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*Mar. 2.

*Nov. 21.

HER MAJESTY THE QUEEN (RESPONDENT) ..... } APPELLANT;

AND

ALEXANDER SMYTHE WOODBURN (SUPPLIANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Public work—Formation of contract—Ratification—Breach.

On November 22nd, 1879, the Government of Canada entered into a contract with C. by which the latter undertook to do all the Government binding for five years from said date. The contract was executed under the authority of 32 & 33 Vict. ch. 7, sec. 6, and on November 25th, 1879, was assigned to W. who performed all the work sent to him up to December 5th, 1884, when, the term fixed by the contract having expired, he received a letter from the Queen's Printer as follows: "I am directed by the Honourable the Secretary of State to inform you that, pending future arrangements, the binding work of the Government will be sent to you for execution under the same rates and conditions as under the contract which has just expired." W. performed the work for two years under authority of this letter and then brought an action for the profits he would have had on work given to other parties during the seven years.

Held, that the letter of the Queen's Printer did not constitute a contract binding on the Crown; that the statute authorising such contracts was not directory but limited the power of the Queen's Printer to make a contract except subject to its conditions; that the contractor was chargeable with notice of all statutory limitations upon the power of the Queen's Printer, and that he could not recover in respect of the work done after the original contract had expired.

On October 30th, 1886, an Order-in-Council was passed, which recited the execution and assignment of the original contract, the execution of the work by W. after it expired, and the recommendation of the Secretary of State that a formal contract should be entered into extending the original to December 1st, 1887, and then

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

authorized the Secretary of State to enter into such formal contract with W. but subject to the condition that the Government should waive all claims for damages by reason of non-execution or imperfect execution of the work, and that W. should waive all claims to damages because of the execution of binding work by other parties up to the date of said execution. W. refused to accept the extension on such terms.

Held, that W. could not rely on the Order-in-Council as a ratification of the contract formed by the letter of the Queen's Printer; that the element of *consensus* enters as much into a ratification of a contract as into the contract itself; and that W. could not allege a ratification after expressly repudiating its terms and refusing to be bound by it.

After an appeal from the final judgment of the Exchequer Court was lodged in the Supreme Court the Crown obtained leave to appeal from an order of reference to ascertain the amount of the suppliant's damages.

Held, that the Judge of the Exchequer Court had authority to allow the appeal and it was properly before the Supreme Court.

APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the suppliant.

The facts of the case are sufficiently set out in the above head-note and in the judgment of the court.

When the appeal was called for hearing a motion was made on behalf of the respondent to quash the appeal in so far as it related to the judgment of the Exchequer Court of 16th April, 1896, on the ground that it came too late and could not be entertained by the Supreme Court. It appeared that under a reference in that judgment the referee in his report found that respondent is entitled to be paid $38,829.03, being $23,553.58, damages for loss of profits between 1st December, 1879, and 1st December, 1884 (in respect to which finding no appeal was asserted by the Crown), and $15,275.45, damages for loss of profits between 1st December, 1884, and 9th November, 1886. The appellant and the respondent each appealed from the referee's report, and by a judgment of the Exchequer Court delivered on

(1) 6 Ex. C. R. 12.

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the 29th November, 1897, the report was confirmed and judgment entered in the respondent's favour for the total sum of $38,829.03 and costs.

The present appeal was instituted on the 22nd December, 1897, by the Crown, by notice filed pursuant to 50 & 51 Vict. ch. 16, sec. 53, and limited to that portion of the judgment of 29th November, 1897, as to damages between the 1st of December, 1884, and the 9th of November, 1886. On 10th of January, 1898, after this appeal had been inscribed for hearing the Attorney General for Canada applied to the Exchequer Court Judge to amend the judgment of 16th April, 1896, or to extend the time for appealing therefrom, and on 17th January, 1898, the Exchequer Court Judge made an order dismissing the application to amend, but extending, until the 1st February, 1898, the time for appealing from the judgment so far as it dealt with that part of the respondent's claim based upon breaches of contract between 1st December, 1884, and 9th November, 1886.

Hogg Q.C. and *Sinclair* for the motion. This appeal ought to be governed by the decision in *The Queen* v. *Clark* (1), and the only question properly open is as to the accuracy of the referee's report respecting the amount of damages for the period between 1st December, 1884, and 9th November, 1886.

After the appeal was in this court the Exchequer Court Judge was *functus officio*, and the order made by him on the 17th January, 1898, is null and should be disregarded. *Lakin* v. *Nuttall* (2); *Walmsley* v. *Griffiths* (3); *Starrs* v. *Cosgrave Brewing and Malting Co.* (4); *Mayhew* v. *Stone* (5); *City of Toronto* v. *Toronto Street Railway Co.* (6); *McGarvy* v. *Town of Strathroy* (7);

(1) 21 Can. S. C. R. 656.
(2) 3 Can. S. C. R. 691.
(3) Cass. Dig. (2 ed.) 697.
(4) Cass. Dig. (2 ed.) 697.
(5) 26 Can. S. C. R. 58.
(6) 12 Ont. P. R. 361.
(7) 6 O. R. 138.

Agricultural Insurance Co. v. *Sargent* (1). The time for appealing cannot be extended under the provisions of the statute, 50 & 51 Vict. ch. 16, s. 51, unless the application for extension be made within thirty days from the date of judgment. *Glengarry Election Case* (2); *Re Oliver & Scott's Arbitration* (3).

Hon. Charles Fitzpatrick Q.C. (Solicitor General of Canada), and *Newcombe Q.C.* (Deputy of the Minister of Justice), *contra.*

THE COURT was of opinion that the order enlarging the time for appealing was within the competence of the Exchequer Court Judge and ordered the hearing to proceed upon the merits.

Newcombe Q.C. for the appellant. The appeal is limited to that portion of the judgment which holds that the present respondent is entitled to recover damages for alleged breaches of a contract, which contract the respondent claims came into effect by reason of the Queen's Printer's letter of 5th December, 1884. No question arises as to payment for any work done. What he claims and has been adjudged entitled to, and what the Attorney General resists, is payment of the profit which the respondent would have earned had he been given work which, after the date of the Queen's Printer's letter, was given to others. The expired contract referred to in the letter was dated 22nd November, 1879, and covered a period of five years from 1st December of that year. It was made pursuant to 32 & 33 Vict. ch. 7, sec. 6.

The Queen's Printer's letter was not authorized by the Governor-in-Council, nor was any extension of the contract of 22nd November, 1879, or any further contract with the respondent. There was no public notice or

(1) 16 Ont. P. R. 397. (2) 14 Can. S. C. R. 453.
(3) 43 Ch. D. 310.

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advertisement for tenders for the purpose of the arrangement evidenced by the Queen's Printer's letter. The statutory requirements were not in any respect complied with. See *Frend* v. *Dennett* (1); *Young* v. *Mayor, etc., of Leamington, Spa.* (2); *The Queen* v. *McLean* (3) at pages 234-235. Yet the judgment gave $15,275.45 damages against the Crown for the period subsequent to 1st December, 1884, and must be wrong in so far as it finds the respondent entitled to these damages and that the portion of the claim relating to the period in question. Nothing was or is conceded as to the existence of any contract after 1st December, 1884. The Queen's Printer's letter merely expresses his intention as then existing. It does not bind the Government to anything. It was not intended either as a contract or the basis for a contract. It is uncertain and void as a contract. Beach on Contracts, sec. 80; *Fell* v. *The Queen* (4). The future arrangements intended could not have been mutual arrangements, otherwise the contract could never be terminated except by agreement of both parties. The arrangements must, therefore, have been such as either party might make independently. It was open upon the terms of the letter for the Crown to arrange at any time that the respondent should not receive the whole or any part of the work, or for the respondent to arrange that he should not receive it. If that be the construction *cadet quæstio*, because the damages complained of are given in respect of work done otherwise than by the respondent under arrangements made by the Government after 5th December, 1884. See *Henning* v. *The United States Insurance Co.* (5); *The People* v.

(1) 4 C. B. N. S. 576.
(2) 8 App. Cas. 517.
(3) 8 Can. S. C. R. 210.
(4) 24 Law J Journal, 420; L. T. Journal, 202.
(5) 4 Am. Reps. 332.

Flagg (1) at page 591; *Brady* v. *Mayor, etc., of New York* (2) at page 316; *Hague* v. *City of Philadelphia* (3) at page 529; *Henderson* v. *United States* (4). Persons who seek to obtain the obligation of the public must ascertain that the proposed act "is within the scope of the authority which the law has conferred." Mechem's Public Offices and Officers, sec. 829. *The Floyd Acceptances* (5) at pages 679 and 680; *Mayor, etc., of Baltimore* v. *Eschbach* (6) at page 282. Contractors dealing with the Government are charged with notice of all "statutory limitations placed upon the power of public officers especially where a statute expressly defines the powers." *Thompson* v. *United States* (7). See also per Richards C.J. in *Wood* v. *The Queen* (8) at pages 645 and 646.

There is no evidence of ratification or proof of any transaction on the part of the Government subsequent to the date of the Queen's Printer's letter which is referable to the idea that the Government had entered into any engagement to send all the binding work to the respondent. The contract was void and incapable of ratification; *Jacques Cartier Bank* v. *The Queen* (9); *The Queen* v. *Waterous Engine Works Company* (10); *The Queen* v. *Dunn* (11). See the observations of Lord Cairns in *Ashbury Railway Carriage and Iron Company* v. *Riche* (12) at page 672, and per Parker C.J. in *Despatch Line of Packets* v. *Bellamy Manufacturing Co.* (13) at page 232; and also Beach on Contracts, sec. 1161.

The instrument was in the first place void and the Order-in-Council has none of the requisites of an

(1) 17 N. Y. 584.
(2) 20 N. Y. 312.
(3) 48 Penn. St. 527.
(4) 4 Ct. of Clms. Rep. 75.
(5) 7 Wall. 666.
(6) 18 Md. 276.
(7) 9 Ct. of Clms. Rep. 187.
(8) 7 Can. S. C. R. 634.
(9) 25 Can. S. C. R. 84.
(10) Q. R. 3 Q. B. 222.
(11) 11 Can. S. C. R. 385.
(12) L. R. 7 H. L. 653.
(13) 12 N. H. 205.

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estoppel. Everest & Strode on Estoppel, 4-10, 198, 200, 205, 219. There can be no estoppel in the face of an Act of Parliament. *In re Stapleford Colliery Co., Barrows case* (1), at page 441; *Kerr* v. *Corporation of Preston* (2), at page 468. The Crown is not bound by estoppel; per Holt C. J., at page 295 in *Coke's case* (3); Chitty on Prerogatives p. 381; *Humphrey* v. *The Queen* (4). The Governor-in-Council had no authority in October, 1886, at the date of the Order-in-Council to ratify any contract for Government binding, because the statute, 32 & 33 Vict. ch. 7, had then been repealed by the Act respecting the Department of Public Printing and Stationary, 49 Vict. ch 22, and the Government printing establishment instituted where all binding required for the service of the Government should be executed. See remarks of Field C. J. in *McCracken* v. *City of San Francisco* (5), at page 624; also *Spence* v. *Wilmington Cotton Mills* (6); *Eyre & Spottiswode* v. *The Queen* (7). We refer also to *Churchward* v. *The Queen* (8); *Aspdin* v. *Austin* (9); *Dunn* v. *Sayles* (10); *Great Northern Railway Co.* v. *Witham* (11): *Burton* v. *Great Northern Railway Co.* (12); *Thorne* v. *City of London*, (13), and *Bulmer* v. *The Queen* (14).

Hogg Q.C. and *Sinclair* for the respondent. We contend that there was a contract between the Crown and the respondent between the 1st of December, 1884, and the 9th of November, 1886, under which he was entitled to do all the binding work of the Government, and in support of that view we rely on the reasons of the learned Exchequer Court Judge (15).

(1) 14 Ch. D. 432.
(2) 6 Ch. D. 463.
(3) Godb. 289.
(4) 2 Ex. C. R. 386.
(5) 16 Cal. 591.
(6) 115 N. C. Rep. 210.
(7) 3 Times L. R. 5. 304, 447.
(8) L. R. 1 Q. B. 173.
(9) 5 Q. B. 671.
(10) 5 Q. B. 685.
(11) L. R. 9 C. P. 16.
(12) 9 Ex. 507.
(13) L. R. 10 Ex. 112.
(14) 23 Can. S. C. R. 488, 496.
(15) 6 Ex. C. R. 12.

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As to the Queen's Printer's Act, 32 & 33 Vict. ch. 7, secs. 7 & 8, the provisions there made are directory only with a view to secure system, uniformity and despatch in the conduct of public business. *Rex* v. *Loxdale* (1); 23 Eng. & Am. Encl. 258; *State of Wisconsin* v. *Lean* (2); *Pearse* v. *Morrice* (3); Maxwell on Statutes, (3 ed.) pp. 528-529; Wilberforce, Statute Law, p. 207; Endlich on Statutes, p. 621, s. 437; Hardcastle on Statutes (2 ed.) pp. 261-2, 276; See also *Caldow* v. *Pixell* (4); *Liverpool Borough Bank* v. *Turner* (5); and *Howard* v. *Bodington* (6), at page 211.

This is one of those cases where the Crown is bound by the act of a subordinate officer in the discharge of his duty. *The Queen* v. *St. John Water Commissioners* (7).

But even assuming the provisions of the statute to be obligatory the obligation only extends to the passing of an Order-in-Council, and where a contract has been entered into but not prefaced by an Order-in-Council there is nothing in the statute to prevent such a contract being ratified and affirmed by an Order-in-Council passed subsequent to the date of the contract; particularly so is this the case when the Order-in-Council is passed ratifying the contract after the parties have acted under it for years, as in this case. Evans Prin. & Agent (2 ed.) p 87; *The Queen* v. *Lavery* (8). Section 7 of the Act in question empowers the Governor-General-in Council to authorize the making of contracts for printing and binding without compliance with the provisions of section 6 as to advertisement and tender. Moreover as the Queen's Printer's Act, 32 & 33 Vict. ch. 7, was repealed by 49 Vict. ch. 22, which came into force on the 2nd June, 1886,

(1) 1 Burr. 145.
(2) 9 Wis. 254.
(3) 2 Ad. & E. 84.
(4) 2 C. P. D. 562.
(5) 30 L. J. Ch. 379.
(6) 2 P. D. 203.
(7) 19 Can. S. C. R. 125.
(8) Q. R. 5 Q. B. 310.

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there was no statute in force on the 30th October, 1886, when the Order-in-Council was passed, which prevented the Governor General from ratifying and adopting the arrangement for the continuance of the contract then existing under the terms of the letter of 5th December, 1884, acted upon by the parties, and so ratified and adopted such contract conferred and imposed upon the respondent the same obligations and rights as he was subject and entitled to under the contract which had existed from the 1st December, 1879, to the 1st December, 1884, and which would entitle him to the damages found due him by the referee's report under the authority of the case of *The Queen* v. *McLean* (1). The Order-in-Council was passed with a full knowledge of the facts, recognizing and adopting the extension, and stipulating for a waiver of claims which could only exist if the respondent was "contractor," and the appellant is now precluded by it from asserting that there is no liability for breach of the contract between December 1st, 1884, and November 9th, 1886, under the letter of the 5th December, 1884, and as all parties so understood it. The condition of the parties and the surrounding circumstances must be considered. *Baltimore and Ohio Rr. Co.* v. *Brydon* (2); *Nash* v. *Towne* (3); Addison on Contracts (9 ed.) p. 44. The appellant, desiring to get the binding work done, took the initiative and so wrote the letter and led the respondent to believe that he would get all the work, and the words of the instrument must be construed most strongly against the party using them. *Ford* v. *Beech* (4); *Garrison* v. *United States* (5). The practical interpretation put upon the instrument by the parties is entitled to

(1) 8 Can. S. C. R. 210.
(2) 65 Md. 198, 215.
(3) 5 Wall. 689.
(4) 11 Q. B. 852, 866.
(5) 7 Wall. 688.

great if not controlling weight. Am. and Eng. Encly. p. 519.

The judgment of the court was delivered by:

SEDGEWICK J.—On the 22nd November, 1879, one Charles Henry Carriere entered into a contract with the Crown by which he undertook to execute all the binding of the Statutes of Canada, Imperial Statutes, Orders-in-Council, Treaties and other similar printed documents, and all the binding required to be done by the several Departments of the Government of Canada of all the several quantities of work and materials specified in the schedules annexed to the contract. The contract was made pursuant to 32 & 33 Vict. ch. 7, sec. 6, which is as follows:

The printing, binding and other like work to be done under the superintendence of the Queen's Printer shall, except as 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 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 contract the Governor-in-Council shall be satisfied, shall be accepted.

All the conditions required by this enactment was duly complied with prior to the execution of the contract. On the 25th November, 1879, Mr. Carriere, with the assent of the Government, assigned his interest in the contract to the present suppliant, who thereupon proceeded to do the work and supply the materials referred to therein. On the 5th December, 1884, Mr. Brown Chamberlain, the Queen's Printer, wrote the suppliant as follows:

I am directed by the Honourable the Secretary of State to inform you that pending future arrangements the binding work of the Government will be sent to you for execution under the same rates and conditions as under the contract which has just now expired.

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Subsequently to this letter the suppliant continued to perform the work for the Government upon request as he had previously done under the contract. For all of this work he has been paid; and the only claim now made is for profits which he would have earned had he been given work which after the date of the letter of the Queen's Printer was given to others. It is admitted by the suppliant that his claim rests solely upon the alleged contract contained in the letter of the Queen's Printer above set out. The first question to be considered is as to whether that letter admittedly acted upon for a time by the suppliant creates a contract binding upon the Crown.

We are all of opinion that the letter does not constitute such a contract. The letter was not authorized by the Governor-in-Council, nor did the Governor-in-Council authorize any extension of the contract on the 22nd November, 1879, nor any further contract with the suppliant. There was no public notice or advertisement for tenders for the work referred to in the letter of the Queen's Printer. In fact the statutory requirements were not in any respect complied with. In our view the statute is not directory, as contended by the suppliant, but limits the power of the Queen's Printer to make a contract except subject to its conditions. It is to be observed that the letter does not purport to be written on behalf of the Crown or of the Government; and in so far as the Queen's Printer purported to enter into a contract he not only exceeded his authority and violated, whether knowingly or not makes no difference, the provision of the enactment in question. But the suppliant must be held to have known that he so exceeded his authority, and to have proceeded with the work at his peril. We have not here to deal with an executed contract, with a claim for goods sold or for work done and materials supplied

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in respect to which other principles may be applicable. It may possibly be that the Crown, like an individual, receiving the benefit of work or goods, may, notwithstanding the statute, be bound to recoup the person from whom the benefit has been received. So far as the present case is concerned the Crown has paid everything due for work done or materials furnished and the liability of the Crown for the profits claimed depends now solely upon the authority which the Queen's Printer had to bind the Crown in the manner claimed by the suppliant. It is perfectly clear that a contractor dealing with the Government is chargeable with notice of all statutory limitations placed upon the power of public officers. Where a statute expressly defines the power, it is notice to all the world. Nor had the Secretary of State, nor the Queen's Printer any statutory power to make the contract, and therefore any claim under it solely must necessarily fail. If, therefore, the suppliant can sustain his claim he must do so upon grounds other than those supplied by the letter of the Queen's Printer. He therefore has to contend that the contract was ratified and that ratification he claims was created by an Order-in-Council of the 30th October, 1886. This Order-in-Council is as follows:

On a report, dated 7th July, 1886, from the Secretary of State submitting that a contract was entered into with Charles Henry Carriere, of the City of Ottawa, on the twenty-second day of November, 1879, for the binding of the laws of Canada, and the binding required to be performed by the several Departments of the Government of Canada, for and during the term of five years reckoned and computed from the first day of December, 1879; that on the twenty-fifth day of November, 1879, the said contract was transferred by the said Charles Henry Carriere to Alexander S. Woodburn, and Her Majesty having consented thereto, the said Alexander S. Woodburn, on the thirtieth day of September, 1880, and Francis Clemow, of the City of Ottawa, as his surety, covenanted with Her Majesty that the said Alexander S. Woodburn would perform, keep and abide by all and singular the

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covenants, agreements and conditions contained in the first above mentioned contract, in place and stead of the said Charles Henry Carriere.

That the said contract expired on the first day of December, 1884, but that since that time the work has been executed under an understanding between the Secretary of State and the said Alexander S. Woodburn that the said contract should be continued until other arrangements should be entered into by the Government for the execution of its printing and binding.

That it is urged by the said Alexander S. Woodburn, among other reasons for this extension, that in expectation of this extention he has at very considerable expense increased his plant and enlarged his business premises.

The minister further submits that it is expedient that the said understanding should be embodied in a formal contract, and that (pending arrangements to be made under the Act, chapter 22, of the last session of Parliament) the first above mentioned contract and the covenant by and with the said Alexander S. Woodburn should be extended until the first day of December, 1887, the day upon which the extended contract for printing will expire.

The minister therefore recommends that he be authorized to enter into an agreement with the said Alexander S. Woodburn for the continued execution of the said binding work up to and until the date last above mentioned, conditional that on the one hand the Government waive all claims to damages for non-execution or imperfect execution or delays in the execution of this contract by the said Alexander S. Woodburn during the continuance of the said contract and its extension to this date; and that the said Alexander S. Woodburn on his part waives and renounces all claim or pretended claim which he may have to damages because of the execution by others than himself under orders of the Departments of the Government of binding work coming within his contract up to and until the same date, and any claim he may have to the binding of the Consolidated Statutes of Canada now about to be printed, the binding of which should be given by tender.

The committee advise that the required authority be granted under the conditions above specified.

On being notified of this Order-in-Council the suppliant wrote to the Queen's Printer, on 16th November, 1886, a letter in which he said :—

With reference to your letter of the 9th instant, enclosing for my information a copy of an Order-in-Council passed on the 30th October

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1886, stating the terms on which the Government would be willing to extend my contract for departmental binding until 1st December, 1887, I have now the honour to inform you that, having given the said Order-in-Council my most careful consideration, I am quite unable to accept an extension of the contract on the terms proposed. * * *

The suppliant now advances the proposition, and bases his right to recover upon the contention, that the Order-in-Council was a ratification of the original letter of the Queen's Printer and thereby validated his claim.

Without more than referring here to the point that the provisions respecting public advertisements were not complied with, we are clearly of opinion that there can be no ratification of a contract by one of the parties without the assent of the other party. The element of *consensus* enters as much into a ratification of a contract as into the contract itself; and it is out of the question for the suppliant to allege a ratification here when he expressly repudiated its terms and refused in any way to act upon or be bound by it. The Order-in-Council is nothing more than an unaccepted offer of settlement. It may doubtless be used by the suppliant as an admission of the facts therein stated as any other statement may be used as evidence, but these are the only benefits that the suppliant can claim from it. To say under the circumstance that it is a ratification of a letter which a Government officer had no authority to write, and was by statute in express terms forbidden to write except upon the compliance with precedent conditions, is opposed to fundamental and elementary principles of law.

Upon the main question therefore the suppliant's case fails, and the appeal must be allowed.

The question was raised at the argument as to whether the case was properly before this court. We expressed the opinion at the argument and are all of opinion that the learned judge of the Exchequer Court

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had ample authority to make the order allowing the appeal to this court, and that the case was properly before us.

The appeal will be allowed with costs and the Crown will be entitled to all costs in the court below so far as this particular portion of the suppliant's claim is concerned.

Appeal allowed with costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitor for the respondent: *R. V. Sinclair.*