1893
Mar. 20.

CHARLES MAGEE, ADMINISTRATOR OF THE ESTATE AND EFFECTS OF THE LATE NICHOLAS SPARKS, THE YOUNGER, MARY SPARKS, NICHOLAS CHARLES SPARKS, AND SARAH SPARKS, INFANTS UNDER THE AGE OF TWENTY-ONE YEARS, RESPECTIVELY, BY THEIR GUARDIAN, THE SAID CHARLES MAGEE, ESTHER SLATER, MARY WRIGHT, AND ALONZO WRIGHT, } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Rideau Canal—7 Vic. (Prov. Can.) c. 11—9 Vic. (Prov. Can.) c. 42—*Conditional gift—Expropriation—Acquiescence—Forfeiture for breach of condition subsequent—Remedy against the Crown for unauthorized use of land—Abandonment by Crown—Reverter—Solicitor and client—Privileged communication—Evidence.*

The Act 9 Vic. c. 42, was passed with the object of removing doubts as to the application of section 29 of the Act 7 Vic. c. 11 to certain lands set out and expropriated from one *S.* at Bytown. By the first section of the first mentioned Act it was enacted that the proviso contained in the 29th section of *The Ordnance Vesting Act* should be construed to apply to all the lands at Bytown set out and taken from *S.* under the provisions of *The Rideau Canal Act*, except,—

(1) So much thereof as was actually occupied as the site of the Rideau Canal, as originally excavated at the Sappers' Bridge, and of the Basin and Bywash, as they stood at the passing of *The Ordnance Vesting Act*, and excepting also,

(2.) A tract of two hundred feet in breadth on each side of the said canal,—the portion of the said land so excepted having been freely granted by the said Nicholas Sparks to the late Colonel By of the Royal Engineers for the purposes of the canal—and excepting also,

(3.) A tract of sixty feet round the said Basin and Bywash * * * * which was then freely granted by the said Nicholas Sparks to the Principal Officers of Ordnance for the purposes of the said canal, provided that no buildings should be erected thereon.

1893

MAGEE v. THE QUEEN.

The site of the canal and the two hundred feet which were included within the limits of the land so set out and ascertained had been given by an instrument, dated 17th November, 1826, under the hand of *S.* and *B.*, who was acting for the Crown, by which it was agreed that such portion of the land so freely given as might not be required for His Majesty's service, should be restored to *S.* when the canal was completed. The canal was completed in 1832. Subsequent to the passing of the Act 9 Vic. c. 42 all the lands of *S.* so set out and ascertained were given up to him, except the portions above described, and deeds in the terms of the Act were exchanged between *S.* and the Principal Officers of Ordnance in regard to the land so given up and so retained, respectively.

Held:—That apart from the question of acquiescence and delay on the part of *S.* and those claiming under him, the Act 9 Vic. c. 42 and the deeds of surrender so exchanged were conclusive between the parties so far as the area and boundaries of the lands to be retained and restored respectively are concerned.

2. That the lands so retained are held by the Crown for the purposes of the canal, and that as to the tract of sixty feet around the Basin and Bywash there is attached a condition that no buildings are to be erected thereon.

3. That the proviso, "that no buildings shall be erected on the said tract of sixty feet," does not create a condition subsequent, a breach of which would work a forfeiture and let in the heirs, nor would the use by the Crown of a portion of the lands in question for purposes other than the "purposes of the canal" work such a forfeiture.

4. The court has no power to restrain the Crown from making any unauthorized use of the land or to compel the Crown to remove any buildings erected thereon contrary to the terms of the grant.

Semble:—That the Crown cannot alien the land held for the purposes of the canal or any portion thereof, and if it should do so the suppliants would have their action against the grantee. If the Crown should abandon the land or any portion of it, the land or such part of it would revert to the suppliants and they might enter and possess it.

Held, also, that where a solicitor or counsel of one of the parties to a suit has put his name as a witness to a deed between the parties he ceases, in respect of the execution of the instrument, to be clothed with the character of a solicitor or counsel and is bound to disclose all that passed at the time relating to such execution.

Robson v. *Kemp* 5 Esp. 52, and *Crawcour* v. *Salter* L.R. 18 Chan. 34 followed.

1893

MAGEE v. THE QUEEN.

PETITION of right to obtain a declaration of title to certain lands in the possession of the Crown.

The facts of the case are stated in the judgment.

Argument of Counsel.

The case was tried at Ottawa on the 15th, 16th, 18th and 19th days of November, 1892.

McCarthy, Q.C. (with whom was *Christie*, Q.C.) for suppliants: Undoubtedly the letter of gift from Sparks to the Crown was a grant of the lands for the purposes of the canal, and for that only, and those purposes being fulfilled so much of the land as was not required therefor was to be restored to the grantor. The conditions of this gift are crystallized in the Act of Parliament 9 Vic. c. 42. Here then we have satisfactory evidence of the basis upon which the Crown holds the lands in question. Now, then, what are the legal elements entering into the ownership of a canal? I think the authorities establish beyond a doubt that the proprietor of a canal is merely the owner of a "highway by water." His title is simply that of an easement in the land covered by the canal. (He cites *Mulliner* v. *The Midland Railway Company* (1); *Angell on Highways* (2); *Lewis on Eminent Domain* (3); *Nelson* v. *Fleming*) (4). There is a wide distinction between the owner of a canal and a railway company which enjoys the franchises and exercises the business of a common carrier. The owner of a highway has nothing to do with the business that passes over the road, nor has the Crown as owner of this canal anything to do with the business done in connection with it. For the Crown to attempt to erect warehouses and other buildings on the banks of the canal is assuming rights of property in excess of our grant.

(1) 11 Ch. D. 611.
(2) Sec. 310.
(3) Sec. 597.
(4) 56 Ind. 310.

1893

MAGEE v. THE QUEEN.

Argument of Counsel.

Now, then, I submit that it is for the court to say how much of the land is required for the purposes of the canal. It is a matter subsisting in contract, and it is for the court, not for a party to the contract, to declare what are the rights of the parties thereunder. The two hundred feet portion, mentioned in the letter of gift and in the statute 9 Vic. c. 42, are subject to the condition that it be used for the purposes of the canal, and it is in evidence that beyond fifty feet from the canal this land is not so required. We are, therefore, entitled to a declaration from the court as to the exact quantity of the tract of land that is required for the purposes of the canal.

Again, in so far as the Crown has permitted the lands to be used for the purpose of erecting commercial buildings thereon, and for other purposes foreign to those for which the lands were unmistakably granted, there has been an abandonment of so much of the lands under the grant, and such lands should revert to the suppliants. We are entitled to a declaration from the court to that effect.

Then, upon two grounds we are entitled to succeed in this case. First, I say we are entitled to the surplusage of the land which the evidence shows the Crown does not require for the purposes of the canal; and, secondly, we are entitled to so much of the remaining lands as have been abandoned. (He cites *Proprietors of Locks and Canals* v. *The Nashua and Lowell Railroad Company* (1); *Inhabitants of Worcester* v. *The Western Railroad Corporation* (2); *The Illinois Central Railroad Company* v. *Wathen* (3); *Browne and Theobald on Railways* (4); *Morawetz on Private Corporations* (5); *McQueen* v. *The Queen* (6); *Tylee* v. *The Queen* (7);

(1) 104 Mass. 9.
(2) 4 Metc. 564.
(3) 17 Ill. App. 582.
(4) P. 231.
(5) Sec. 419.
(6) 16 Can. S.C.R. 1.
(7) 7 Can. S.C.R. 651.

1893

MAGEE
v.
THE
QUEEN.

Argument of Counsel.

Jessup v. *The Grand Trunk Railway Company* (1); *Great Western Railway Company* v. *May*) (2).

Robinson, Q.C. (with whom was *Hogg*, Q.C.) for the Crown:

The suppliants' claim is barred by acquiescence. It is perfectly plain that the stipulation in the so-called letter of gift was contemplated to be enforced by the grantee as soon as the canal was completed. The canal was completed in 1832, and from that time the statute begins to run against Sparks and his heirs. So much, then, for the argument that the Crown derives title under the letter of gift. We contend, however, that Colonel By had no authority to bind the Crown by any agreement with Sparks, and, moreover, the Crown can only acquire title by deed or matter of record, and its title must be referable to a conveyance that will hold in law. The Crown's title was acquired by virtue of the expropriation proceedings taken under *The Rideau Canal Act* (3), and Sparks never made a claim for compensation under that Act. (He cites *Duke of Leeds* v. *Earl of Amherst*) (4).

Then, referring again to the letter of gift to ascertain the purposes for which the property was acquired, we find the land was to be taken for "His Majesty's service." That, I submit, means military service in connection with the canal at all times and in view of all possible military contingencies, such as requiring the lands for the purposes of fortification, storing supplies, &c.,—purposes which would require every portion of the lands in dispute to be controlled by the Crown.

Then, as to my learned friend's contention, that it is for the court to declare how much of the lands are required for the purposes of the canal,—I submit that the right to determine that fact rests with the military

(1) 7 Ont. App. 128.
(2) L.R. 7 H.L. 283.
(3) 8 Geo. IV. c. 1.
(4) 2 Phil. 123.

1893

MAGEE v. THE QUEEN.

Argument of Counsel.

authorities. Looking at the letter of gift as a good contract, is it not the plain intention of the parties that the quantity of land required was to be decided by the grantee? To illustrate the case in the light of the law of contract, A. gives B. so much land for a specific purpose, and B. agrees to give back so much as he does not use for such purpose; now when the object of the grant is completed is the time for B. to require of A. a statement or declaration as to how much land he needs to hold for the original purposes of the grant. It being a matter of contract, the statute of limitations runs against B. from the time I have mentioned.

My learned friend also contends that by the passing of 9 Vic. c. 42, a new title was created and that the Crown cannot refer its title to the expropriation under *The Rideau Canal Act* (1). Our answer to that is that we are so entitled to the land. I do not understand how that statute makes a new start as regards the title at all. It was under 7 Victoria, c. 11, *The Ordnance Vesting Act*, that the Ordnance land vested in the Crown as represented by the Principal Officers of Ordnance. The new statute only provided for the restoring to Mr. Sparks of the lands not wanted for the canal. The new statute was to settle the doubts arising under the proviso in the former Act. It is simply a declaration in 9 Victoria that section 29 of the former Act would apply to Sparks. This does not in any way affect the previous title acquired by the Crown to the 104 acres. It is expressly stated that the Crown had previously acquired title to the Bywash, to the canal and to the 200 feet and the 104 acres. I think a fair construction of the preamble in 9 Victoria is that it was passed for the relief of Mr. Sparks purely and simply.

(1) 8 Geo. IV. c. 1.

1893

MAGEE v. THE QUEEN.

Argument of Counsel.

Any recital of facts in the preamble of the statute 9 Vic. c. 42 would not override a legal title which was acquired under a former statute. It would require a provision in the operative part of the statute to do that.

If your lordship decides that the lands were taken under the statute 8 Geo. IV. c. 1, then that will settle any question as to there being a reverter.

As to the question of abandonment, I maintain that a temporary user of the land is not an abandonment of it for the original purposes for which it was given. So long as the Crown keeps the land in its own hands it is quite within its rights and cannot be said to be permanently using it or allowing it to be used for other purposes than the purposes of the canal. The Crown has not parted with the fee of any portion of the lands. Lots are held either by tenants at will or by squatters, or by lessees under terms. (He cites *Smith on Real and Personal Property*) (1). When the fee simple is once vested any condition for devesting it should be construed with the utmost strictness. There is nothing in the evidence to show we are abusing the rights we have obtained, and even if we are, that is ground perhaps for restricting our improper use of it, but not for recovering the land back. Where land is given for certain purposes, I do not know of any law which says that the abuse of that right is ground for reverter. I do not see upon what authority my learned friend bases his claim to the rents we got from these lands. And it must be remembered that we have granted none of this land. My learned friend has said that the canal is but a highway, and he has also said that a grant for a canal is only an easement. To that I answer that the land was taken under the statute. If your lordship finds that way,—that the lands were

(1) Sec. 177.

1893

MAGEE v. THE QUEEN.

Argument of Counsel.

ascertained and taken under the statute,—our rights to them are absolute and incontestable. Before there was a *Rideau Canal Act*, Mr. Sparks put it in writing that he would give the Crown this land. It needed the passage of the Act to pass a good title to the Crown. The facts are that Mr. Sparks first signed a memorandum agreeing to give the land, the statute was passed enabling the Crown to acquire it, and then the lands were set out. There was no dedication by Sparks to perfect the gift under his license, and can anybody pretend to say that the Crown could acquire any rights under that license until they acted upon it?

Now take the Bywash. That portion of the land has been built upon years and years ago.

[*McCarthy*, Q.C.—We claim the Bywash from the abandonment of it.]

Then let us look into the facts. We have merely taken advantage of the main drain of the city for canal purposes. Suppose that main drain gave out and it was decided by the city authorities to change its course. It might then become necessary for us to use the Bywash again and I say that the Bywash, so so far as it stands now as an element in this action, has only been the subject of a temporary disuse. I venture to say there is no authority that can be advanced by the suppliants that the lands can be taken away from us under such circumstances.

I have found no authority to show (I am speaking of Ontario) where land is taken by a railway company that it is not taken as a rule in fee simple. I never heard that people could claim the land back again from them. [He here refers to *The People* v. *White*) (1). There is a great difference between American law and English law on this subject as to the question of constitutionality. I think that it must be held that in

(1) 11 Barb. S. C. 26.

1893

MAGEE v. THE QUEEN.

Argument of Counsel.

order to support the suppliants' contention the lands are held in trust, otherwise the statute would run against the suppliants. There is no express trust in this case, and I refer your lordship to *Cunningham* vs. *Foot* (1); *Lewin on Trusts* (2); *Wright* v. *Wilkin* (3); *Lewis on Eminent Domain* (4); *Bright* v. *Legerton* (5); *Hodgson* v. *Bibby* (6); *Browne* v. *Cross* (7); *Payne* v. *Evens* (8); *Kennedy* v. *City of Toronto* (9); *Jones* v. *Higgins* (10); *Lewin on Trusts* (11); *Mills* v. *Fox* (12); *Jessup* v. *Grand Trunk Ry. Co.* (13).

McCarthy, Q.C. in reply:

Your lordship is asked to find that there was no dedication by Mr. Sparks of the land to the Crown, but in answer to that I have to say that there is not a syllable alleged by the Crown that this was not a voluntary gift. I say it is incumbent upon the Crown to either reject it out and out or to accept it out and out; and I say, further, that unless they communicated to Mr. Sparks their determination not to accept it, the presumption is that they did accept it and act upon it. It is not for them now, in the absence of a disavowal or refusal of it, to come here and say that they took the land under the statute and not under the gift. They should have communicated their rejection of the gift to Mr. Sparks. They never let Mr. Sparks know that they did not take the land as a gift, but sixty years afterwards they come in here and attempt to say that they took it under the statute. I do not think that the document of 1826 can be construed as raising a reverter in the legal sense of the word. I do not so read that

(1) 3 App. Cas. 974.
(2) P. 140.
(3) 2 B. & S. 232.
(4) Secs. 922, 873, 874, 716.
(5) 29 Beav. 60.
(6) 32 Beav. 221.
(7) 14 Beav. 105.
(8) 18 L. R. Eq. 356.
(9) 12 Ont. 211.
(10) L. R. 2 Eq. 538.
(11) 9th ed. p. 900, 994.
(12) 37 Ch. Div. 153.
(13) 7 Ont. App. 128.

1893

MAGEE v. THE QUEEN.

Argument of Counsel.

document. That document created a trust. (He cites *Lewin on Trusts* (1), and also *Croome* v. *Croome*) (2). It may be that it is an implied trust in this instrument, but the case of *Cunningham* v. *Foot* (3) seems to show that it would be an express trust. (He cites *Lewin on Trusts* (4); *Kennedy* v. *City of Toronto* (5); *Trent Valley Canal Case* (6); *McQueen* v. *The Queen* (7). Now then when you get the Crown in the position of a trustee, I wish to know what is to prevent the suppliants at any time from coming in and asking that the trust should be declared. I deny the proposition of my learned friend that Mr. Sparks should have insisted on his rights under the agreement of 1826 upon the completion of the canal, for against an express trust the statute never runs. (He cites *Lewin on Trusts*) (8). The statute might run if we had to come into court and prove that there was a trust, but where the document shows a trust on the face of it the statute does not run against us. (He cites *McDonald* vs. *McDonald*) (9). If we were entitled in 1830 to the benefit of such a trust, we can get the benefit of it to-day. They cannot say that there was no trust on the face of the document. The trust appears plainly from the statute 9 Victoria c. 42; and that statute reaffirms the terms of the gift and, for the first time, puts our rights on a definite footing. It was not until 1846 that our rights were publicly defined, and it would be monstrous now to hold that we could not take advantage of them because we had not done so at the time of the completion of the canal. Why should I not be able to call my trustee to account at any time? (He cites

(1) Pp. 150 and 151 and cases cited there.
(2) 59 L. T. N. S., 582.
(3) 3 App. Cas 974.
(4) Pp. 116, 136, 137.
(5) 12 Ont. 211.
(6) 11 Ont. 698.
(7) 16 Can. S.C.R. 40.
(8) P. 113.
(9) 21 Can. S. C. R. 201.

1893

MAGEE v. THE QUEEN.

Argument of Counsel.

Lewin on Trusts (1); *Rennie* vs. *Young*) (2). Then with regard to the fact that the Crown can say it is only using this land for temporary purposes now, but that it requires the land for purposes in connection with the canal in the future, and will hold it for such purposes, I think my learned friend can cite no authority in support of that argument. It seems to me, to ask your lordship to decide that way would be to broaden the rule altogether beyond its proper limits. The statute should run only from the time when we have been given a remedy in the Exchequer Court. Until there was some tribunal having jurisdiction in this matter, whereby we may have obtained the remedy we seek for here, we should not be held to be barred by the statute. My learned friend would contend that although we had no court which afforded us a medium whereby we might obtain our rights, that we are bound by acquiescence. Now acquiescence here means forbearance to sue, and how could we sue when we had no court to resort to for that purpose. (He cites *Vane* v. *Vane* (3); *McQueen* v. *The Queen* (4) and *Rustomjee* v. *The Queen*) (5).

Then the statute only runs in cases of actual occupation, so it is held in the case of *McDonald* v. *McDonald* (6) I have before referred to. With respect to the lots, the possession of the Crown is not the kind of possession in favour of which the statute runs. It is required to be an actual occupation, no theoretical possession is sufficient. It cannot be possession referable to anybody else.

Now my learned friend contends that it is not for the court to determine as to how much of this land is required for the purposes of the canal; but looking

(1) P. 995.
(2) 2 De.G. & J. 136.
(3) 8 Ch. App. p. 383.
(4) 16 Can. S.C.R. 40.
(5) 1 Q. B. Div. 487.
(6) 21 Can. S. C. R. 201.

1893

MAGEE v. THE QUEEN.

Argument of Counsel.

at this transaction as a matter of contract, I do not think it can be said that Sparks gave to the grantee the exclusive right to say how much of the land is required for the work. In that case the *cestui que trust* would have no voice or determination in the matter at all.

With reference to the fact as to whether putting up buildings will work a forfeiture I refer to the case of *Vankoughnet* vs. *Denison* (1).

I submit that we are entitled to a declaration as to the Bywash, that part of the property has been abandoned by the Crown. But my learned friend says there could be no abandonment of this property except by conveying the fee. On this point I will refer to *Lewis on Eminent Domain* (2). (He also cites *The People* v. *The Albany and Vermont Railroad Co.*) (3). There can be no doubt about the abandonment of a portion of the Bywash. Then as to the question as to whether the Crown has been using this property consistently with our grant, I would refer to the recent case of *Canada Southern Ry. Co.* v. *Niagara Falls* (4), and also the cases cited in *Lewis on Eminent Domain* (5), and *Grand Junction Canal Co.* v. *Petty* (6). I think it is eminently fair and reasonable that the court should determine what is required for the purposes of this canal, and that the excess should be declared as not necessary for that purpose.

BURBIDGE, J. now (March 20th, 1893) delivered judgment.

The suppliants bring their petition to obtain a declaration of their rights in certain lands in the city of Ottawa adjacent to the Rideau Canal and Basin, the

(1) 11 Ont. App. 699.
(2) P. 598.
(3) 24 N. Y. 261.
(4) 22 Ont. 41.
(5) P. 584.
(6) 21 Q. B. Div. 273.

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

title to which was acquired by the Crown under the following circumstances. In 1826 the lands mentioned formed part of Lot C in Concession C, of the Township of Nepean, of which lot Mr. Nicholas Sparks, through whom the suppliants claim, was at the time the owner in fee simple. On the 17th of November of that year, by an instrument under his hand, and that of Lieutenant-Colonel By, commanding the Royal Engineers on the Rideau Canal, Mr. Sparks authorized Colonel By to take such part of the said lots *gratis* as might be required for the purpose of constructing the canal, but not to exceed two hundred feet in breadth on each side thereof; and it was agreed between them that such parts of the land as might not be required for His Majesty's service should be restored when the canal was completed.

At that date there was no legislative authority for the construction of the contemplated canal, or for the expropriation of the lands required therefor. That authority was given in February of the following year by *The Rideau Canal Act* (1), by which, after reciting that His Majesty had been most graciously pleased to direct measures to be immediately taken, under the superintendence of the proper Military Department, for constructing a canal, uniting the waters of Lake Ontario with the River Ottawa, and affording a convenient navigation for the transport of naval and military stores, and which when completed would tend most essentially to the security of the Province by facilitating measures for its defence, and would also greatly promote its agricultural and commercial interests, it was in substance enacted that the officer employed by His Majesty to superintend the said work, might enter upon any lands, and survey and take levels of the same, and set out and ascertain such parts thereof

(1) 8 Geo. IV. c. 1.

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

as he should think necessary and proper for making the canal and other works and conveniences connected therewith and requisite and convenient for the purposes of the said navigation. By the second section of the Act it was provided that after any lands should be set out and ascertained to be necessary for making and completing the canal, and other purposes and conveniences mentioned, such officer might agree with the owners or persons interested in such lands, for the absolute surrender to His Majesty of so much thereof as should be required, or for the damages which they might reasonably claim in consequence of the canal and other works being cut and constructed in and upon their respective lands. By the third section it was enacted that such parts and portions of land as might be so ascertained and set out by the officer employed by His Majesty, as necessary to be occupied for the purposes of the canal, should be forever thereafter vested in His Majesty, His heirs and successors. Then followed provisions for determining the compensation to be paid for land taken for, and for damages occasioned by, the construction of the canal (1); and it was provided (2) that in estimating the claim of any individual to compensation for property taken or for damages done under the authority of the Act, the arbitrators or jury assessing such damages should take into their consideration the benefits likely to accrue to such individual from the construction of the canal by its enhancing the value of his property, or producing other advantages, but that it should not be competent to any arbitrators or jury to direct any claimant to pay a sum in consideration of such advantages over and above the amount at which his damages should be estimated.

Acting under the authority of this statute Colonel By, the officer employed by His Majesty to superintend

(1) Ss. 4–9. (2) S. 9.

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

the work, ascertained and set out, as being necessary for the purposes of the canal, a portion of Lot C, in Concession C before referred to, containing about one hundred acres, the area being sometimes given as 104 acres, and at others 98 acres. In the portion so ascertained and set out was included the site of the canal where it passed through the lot, and the two hundred feet on each side of the site, which had been previously acquired under the license of the 17th of November, 1826. In the setting out of this land Mr. Sparks never acquiesced. On the contrary he always protested that, with the exception of what he had freely given, no part of his land was necessary for the purposes of the canal, and he never took any steps to determine the compensation to which he was entitled. It was suggested at the time, as it is now suggested, that he was deterred by the provision of *The Rideau Canal Act*, to which reference has been made, and under which the arbitrators or jury would have been bound to take into account the benefits accruing to him, in the enhanced value of his other lands, arising from the construction of the canal. But without attempting to determine how far that consideration may have affected or controlled his course of action, a question that in view of the subsequent disposition of the controversy is unimportant, it is clear that he persistently pressed upon the authorities the simple demand that they should restore to him the land of which he alleged they had wrongfully deprived him.

The Rideau Canal was, it appears, completed and opened for traffic throughout its entire length some time in the month of May, 1832. In 1843 the canal and the lands acquired for the purposes thereof were vested in the Principal Officers of Her Majesty's Ordnance in Great Britain, and their successors in office,

in trust for Her Majesty (1). In 1856 it and "its adjuncts" were transferred to the Crown for "the benefit, use and purposes" of the Province (2), and in 1867 the canal and the lands connected therewith became part of the public property of Canada (3).

When, in 1843, the Ordnance Vesting Bill was before the legislature, a special committee was sitting on Mr. Sparks's petition to have the lands restored to him, and, to meet the objections of those who supported his claims, a provision was added to the Bill, which is to be found in the proviso to the 29th section of the Act (4), that all lands taken from private owners at Bytown, under the authority of *The Rideau Canal Act*, for the uses of the canal, which had not been used for that purpose, should be restored to the party or parties from whom the same were taken. About seventy-seven acres of the land taken from Sparks were within the effect and operation of this proviso, but the Officers of the Ordnance, contrary to good faith it was charged, and so far as I can see justly charged, refused to give up possession. They did not say, for it could not be said, that such lands were then required for the purposes for which they had been taken; but it was suggested that some day they might be, and on that plea they sought to retain the hold they had on the land.

The refusal of the officers in charge of the canal to give effect to the provisions of *The Ordnance Vesting Act* was followed by the exercise by Sparks of acts of ownership over the lands then in question, which, in December, 1844, the Principal Officers of Her Majesty's Ordnance took steps to restrain. In 1845 the controversy was again before the legislature, and a Bill was

(1) 7 Vic. c. 11 s. 1 and schedule.
(2) 19 Vic. c. 45 s. 6 and second schedule.
(3) *The British North America Act*, 1867 s. 108 and third schedule (1).
(4) 7 Vic. c. 11 s. 29.

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

passed to explain and amend *The Ordnance Vesting Act* so far as regarded the proviso to the 29th section, and to set at rest the doubts that had arisen as to its application. The Bill was reserved for the signification of Her Majesty's pleasure thereon, and did not receive the Royal assent.

In August, 1845, Sparks, who was defending the suit that the Principal Officers had brought against him in the previous December, in his turn filed a bill against them, and so matters stood until June, 1846, when the Act 9th Vic. c. 42 was passed, with the object of removing the doubts to which I have alluded, and of fairly and amicably settling all matters in difference between the Principal Officers and Mr. Sparks. To the provisions of this Act it will be necessary to refer at some length. By the first section it was enacted that the proviso contained in the 29th section of *The Ordnance Vesting Act* should be construed to apply to all the lands at Bytown set out and taken from Nicholas Sparks, under the provisions of *The Rideau Canal Act*, except:

(1) So much thereof as is actually occupied as the site of the Rideau Canal, as originally excavated at the Sappers' Bridge, and of the Basin and Bywash, as they stood at the passing of the Ordnance Vesting Act, and excepting also,

(2) A tract of two hundred feet in breadth on each side of the said canal, the portion of the said land so excepted having been freely granted by the said Nicholas Sparks to the late Colonel By, of the Royal Engineers, for the purposes of the canal; and excepting also

(3) A tract of sixty feet round the said Basin and Bywash (wherever the present Ordnance boundary stones stand beyond that distance from the said Basin and Bywash, but where they stand within that distance, then they shall bound the tract so excepted) which is freely granted by the said Nicholas Sparks to the said Principal Officers for the purposes of the said canal, provided no buildings be erected thereon.

It was further enacted that all the land to which the proviso was applicable should, if retained by the Prin-

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

cipal Officers of Her Majesty's Ordnance, be paid for in the manner provided by the Act, and that any parts thereof which should not be so retained and paid for, should be and the same were thereby declared to be absolutely revested in the said Nicholas Sparks, or the parties respectively to whom he had conveyed the same, to his and their proper use for ever.

By the second section it was provided that the Principal Officers should, within one month after the passing of the Act, obtain a certificate from the Officer Commanding Her Majesty's forces in the Province, setting forth what part or parts of the land, to which the proviso was applicable, it was necessary to retain for the service of the Ordnance Department for military or canal purposes; and that such part or parts should be retained by, and remain vested in, the Principal Officers in trust for Her Majesty; and that the remainder, if any, should be immediately thereafter absolutely revested in the said Nicholas Sparks or the party or parties claiming under him, to his and their own proper use for ever. By the fourth, fifth and sixth sections of the Act, provision was made for determining by arbitration the amount of compensation to be made for any land retained; and by the seventh, in some distrust, apparently, of the methods of the Officers of the Ordnance, and to leave them no chance to longer delay complying with the will of the legislature, it was provided that if the sum awarded should not be paid within three months after the award was made, or if the Principal Officers should fail to obtain the certificate of the Officer Commanding Her Majesty's forces within the time limited for that purpose; or if they should negligently fail to comply with any of the other requirements of the Act, or if, through the non-attendance or wilful neglect of the arbitrator acting for them, the other arbitrators should be prevented from pro-

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

ceeding, and such wilful default or neglect should continue for three months, the land to which the proviso, that has been referred to, was applicable, should be absolutely revested in the said Nicholas Sparks and those claiming under him, without any proceeding being requisite for that purpose.

The certificate of the commanding officer, a copy of which I find with the papers filed in this case, and to which, though it was not, I think, tendered in evidence, I may perhaps, without impropriety, refer on a matter respecting which there is no dispute, was obtained within the time limited by the statute, and there were described in such certificate all the lands to which the proviso was applicable, excepting about twelve acres.

For the lands so proposed to be retained by the Principal Officers, the arbitrators awarded Mr. Sparks the sum of twenty-five thousand pounds, and the Master-General and Board of Ordnance, thinking the amount of the award excessive, declined to complete the purchase. Their decision was communicated to Mr. Sparks by a letter from the officers of the Ordnance at Montreal, dated the 21st of May, 1847, wherein, in order that no difficulty might thereafter arise between him and the Department in respect to this property, it was proposed to reinvest him by a deed of surrender with all the land taken from him for the canal, except the portions he had freely granted and which were vested in the Principal Officers by the statute 9th Vic. c. 42; and that he should give a deed to the Principal Officers conveying to them, in the terms of the statute, the portions so excepted, being the ground actually occupied as the site of the Rideau Canal as originally excavated at the Sappers' bridge, and of the Basin and Bywash as they stood at the passing of *The Ordnance Vesting Act*, and also a tract of two hundred feet in

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

breadth on each side of the said canal, with a tract of sixty feet round the Basin and Bywash. At the time Mr. Scott was the Solicitor, at Bytown, of the Ordnance Department, and the letter to Mr. Sparks concluded with the statement that Mr. Scott would present these deeds to him for his approval and signature, and that, as the latter had been desired to draft them in communication with the former's solicitor, it was not doubted that the arrangement referred to would meet with his concurrence. From a letter of the 26th of May from Mr. Scott to the Respective Officers of Her Majesty's Ordnance at Bytown, it appears that he had a personal interview with Mr. Sparks and his counsel, Mr. R. Harvey, relative to the restoration of the land taken from Mr. Sparks for the uses of the Rideau Canal, and that they would be prepared to have the land surveyed and the portions to be given up marked off, on the 29th of that month, and that up to that time Mr. Sparks would not execute any conveyance as required by the Respective Officers at headquarters in their letter dated the 21st.

An official plan produced from the office of the Rideau Canal (Exhibit H^1) dated and signed on the 9th of July, 1847, shows that the proposed survey, of which Mr. Scott wrote on the 26th of May, was completed in June of that year, and that the boundaries between the lands retained for the purposes of the canal by the Principal Officers, and those that were to be given up to Mr. Sparks were definitely determined and indicated on the ground by stone posts or monuments then set up. Of the deeds that it was proposed to give and take, a most diligent and exhaustive search has failed to secure a trace. They were not registered, but the fact has not perhaps the importance that was sought to be attached to it by the suppliants' counsel. So far as Mr. Sparks was concerned there was nothing in the Regis-

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

try in respect of the transactions, of which I have been speaking, to cloud the title he had acquired in 1821; and for the rest he may well have been satisfied with the provisions of the statute 9th Victoria, chapter 42; while on the other hand it was provided, by the 27th section of *The Ordnance Vesting Act* (1), that no enrolment of any deed conveying any lands or real property or any estate or interest therein to the Principal Officers should be necessary to vest the same in them in trust for Her Majesty, but at their option they might cause any such deed to be enrolled in the office of the Provincial Registrar. Both parties could, I think, afford to be, and probably were, indifferent as to the registration of any deeds that may have passed between them. To prove the execution and exchange of the deeds proposed in the letter of the officers of Ordnance at Montreal of the 21st of May, the Crown called Mr. Harvey who is mentioned in Mr. Scott's letter of the 26th, and who acted as solicitor and counsel for Mr. Sparks. Putting aside for the present the question of the admissibility of a part of his evidence to which objection was taken, he testified, in substance, that he acted professionally for Mr. Sparks from 1841 to 1852 and was cognizant of the litigation and difficulties that took place between Sparks and the Principal Officers with regard to the Rideau Canal; that he prepared the petitions to the Governor and Legislature; that he was instrumental in getting the proviso put into *The Ordnance Vesting Act;* that he was counsel for Sparks before the arbitrators and conducted his case; that the deeds mentioned in the letter of May 21st, from the Ordnance Department at Montreal, were prepared by Mr. Scott, and were handed to him (Harvey) for examination, and that after examining them he took them to Sparks, that the latter might execute

(1) 7 Vict. c. 11.

1893.

MAGEE v. THE QUEEN.

Reasons for Judgment.

the deed in favour of the Principal Officers, the other having been executed before it was delivered to him (Harvey) by Scott; that Sparks refused to receive the one or to execute the other until the contents of the land were ascertained by actual survey; that the survey was made and other deeds prepared by Mr. Scott; that he (Harvey) took to Sparks the deed from the latter to the Principal Officers and it was executed by Sparks and his wife, he (Harvey) and one Caldwell Waugh being the witnesses to the execution thereof; that he then took the deed to Scott and delivered it to him, whereupon the latter delivered to him (Harvey) the deed from the Principal Officers to Sparks which he handed over to the latter. With reference to the contents of the deed from Sparks to the Principal Officers, Harvey's memory is that there was no reference therein to the statute 9th Victoria c. 42, and no condition that the lands were to be held for the purposes of the canal; that the deed was an absolute conveyance to the Principal Officers of the site of the Canal, Basin and Bywash, of the two hundred feet on each side of the canal, and of the sixty feet round the Basin and Bywash. This is at once the most important part of his evidence, and that which, if it is admissible, should be received with the greatest caution.

Of the testimony of this witness, I desire to say that from the manner in which it was given, and the fact that, speaking generally, it was corroborated by the documentary evidence, I attach to it all proper weight and credit. But the transaction happened nearly half a century ago, and it would be surprising that there should not be some infirmity of memory. The letters of May, 1847, which are in evidence, show, I think, that there was. For instance, I do not think it at all probable, that the deed from the Principal Officers to Sparks was, as he says it was, executed when Mr.

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

Scott first handed it to him. As to that he has, perhaps, confounded the first with the second deed. Then too it is probable that he is wrong when he says the deed was executed at Bytown and not at Montreal. But I attach more importance to the circumstance that what he recollects and states of the contents of the deed is not consistent with the facts of which there is no doubt. First, I think we are safe in concluding, from all we have learned of him, that Mr. Sparks was not the man to make any concession that was not demanded of him, or to which the Principal Officers were not entitled. What did they ask of him? That he would give them a deed in the terms of the statute. What would a deed in the terms of the statute give them? A surrender for the purposes of the canal of the lands which they were to retain, with a condition that no buildings were to be erected on the sixty feet round the Basin and By-wash. It is evident that for some reason Mr. Sparks attached considerable importance to this proviso, and it is not likely that having, in 1846, taken the trouble to have it inserted in an Act of the Legislature, he would in 1847 destroy its effect by executing a deed containing no such condition. Then the letter of instructions from the officers of Ordnance to Mr. Scott for the preparation of the deeds is expressed in terms similar to those used in the letter to Sparks, and I see no reason to doubt that the deeds were prepared in accordance with the instructions given. For these reasons, while I conclude that the deeds Mr. Harvey speaks of were duly executed and delivered, I am unable to rely upon his recollection of what the deed from Sparks to the Principal Officers contained. As to that I think the safe and proper course is not to depart from the Act 9th Victoria, chapter 42, and the facts established by, and the fair inferences to be drawn from, the letters of May, 1847.

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

In that view of the case it was, of course, a matter of no great importance whether the deeds, that it was proposed to exchange, were ever executed and delivered or not. But there is nothing apart from Mr. Harvey's evidence to suggest that any departure from the statute was proposed. Everything that we know with certainty is to the contrary, and it is clear that the exchange of the deeds of surrender was suggested as a matter of greater caution, and for no other reason. The Act by which their differences were settled expressly defined the rights of the parties and their respective interests in the lands to be retained by the Principal Officers, and those to be given up, leaving to be determined the question of the amount of compensation and the respective boundaries and limits of such lands; and the latter as we have seen, were in June, 1847, duly ascertained, set out and marked upon the ground.

To return for a moment to the objection to Mr. Harvey's evidence, that his knowledge of the facts of which he spoke were acquired in his capacity as solicitor and counsel to Mr. Sparks, it is settled law that when he put his name as a witness to the deed from the latter to the Principal Officers he ceased, in respect of the execution of the instrument, to be clothed with the character of an attorney, and bound himself to disclose all that passed at the time relating to such execution (1). Then as to the objection to the contents of the deed, there is, it seems to me, great weight in the answer that was made, that the witness's knowledge was not obtained from Mr. Sparks but from Mr. Scott; and that the terms and provisions of the deed submitted to the former on behalf of the Principal Officers, and accepted by him, could not in any fair sense be considered to be a privileged communication between him

(1) Robson v. Kemp, 5 Esp. 52; Crawcour. v. Salter, L. R. 18 Chan. 36.

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

and his attorney (1). It is unnecessary, however, to further discuss that question, as, in the view I have taken of the contents of the deed, it is not material.

Now I think that the facts that I have recited establish two things. First, that the contention of the suppliants that they are entitled to have an inquiry as to what parts of the lands in question are not now required for Her Majesty's service within the meaning of the writing of November 17th, 1826, which Nicholas Sparks and Colonel By signed, and a declaration that such parts should be restored to them, cannot be maintained.

From the time the canal was completed to the day the statute 9th Victoria c. 42 was passed, Mr. Sparks never put forward any claim to any part of the land that he had freely given for the purposes of the canal. The fair inference from all that we know he said or did, is that in his opinion the two hundred feet on each side of the canal were necessary for such purposes. And apart altogether from any question of acquiescence or delay on his part, or on the part of those who claim under him, the Act by which he and the Principal Officers of Her Majesty's Ordnance determined their controversy (2), and the deeds of surrender they exchanged, were, it seems to me, conclusive between them so far as the area and boundaries of the lands to be retained and restored, respectively, were concerned.

In the second place it is, I think, equally clear that the Crown holds for the purposes of the canal the lands so retained, and that to "the sixty feet round the Basin and Bywash" is attached the condition that no buildings shall be erected thereon. This question is, it seems to me, equally concluded by the Act 9th Victoria chapter 42, which declares in plain terms that

(1) Lyell v. Kennedy, L.R. 23 Ch. D. 405; 9 App. cas. 81.

(2) 9th Victoria c. 42.

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

such lands were freely granted for the purposes of the canal. Such a declaration may not be disregarded. If authority is required for that proposition it is to be found in the judgment of the Judicial Committee of the Privy Council in the late case of *The Labrador Company* v. *The Queen* (4), in which their lordships say, that even if it could be proved that the legislature was deceived in an absolute statement of facts in a statute, it would not be competent for a court of law to disregard its enactments. If a mistake is made, the legislature alone can correct it. The courts of law cannot sit in judgment on the legislature but must obey and give effect to its determination.

With reference to the proviso that no buildings should be erected, I cannot agree with the suppliants' contention that it extended as well to the two hundred feet on each side of the canal. I entertain no doubt that the Act will not bear that construction, and that the proviso is limited to "the tract of sixty feet round the Basin and Bywash."

That brings us to a consideration of the question of the relief that the suppliants may obtain in this court for any breach of the condition not to erect buildings, or for the non-user of any portion of the land granted, or for its misuse. This branch of the case demands, I think, more consideration than was given to it at the hearing, the attention of all parties having then been principally directed to the discussion and determination of the title by which the Crown holds the lands in dispute, and I propose to reserve it for further argument, and if necessary to take further evidence as to the use to which in particular cases such lands have been put. But to refer briefly to the questions involved, it is not contended, and I do not think it could with success be contended, that the proviso that no buildings should

(4) 67 L. T. N. S. 734; [1893] A. C. 104.

1893

MAGEE v. THE QUEEN.

Reasons for Judgment.

be erected on the tract of sixty feet round the Basin and Bywash, created a condition subsequent, a breach of which would work a forfeiture and let in the heirs, or that the use by the Crown of a portion of the lands in question for purposes other than the "purposes of the canal" would work such a forfeiture. Under like circumstances, and in a proper case between subject and subject a court of competent jurisdiction would no doubt restrain the defendant from making any unauthorized use of the land, and would compel him to remove any buildings that had been erected thereon contrary to the terms attached to the grant. But this court has no such power or authority where the Crown is the defendant. It may, I think, declare what the rights of the parties are, but at present I do not well see how it could go beyond that. The Crown cannot alien the land or any portion of it, and if it should do so the grantor's heir would probably have their action against the grantee. If the Crown should abandon the land or any portion of it, the land or such portion would revert to the heirs and they might enter and possess it. The Crown ought not, it seems to me, to use the land or any portion of it, contrary to the terms of the gift; but if it does, it is clear that it cannot be restrained by order of the court, and I do not at present see what remedy the suppliants would have except to appeal to the Crown or to Parliament to do them justice and to render to them the profits derived from any use of the land foreign to the purposes for which their ancestor had freely granted it. If it were conceded that the grant from Sparks and the Act 9 Vict. c. 42 created a contract or agreement on the part of the Crown not to use the lands granted for other than the canal purposes, and not to build on the sixty feet mentioned; and that for the breach of such agreement the suppliants are entitled to damages, the answer would be that no

damages have been proved. In such a case the damages would not, I am inclined to think, depend upon and be measured by the profits the Crown has made by the unauthorized use of the land granted, but by the loss which the suppliants have suffered, though I wish to add that the case of *The Proprietors of Locks and Canals on the Merrimack River* v. *The Nashua and Lowell Railroad Company* (1) would appear to support a contrary opinion.

It seems, that some years ago, an arrangement was made with the city authorities, and a drain constructed by which the water from the waste-weir at the Bywash was carried into the city sewers, and since then a portion of the land at the Bywash has not been used for the purposes of the canal. This portion is now useful, so Mr. Wise, the Government engineer in charge of the canal, says, for building purposes only. But the Crown still retains possession, and it is doubtful if the court can give any relief; though if Mr. Wise expresses the views of the Government, as well as his own, it would seem to be fair and just that this portion of the tract of land at the Bywash, excepting so much thereof as is occupied by Mosgrove Street, should be given up to the suppliants.

There will be a declaration that the Crown holds the lands in question for the purposes of the canal, and that no buildings should be erected on the tract of sixty feet round the Basin and Bywash.

The other questions, including the question of costs, will be reserved.

Judgment accordingly.

Solicitors for suppliants: *Christie, Christie and Greene.*

Solicitors for respondent: *O'Connor, Hogg and Balderson.*

(1) 104 Mass. 1.