant in expectation of having to do all the Parliamentary and Departmental Printing.

7. That your suppliants may have such further and other relief in the premises as may seem meet.

8. That your suppliants may be paid the cost of this petition.

To so much of the suppliants' petition as relates to the Departmental printing Her Majesty's Attorney General demurred upon the following grounds :

1. Because it discloses no claim against Her Majesty capable of enforcement by petition of right.

2. Because it does not appear that Her Majesty contracted with the suppliants that they should do all the Departmental printing which might be required, or that Her Majesty incurred any liability towards the suppliants because Departmental printing was done by others than the suppliants.

The demurrer was argued with the previous one before Mr. Justice *Henry*, who gave judgment overruling the demurrer.

From this judgment Her Majesty appeals.

In construing this agreement I freely admit that we have no right to introduce any stipulation into the contract which the parties may have either from design or inadvertently omitted. I should not venture to add to the contract covenants or stipulations which have been purposely, unintentionally or inadvertently omitted, merely because I may deem them necessary to carry out what I may suppose to have been the intention of the parties, but I think I am bound to apply such a rule of construction to the circumstances of the case, and what has been written, as will carry out the law and effectuate that intention so far as the parties have, though imperfectly, expressed themselves. Where words of recital or reference manifest a clear intention that the parties should do certain acts, the Court should infer

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from them an agreement to do such acts just as if the instrument had contained an express agreement to that effect.

Having regard, then, to the whole scope and nature of this transaction, the statute, the advertisement, the tender, the acceptance and the contract, I am of opinion that there is a clear intention shown that what the Government advertised for, what the suppliants tendered for, what the Governor-General in Council, in accepting the tender, intended, and what the contract, prepared by the officers of the Crown, contemplated and agreed the contractors should have, was all the printing that should be required for the several departments of the Government. This, in my opinion, is not a unilateral contract, but a binding mutual agreement solicited by the Crown, responded to by the suppliants, and that response accepted by the Crown, all which, I think, amount in law to mutual binding promises which sustain and uphold each other.

In order to ascertain the intention of the parties, we must take notice of the statute and what was done under and by virtue of it in reference to this matter. This contract having been entered into under a statutory authority, stands in a very different position from an ordinary contract between private individuals; in the latter case we have nothing to look to but the contract itself, here we have the statute and what it authorized to be done and what was done by virtue thereof to guide and aid us, and to which, I think, we are bound to refer to ascertain what the law authorized, and from thence, and from the language used by the parties to discover what it was intended to stipulate should be done, bearing always in mind this most important consideration, that this is not Government work which the executive, still less any department, could deal with at its pleasure; that the matter is not under

the control of the several departments, nor indeed is it left to the discretion of the executive, but must be dealt with under the statutory provisions, and can be given only after tender, except as provided by sec. 7, which enacts that :

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The Governor may, from time to time, by Orders in Council authorize for reasons to be stated in such orders, cause printing and binding for the public service to be done without tender ; and such Orders in Council and the expenditure under them shall be laid before parliament at its then next session.

It is not necessary to discuss whether this section would apply when tenders had been already received and accepted ; the suppliants seem to assume it would ; at any rate they have only asked to be declared entitled to perform the departmental printing, "save and excepting such printing as was by Orders in Council and for the reasons stated in such orders, authorized by the Governor in Council to be done without tender," and only pray "that an account may be taken of the quantity and amount of printing done by others than your suppliants and not authorized to be done by an order of the Governor in Council."

In view then of the law and of the tender, acceptance and contract, I think irresistible implications arise. Can it for a moment be presumed that the Crown could have contemplated that the work tendered and contracted for might be given, as the petition alleges was done in this case, by the departments to others than the contractors, when it could only be so given in violation of law ? Is it not an irresistible inference that the contrary was intended ? And as to the agreement, must it not be treated as containing the words of both parties, and to those words must there not be given such a reasonable construction as will effectuate the intention of the parties ? And while there is a clear obligation on the part of the contractors to do all the departmental printing, is there not implied a corresponding obligation on the

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part of the Crown to give them the work? I think the agreement itself clearly indicates something to be done on both sides, and that there is on the part of the Crown an obligation to give all the departmental printing, and that this results by legal implication from the terms of the agreement to be gathered from a fair construction of the tender, acceptance, and contract read in the light of the statute by virtue of which alone the work could be done.

No doubt there may be contracts by which parties agree to do work when called on, or to carry such goods as may be presented, or to supply stores such as might be ordered from time to time, where there may be no corresponding obligation to furnish work to be done, or goods to be carried, or to order goods to be supplied, and these are the class of cases relied on by the counsel for the Crown in this case, but they are clearly distinguishable from this that we are dealing with.

The Government did not ask tenders for such printing as they might think fit to order for five years, but tenders were asked for the performance of certain specific work, viz., for printing the *Canada Gazette*, the Statutes, Orders in Council, other books or blank books, forms, blanks and other printing required by the several departments of the Government.

There might be some analogy to the cases referred to, if it turned out that during the five years the contract had to run the Government had little or no departmental printing; in such an event, if the contractors claimed the Crown was bound to find printing for them to do, it might well be contended that had the contractors desired to protect themselves against such a contingency they should have required a provision to be inserted in reference thereto, and not having done so, they took the risk of such an event happening, and therefore had no right to complain, and the Crown might, in such a

case, contend, with some show of reason, and possibly support their contention by the cases referred to, that though they undertook to give the contractors all the departmental printing, they did not undertake to make printing for them, that the only printing they agreed contractors should have was what was required by the departments, and if they required none they could claim none; that is, that in the event of the Government discontinuing all departmental printing, it may be that against such a risk the contractors have not provided and could not complain. But as to the possibility of there being no work to do, of this practically there was no risk at all, because the Laws and Gazette had beyond question to be printed, and the work of the departments absolutely required a certain amount of printing which, in the exigencies of the public service, could not be dispensed with. However, no such question arises here, for the petition shows that there was departmental printing which the contractors agreed to do, but instead of the contractors being permitted to do it, the departments, contrary to the statute, gave the work to others. The observations of *Pollock*, C.B, in *Knight v. Water Works Co.* (1), are worthy of notice as very applicable to this case; he says:

It is admitted that there is no covenant in express terms contained in the deed, but wherever it is manifest from expressions in a deed that the parties must have intended to stipulate that a particular thing should be done by either of them, there is an implied covenant to do it. * * * But, in fact, every case where a covenant is implied must stand upon its own foundation, and there is great difficulty in arguing from the analogy of other cases; the question always is, what is the reasonable conclusion to be drawn from all the matters to which the courts are entitled to look.

The Master of the Rolls, in *Thom. v. Commissioner of Public Works* (2), says:

The third question is, what the offer was which was so accepted.

(1) 2 H. & N. 810.

(2) 32 Beav. p. 494.

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This depends on the construction to be put on the original advertisement and the tender of the plaintiffs following it, by the acceptance of which by the defendants through their agents Mr. Price and Mr. Harris, without the imposition of any conditions or limitations whatsoever, the contract is created. The plaintiffs contend that this means the whole of the stone of the kinds mentioned in their offer; the defendants contend that it means only so much stone as they may think fit to let them have.

This point, I am also of opinion, must be decided in favour of the plaintiffs. In the first place, the words of the advertisement are general: "Offers will be received for the old *Portland* stone, &c.;" that is offers will be received for all or any part of the *Portland* stone, &c. It would, no doubt, have been open to any person making a tender to offer to take a portion of what was offered only, specifying what portion he desired to take; and accordingly the plaintiffs offered to take the arch stone, the spandril stone and the *Bramley Fall* stone only, and made no offer to take the rough rubble. But their offer, which follows the advertisement in the generality of its terms, is to take *Westminster* bridge stone of the description and at the prices I have already mentioned. I think this means the whole of such stone. If it does not, it is plainly no contract at all for anything; for the vendors could immediately afterwards have said: "Our contract means that we accept your offer only for as much as we choose to let you have," though the plaintiffs might, as the fact is, have been put to great expense to enable them to perform the contract, in the belief that their offer to take the entirety of the stone had been accepted, the delivery of one ton, or even one cwt. of stone, would have satisfied the contract. And again, on the other hand, unless the plaintiffs had contracted to take the whole, it is plain that the converse objection would apply, and that the vendors might say: "on the faith of your taking the whole, we have accepted your offers and rejected others which would have enabled us to dispose of it, and now, when you have taken a ton of each sort, and when the price of this sort of stone has fallen, you refuse to take any more." I think neither of these contentions could be supported. I think it also impossible that any one would hold the contract to be wholly one-sided, and that it meant: "You, the plaintiffs, must take the whole, if we, defendants, choose to require it; but you are not entitled to require us to let you have any more than we desire." Such a contract, which gives to one party all the advantage of a rise in the price of the articles sold, and none of the disadvantages of a fall in the price of it, obviously could not be supported without express words, and would certainly make most persons very reluc-

tant to enter into any dealings with a Government board. It follows, therefore, that in my opinion, the true construction of the contract is an offer to take the whole of such stone, and an acceptance of that offer which compels the defendants to deliver the whole of that stone. Unless it means this, it means nothing, and the contract is merely idle and illusory. In that case, the advertisement is a mere delusion, and the acceptance by the defendants of the plaintiff's offer amounts to nothing.

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But that meaning must include the whole, as no limit can be placed upon it, nor can any line be drawn that would not be plainly arbitrary between the whole and what amounts practically to nothing.

I cannot think any business man with the statute before him tendering in response to such an advertisement as was put forward in this case, and having his tender accepted could for a moment suppose that he was not to have the whole work, but that, on the contrary, while he should be at all times ready and bound to do all he should be required to do, at the same time no obligation existed on the part of the Crown to give him anything whatever to do. I cannot think it consistent either with ordinary business notions or with common sense to suppose that any sane man would tender under such an idea, in view of the extent of the work a contractor might be required at any moment to do, the number of men he must always have in readiness, the amount of capital that must be invested, material that must necessarily be kept constantly on hand for the performance of the work, for the contract says the contractor must be prepared to deliver work at short notice, and he will be expected to use the newest styles of types and to keep the work up to the standard of first-class workmanship, and in addition to this he is required to give good and sufficient security in the sums of \$5,000 by a bond of a guarantee company approved by the Government for the due fulfilment of his contract, and all to extend over a period of five years; and if the present

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contention should prevail, with no obligation to secure to them the work, but that the contractors with their men, capital, printing presses, materials, may remain for five years ready for work at a moment's notice, and yet, during all that time, not be in a position to require that a dollar's amount of the work advertised to be done should be given them, but they must keep up such a large establishment of expensive machinery and skilled workmen and be compelled to stand by and see their neighbor employed, without tender, to do the very work for which their tender had been accepted, no such an utterly absurd state of things could possibly, in my opinion, have been present to their minds or intended by any of the parties; the idea of such a contract being sought by the Government or entered into by any sane man is opposed not only to every principle on which business transactions are based, but to reason and common sense. This would of itself be sufficient to negative the contention, but there is to be found in the contract itself abundant evidence that nothing so unnatural and absurd was contemplated. I think the length of time (five years) for which tenders were asked suggests very strongly the inference that as the work was of a nature and magnitude involving the expenditure of so large an amount no contractor would be found to make such an outlay unless not only the certainty of the work but the certainty of the work for a lengthened period was secured to him, and therefore it may be fairly inferred the Government contemplated the contractor would be entitled to all the work for which he tendered. By the sixth paragraph of the contract it is

Provided always, and it is the true intent and meaning of this contract and of the parties hereto, that if the contractors at any time during the subsistence thereof fail, in the opinion of the Queen's Printer, in the performance of any, or either, of the covenants or agreements herein contained in any respect; and if the Governor in Council should consider that the exigencies of the public service

require that the Departmental Printing should be, by reason of such default, taken out of the hands of "The contractors" and given to others, the Governor General in Council may, in such case, at any time thereafter, declare this contract rescinded, and the same shall be thenceforth treated as null and void. "The contractors," nevertheless, being and continuing liable for all damages and expenses consequent upon their default.

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Does this not establish that this contract was not intended to be unilateral? And is not the contention on the part of the Crown that the suppliants were only entitled to have so much of the Departmental printing as by requisition might be made on them by and on behalf of the several respective departments, and that all or any portion of the printing might be given to other parties by the departments inconsistent with this clause? Have we not here a clear declaration that the intent and meaning of the contract and of the parties thereto was, that it was only on failure, in the opinion of the Queen's Printer, by the contractors to fulfil the agreement on their part, and on the Governor in Council considering that the public service required that the printing should be taken from them and given to others, that such was to happen? What other meaning can be attached to the provision, that in the events spoken of—

The departmental printing should be by reason of such default taken out of the hands of the contractors and given to others, that the Governor in Council may in such case at any time thereafter, declare this contract rescinded, and the same shall be thenceforth treated as null and void?

Why this power to rescind the contract if no obligation on the Crown to give the printing to the suppliants, or if they had not a right to require it? On the hypothesis now set up the Crown could have ceased to give the suppliants any departmental printing, and that would, so far as the Crown was concerned, have terminated the contract; but this clause saves the contractors

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from any such termination, and secures to them the protection of the opinion of the Queen's Printer, and the consideration and determination of the Governor-in-Council, that the exigencies of the public service required that they should be deprived of the departmental printing, before it could be taken from them and given to others, or in language of the contract "taken out of the hands of 'the contractors' and given to others." The language of this paragraph is the language of both parties, for it is inserted by way of proviso in an agreement prepared by the Government officials, and declares :

Provided, and it is the true intent and meaning of this contract and of the parties hereto.

And therefore, giving the language used a reasonable construction, the necessary implication from that language is, that the contractors were to have all the departmental printing, and that there was an obligation on the part of the Crown to give them such printing, and such an obligation being on the Crown this clause was no doubt likewise inserted for the protection of the Crown to enable the Crown, in the events indicated, to free itself from such obligation and be placed in a position to deal with other parties in relation thereto.

That this taking of the departmental printing out of the hands of the contractors applies to the whole departmental work contemplated by the contract, viz., all the departmental work required to be done by the respective departments, and not to work which might be in the hands of the contractors under requisition from any one of the departments, is made, to my mind, abundantly clear, for in this paragraph "the departmental printing" is spoken of without limit or restriction, and in the recital the meaning of the terms "the departmental printing" is placed beyond all doubt, and shows both

what tenders were advertised for and what all parties understood by the term "departmental printing" and how it was used and to be understood in the contract; for, after reciting at length the 6th section of the 32 & 33 *Vic*, we have this recital :

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And whereas, in pursuance thereof, tenders were advertised for, amongst other things, the printing for the several departments of the Government of *Canada* (commonly called the departmental printing) for the term of 5 years, to be reckoned and computed from the 1st day of October, 1874, and the Governor in Council has seen fit to accept a certain tender made for the performance of such service and work by the contractors.

If anything more could be wanting to place this beyond a peradventure, and to show that it did not apply to work for which requisitions may have been made, we have sec. 3 which makes provision for such work, and provides that such work "not being delivered and performed in a perfectly workmanlike manner," the department which may have required the work, may require the same to be re-executed, &c, and "the department so requiring the work to be done shall be at liberty, if it shall be thought the exigencies of the public service require it, to require other parties to do such work," and makes contractors liable to pay, &c.

In dealing with a clause such as the 6th, in the *Great Northern Railway v. Harrison* (1), in which the question was whether there was a covenant on the part of the company to take a certain quantity of sleepers, *Parke, B.*, delivering the judgment of the Exchequer Chamber, after premising that

No particular form of words is necessary to form a covenant, but, wherever the Court can collect from the instrument an engagement on the one side to do or not to do something, it amounts to a covenant, whether it is in the recital or in any other part of the instrument—

proceeds to apply the rule, and after going through the deed says :

(1) 12 C. B. 576.

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Then comes a clause which proves to demonstration that the company understood themselves to be contracting to receive the whole quantity of 350,000 sleepers within the times limited. "That in case the contractors, their executors, &c., shall not regularly deliver the said sleepers in such quantities and at such times and place as are or is herein agreed upon to the satisfaction of the engineers of the company according to this contract, or shall from any cause whatever other than the acts of the said company or their agent be prevented from making such delivery or deliveries as aforesaid according to this present contract, and if such default, impediment, or delay shall continue for the space of 15 days, next after notice in writing, signed by the secretary of the said company, or by their engineer, requiring them to put an end to such default, impediment, or delay, shall have been given to the said contractors, or if they the said contractors before the completion of this contract shall be declared bankrupt or insolvents, then, and in any of such cases, it shall be lawful for the company, and as they shall think proper by writing under the hand of their secretary, absolutely to determine this contract. Is not that just as if the company had in so many words recited that this is their contract? and if it be their contract it is clearly a contract on the one side to deliver, and on the other to receive, the entire number of sleepers mentioned in the recital and in the specification.

This construction of the agreement introduces no new term into the contract, but simply carries out the law and gives effect to the intention of the parties as it is to be gathered from the nature of the transaction and as exhibited on the face of the contract itself. To put any other construction would render the statute of no effect and to make the advertising, tender, acceptance and contract, so far as the contractor is concerned, perfectly illusory.

And when we look at the other work for which tenders were asked in the same advertisement and in the same terms, and which was tendered for, and tenders accepted in the same manner, viz.: the printing of the Statutes and the *Royal Gazette*, can it be supposed that it could ever have been conceived by either party, that after such an advertisement, tender accepted and contract, that any Department of the Government could take from

the contractors the printing of the laws and *Gazette*, and give it to others or divide the work and give portions of it away from the contractors to others, as, for instance, to give the printing of the *Gazette* one week or month to the contractors and another week or month to other parties, and the contractors be compelled to be ready at all times, week in and week out, with materials and artizans to do the work? The proposition seems to me too absurd; the mere statement of such an idea suggests its own refutation, but if part of the departmental printing may be given by any of the departments to others to do when the contractor is able and ready and willing to do the work in a proper manner, as the petition alleges these contractors at all times were, why may not the printing of the *Gazette* or of the laws be dealt with in like manner? in other words: the tender and its acceptance was intended to be the agreement between the parties. The tender was accepted "pure and simple," and the tender and acceptance indicated the contracting mind of both parties, and so a contract was constituted between the Crown and the suppliants. The preparation of a contract by the officers of the Government and requiring the signatures of the tenderers thereto, was merely for expressing the agreement arrived at in formal language, and possibly to comply with the direction of the statute, certainly not to lessen the liability of the Crown, still less to release the Crown from the obligation of fulfilling the contract.

Had this case then rested on the contract alone, I should have been of opinion the obligation existed to give all the required printing to the contractors, but by the statute and contract read together, to my mind, the matter is placed beyond all question, and I should have dealt with it in a much more summary manner were it not that I find two of my learned brothers have come to

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a different conclusion. In deference to their views, I have considered it right to put forward at greater length than I should otherwise have thought necessary to do, the reasons which have so strongly constrained me to the conclusion at which I have arrived.

STRONG, J., concurred with the Chief Justice.

FOURNIER, J. :

I am of opinion that the appeal from that portion of the judgment respecting the departmental contract ought to be dismissed. As to the contract for the printing with the joint committee of the House and the Senate, I cannot find any way to make the executive answerable for it. The law takes such precautions to prevent any interference on the part of the Government in that contract, that I cannot see how they can be made responsible.

TASCHEREAU, J. :

I am of opinion that the appeal should be allowed on both parts of the action for the reasons contained in Justice *Gwynne's* judgment, which I have seen, and in which I fully concur.

GWYNNE, J. :

I am of opinion that this appeal should be allowed, and that judgment should be ordered to be entered in the Exchequer Court in favor of Her Majesty upon the demurrer filed to the suppliants' petition, and for the reasons stated in that demurrer.

As to the parliamentary contract, signed by and between the suppliants, of the first part, and *Henry Hartney*, in his capacity as clerk of the joint committee of both Houses of the Parliament of *Canada* on the printing of Parliament, of the second part, it shows plainly, upon its face, that it is not a contract between

Her Majesty and the suppliants, and that Her Majesty is not affected by it, or liable to be proceeded against upon it by petition of right.

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The joint committee on printing of both Houses of Parliament can in no sense be said to be servants or agents of Her Majesty, or in any respect to represent Her Majesty. They, as members of the respective Houses of Parliament, are appointed by the house to which respectively they belong, to render services, the object of which is to enable the respective houses effectually to perform their parliamentary duties; and for the due rendering of such services by such committee, the members constituting it can be responsible only to the respective houses by whom they are appointed, and if that joint committee, which is the body having authority over all parliamentary printing, and power to enter into all contracts for that purpose, are not themselves servants or agents of Her Majesty, it is plain that their subordinate officer or clerk cannot be such an agent. It is contended that as he receives his appointment under the great seal of the Dominion, contracts, entered into by him under the order and direction of his superiors, the committee, become contracts entered into by him on behalf of Her Majesty, but no case has been cited in support of this proposition, and if his immediate superiors, the committee, are not agents of Her Majesty, I cannot see how their subordinate officer or clerk can be such agent.

As to the other contract set out in the petition, which upon its face does purport to be made between the suppliants of the first part and Her Majesty the *Queen* of the second part, and which is executed by the suppliants, and is on their part a contract whereby, after reciting the fact that tenders had been called for by the Dominion Government, and had, in pursuance of such call, been made by the sup-

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pliants, for the printing of certain work for the govern-
 ment, namely, for the printing of the statutes and orders
 in council, at certain scheduled prices for that work men-
 tioned in a specification, and for printing the *Canada*
Gazette, at certain other scheduled prices specified for
 that work, and for printing what is called "departmental
 matter" at certain other scheduled prices appropriate to
 such matter, the suppliants covenanted that :

In consideration of the sums and prices for the several different descriptions of work and services embraced in the said tender to be done and performed by the contractors in accordance with and at the respective rates and prices mentioned and expressed in the printed schedule and specification thereof annexed to the contract, and which is to be read and construed as part and parcel thereof as if the same were embodied therein, they, the contractors, should and would, from time to time, and at all times during the term of five years, well, truly, faithfully, and promptly do, perform and execute, or cause, or procure, to be done, performed, and executed all jobs or lots of printing for the several departments of the Government of *Canada* of reports, pamphlets, circulars, and blank forms of every description and kind soever coming within the denomination of Departmental Printing, and all the work and services connected therewith and appertaining thereto, as set forth in the said specification annexed to the contract, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of the said several respective departments, the contractors being in all cases furnished with the necessary supplies of paper, and they furnishing the necessary inks for the purpose ; such jobs or lots of work to be executed and performed in a good and workmanlike manner, in strict accordance with the terms of the said schedule and specification in every respect and to the entire satisfaction of the Queen's Printer, and to be delivered by the said contractors to the said several departments or the Queen's Printer on their behalf, as he or they may direct within a reasonable period after the receipt of the requisitions therefor respectively.

The contract contains no express covenant or agreement as made, and in fact is not signed, by any one as representing or on behalf of Her Majesty. Now, from the above contract, as signed by the suppliants, although

it may be that a contract upon the part of the Crown should be implied to the effect that the Dominion Government would give to the suppliants the printing of the matter particularly specified under the separate heads of the statutes, and orders in council and the *Canada Gazette*, yet as to the other jobs or lots of work, coming under the denomination of departmental printing the suppliants' contract, as it appears to me, is that they will execute in a good and workmanlike manner, at certain scheduled prices, all jobs or lots of such matter as the suppliants, by requisition, from the several departments, shall be required to execute, the departments supplying the paper, and that they will complete such work within a reasonable period after the receipt of such requisitions respectively; and from such a contract there cannot, in my judgment, be implied any agreement upon the part of the Crown, that all the departmental work which the departments may have occasion to have printed, shall be given to suppliants to print, which is the contention asserted by the suppliants in this petition.

In *Dwarris v. Harris* (1) and *Thorn v. Mayor of London* (2) it is laid down as a rule, that in determining a question of this kind, no covenant is to be implied, unless it is clear to all men of ordinary intelligence and knowledge of business, that what is sought to be implied must have been either latently in, or palpably present to the mind of both parties to, the contract when it was made; unless that be clearly so, the introduction of the covenant desired to be implied is, in truth, the introduction into the contract of a wholly new term, which no court is competent to do. In *Churchward v. The Queen* (3) *Cockburn, C.J.*, states the rule that the court is not lightly to assume what is not

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(1) L. R. 9 C. P. 1.

(2) L. R. 10 Ex. 123.

(3) L. R. 1 Q. B. 201.

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expressed, still less is it to imply that which it is convinced from what is expressed that the parties never intended. Mr. Justice *Mellor* (1) says :

We have to ascertain from the nature of the instrument, the parties to it, the subject-matter of the contract, and the expressions actually used in it, what was the meaning and intention of the parties ; and in order to ascertain that we must not only consider the actual language and expressions contained in the instrument, but all that must necessarily be implied from the scheme of the instrument and the expressions used in it, and if we can see that certain stipulations and conditions must have been necessarily intended by the parties, although not fully expressed in words, we must give effect to such intent.

And Mr. Justice *Lush* (2) says :

In order to raise what is called an implied covenant, I apprehend the intention must be manifest to the judicial mind, and there must also be some language, some words or other, capable of expressing that intention.

In order to imply the covenant which is sought to be implied in the present case ; namely, that besides the specific articles mentioned in the specifications, namely, the statutes, Gazette, &c., &c., all the departmental printing which might be required for the use of the various departments of the Government during the period of five years, should be given to the suppliants to execute, it is essential that the judicial mind should be convinced beyond all doubt from what is expressed in the instrument that such was the clear intent of the parties acting on behalf of Her Majesty. Now, so far from finding any words in the instrument indicative of such an intention, it appears to me to be impossible that the persons acting for Her Majesty would have consented, if they had been asked, to the introduction into the instrument of any words which could be construed to have the effect of the covenant which is sought to be implied. The introduction into the instrument of such a covenant, if proposed to have been inserted in express terms, might very naturally,

(1) P. 201.

(2) P. 211.

as it appears to me, have been objected to as interfering with, and neutralising, during the five years named in the instrument, the power vested in the Governor General by the 7th sec. of the Act 32 and 33 *Vic.*, ch. 7, (upon which Act the suppliants rest their claim to have the covenant implied,) by which the Governor General is authorized by orders in council from time to time, for reasons stated in such orders, to cause printing, &c., for the public service to be executed without tender, notwithstanding the general provisions of the Act requiring all printing, &c., to be done under contracts after the receipt of tenders therefor. If the contention of the suppliants be correct that there should be implied a covenant, binding on Her Majesty, that the suppliants should have given to them *all* the departmental printing, which might be required for the public service during the period named, then of necessity the power of the Governor General under this section of the Act is interfered with, if not wholly excluded during the existence of the contract. To my mind there is nothing expressed in the instrument which would justify us in holding such to have been the intention of the parties acting on behalf of Her Majesty in entering into the contract which was entered into with the suppliants, and which is the subject of the present proceeding, and we cannot, I think, hold such to have been their clear intent without falling into the error of making a new contract for them.

Appeal allowed as to demurrer on Parliamentary Printing contract, and dismissed as to demurrer on Departmental Printing contract, without costs to either appellant or respondent in either court.

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

Solicitors for respondent: *MacLennan & McDonald.*

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