
HER MAJESTY THE QUEEN (DEFEN- } APPELLANT; 1885
DANT) }

AND

WILLIAM DUNN (SUPPLIANT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Petition of Right—Provincial debt—Liability of Dominion for—
Order in Council—Account stated—Consideration—Demurrer—
Right to Petition.*

Prior to confederation one T. was cutting timber on territory in dis-

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

1884
 THE QUEEN
 v.
 DUNN.
 —

pute between the old Province of Canada and the Province of New Brunswick, the former having granted him a license for the purpose. In order to utilize the timber so cut, he had to send it down the St. John River, and it was seized by the authorities of New Brunswick and on y released upon payment of fines. T. continued the business for two or three years, paying fines to the Province of New Brunswick each year, until he was finally compelled to abandon it.

The two Provinces subsequently entered into negotiations in regard to the territory in dispute which resulted in the establishment of a boundary line, and a commission was appointed to determine the state of accounts between them in respect to such territory. One member of the commission only reported finding New Brunswick to be indebted to Canada in the sum of \$20,000 and upwards, and in 1871 these figures were verified by the Dominion Auditor.

Both before and after confederation T. frequently urged the collection of this amount from New Brunswick with the object of having it applied to indemnify the parties who had suffered by the said dispute while engaged in cutting timber, and finally by an order in council of the Dominion Government (to whom it was claimed the indebtedness of New Brunswick was transferred by the B. N. A. Act), it was declared that a certain amount was due to T., which would be paid on his obtaining the consent of the governments of Ontario and Quebec therefor. Such consent was obtained and payments on account were made by the Dominion Government, first to T. and afterwards to the suppliant to whom T. had assigned the claim. Finally the suppliant, not being able to obtain payment of the balance due by said order in council, proceeded to recover it by petition of right, to which petition the defendant demurred on the ground that the claim was not founded upon a contract and was not properly a subject for petition of right.

Fournier J. sitting in the Court of Exchequer, over-ruled the demurrer and gave judgment for the suppliant. On appeal to the Supreme Court of Canada.

Held,—Reversing the judgment of Fournier J., (Fournier and Henry JJ. dissenting,) that there being no previous indebtedness shown to T. either from the Province of New Brunswick, the Province of Canada or the Dominion Government, the order in council did not create any debt between T. and the Dominion Government which could be enforced by petition of right.

APPPEAL from the judgment of Fournier J. in the

Exchequer Court, over-ruling the demurrer of the appellant.

1884
 THE QUEEN
 v.
 DUNN.
 —

The petition of right, pleadings and facts are set out at length in the judgments of the Exchequer Court and of the Supreme Court of Canada.

The case was argued in the Exchequer Court by *Laflamme* Q.C., (*A. F. McIntyre* with him) for the suppliant, and by *Gregory* (*W. D. Hogg* with him) for the defendant.

The following is the judgment of the Court of Exchequer:—

[TRANSLATED.]

FOURNIER J.—“The suppliant, as transferee of a claim of James Tibbits, claims from Her Majesty the sum of twenty-five thousand dollars, established by an order in council, passed by the Dominion Government, as being the amount of said James Tibbits’s claim against the late Provinces of Canada and New Brunswick.

“The facts which gave rise to the present petition relate as far back as 1842, and originated in a conflict of authority between the governments of Canada and New Brunswick with respect to certain territory around the sources of the rivers St. John and Cabaneau, each government claiming the said territory as being part of its province. James Tibbits, having obtained from the government of the province of Canada a license to cut timber upon a part of the disputed territory, cut a large quantity of timber which could only reach the market by being floated down the river St. John and other rivers flowing through New Brunswick. The government of New Brunswick caused the timber to be seized as it passed through their province, contending that it had been cut, contrary to the law, on their public domain. The timber was released to Tibbits only upon payment by him of fines and penalties.

1884
 THE QUEEN v. DUNN.
 Fournier J. in the Exchequer.

"Notwithstanding this hostile intervention on the part of the government of New Brunswick, Tibbits continued to work the limits for two years, but heavier fines and penalties being again imposed by the government of New Brunswick, thereby absorbing all profits, Tibbits was compelled to cease his operations.

"The two governments interested in this conflict having referred the matter in dispute to arbitrators, the latter made an award, the provisions of which were incorporated in an Imperial statute, 14 and 15 Vic. ch. 63. By that act it was amongst other things enacted that the net proceeds of the funds arising from the disputed territory should be applied: 1st, to defray the expenses of arbitration: 2nd, to defray expenses of running the boundary line: 3rd, the balance of the funds to be applied towards the improvement of the land and water communications between the rivers St. John and the St. Lawrence. The commissioners appointed to run the boundary line between the two provinces having finished their work others were required to strike a balance between the two provinces on the transaction. No report was ever made by the commissioners jointly, but Mr. Dawson, one of the two, by his report, dated the tenth day of August, eighteen hundred and sixty-three, found that the sum of twenty thousand and two hundred and sixty-three dollars and thirty-one cents was due by New Brunswick to Canada as a balance of all the transactions in reference to the territory in dispute. Afterwards Mr. Langton, Dominion auditor, to whom this matter was referred, came to the same conclusion, as appears by his memorandum upon the matter made on the thirty-first day of May, 1871.

"Tibbits frequently requested the government of Canada and of the provinces of Ontario and Quebec to obtain and be paid the balance found to be due by

New Brunswick, in order that it might be paid over to himself and others who had been licensees of the territory by way of compensation to them for the serious losses they sustained in consequence of the action taken by the government of New Brunswick.

"The suppliant, in his petition, alleges that under the British North America Act the indebtedness of the province of New Brunswick to the late province of Canada became a liability of and was assumed by the Dominion of Canada, which has thereby become bound to recover the said amount from New Brunswick and to credit the same to the old province of Canada, now the provinces of Ontario and Quebec respectively.

"By the 14th, 15th, 16th, and 17th paragraphs of his petition, which are so important that I quote them at length, the suppliant alleges that :—

"14. The honorable the Privy Council of Canada, on the thirtieth day of August, eighteen hundred and seventy-seven, passed an order in council which was duly approved, to which said order your suppliant craves leave to refer at the trial of this petition, whereby it was acknowledged and declared that the said sum of twenty thousand two hundred and sixty-three dollars and thirty-one cents, with interest thereon at six per cent. per annum from the twelfth day of November eighteen hundred and fifty-six, was then due by the province of New Brunswick to the late province of Canada in respect of the matters aforesaid, which said sum with interest amounts to forty-five thousand four hundred and ninety-one dollars and thirteen cents.

"15. The said order in council declared that the province of Quebec had consented, as was in fact true, that the amount coming from the province of New Brunswick should be paid to the parties entitled to the same, and mentioned in the statement thereunto annexed, and agreed with the said Tibbits and the other licensees

1884
 THE QUEEN
 v.
 DUNN.
 Fournier J.
 in the
 Exchequer.

1884
THE QUEEN
 v.
DUNN.
 Fournier J.
 in the
 Exchequer.

that upon the consent of the governments of Ontario and Quebec being given thereto the said amounts should be paid to the parties entitled to the same and mentioned in the statement thereunto annexed, and agreed with the said Tibbits and the other licensees that upon the consent of the governments of Ontario and Quebec being given thereto the said amounts should be paid to the respective claimants *pro rata* according to the amounts of their respective claims, subject to certain special conditions therein mentioned. By a statement annexed to the said order in council, it appeared that one James Tibbits was one of the said claimants for and in respect of a certain sum or balance of twenty-seven thousand eight hundred and ninety-seven dollars and ninety-four cents, as therein set forth and which was thereby awarded to him.

“ 16. The said order in council was duly communicated by the said government to the said Tibbits, and at his and the other claimant's request and solicitation the governments of Ontario and Quebec, to whom the said order in council had also been duly communicated, by the government of Canada, respectively, by orders in council duly passed and communicated to the said government, ordered the payment by the government of Canada of the said sum of money and interest to the said James Tibbits.

“ 17. In and by the said order in council of the thirtieth day of August, eighteen hundred and seventy-seven, it was provided that so much of the said amount as might be payable to the said James Tibbits as should be necessary to meet a certain alleged claim of the province of Quebec against the said James Tibbits, should be retained until the amount of his alleged indebtedness to the government of Quebec be ascertained either by agreement of the parties or by some process of law, but, as your suppliant alleges, all matters of account between

the said government of Quebec and your suppliant have long since been settled by the payment by your suppliant of all amounts due by him to the said government of Quebec, so that the said government has no longer any claim to such moneys or any part thereof.

1884
 THE QUEEN
 v.
 DUNN.
 —
 Fournier J.
 in the
 Exchequer.
 —

“The suppliant then avers that he obtained from the provinces of Quebec and Ontario by orders in council, dated the 3rd November and the 2nd January, their consent to the payment of the sum mentioned in the order in council of the 30th August, 1877, and that the Government of New Brunswick, although requested to pay the said sum, has refused to give any answer; and that the government of Canada, acting upon the said order in council, have paid on account of the amount so payable the following sums: five hundred dollars on the twenty-third day of August, eighteen hundred and seventy-nine, two thousand dollars the tenth of December, eighteen hundred and seventy-nine, to the said James Tibbits, with the consent of the suppliant, which consent was required by the government, two thousand dollars to the suppliant on the twenty-seventh of November, eighteen hundred and eighty, and five thousand seven hundred and twenty-nine dollars and thirty-two cents to the suppliant on the seventh of June, eighteen hundred and eighty-one. He further alleges that on the thirtieth day of August, eighteen hundred and seventy-seven, there was a settlement by said order in council between the said James Tibbits and the government of Canada, whereby the sum of twenty-seven thousand eight hundred and ninety-seven dollars and ninety-four cents was established as the amount then due to said Tibbits, and that the government agreed and consented to pay it to him with interest from the 12th August, 1877, so soon as authority thereunto should have been received from the governments of Ontario and Quebec, which authority was

1884 obtained in accordance with the order in council above
 THE QUEEN mentioned. That the government of Canada have
 v. frequently admitted the justice of the suppliant's claim
 DUNN. and promised to pay the amount, but that they have so
 Fournier J. far neglected to do so with the exception of the pay-
 in the Exchequer. ments on account as aforesaid.

"The suppliant then alleges the circumstances under which he, upon the security of the said orders in council and with the knowledge of the government, advanced large sums of money, and that he subsequently obtained for the same a formal transfer from James Tibbits of his claim admitted by said order in council, and that the transfer was communicated to the government and accepted, and that they paid to the suppliant sums of money on account in accordance with the said order in council, and concludes by praying for the balance due after deducting the above payments, viz.: a sum of \$25,400 and interest.

"In answer to suppliant's claim the Crown has filed two pleas, the first is a demurrer and the second is a plea to the merits of the claim.

"I have only to consider for the present the demurrer.

The grounds upon which the claim for the sum of money prayed for by the suppliant's petition is demurred to are:—

"1. That the claim of James Tibbits, of which the suppliant is the assignee, does not arise upon contract, and, therefore, is not a claim such as to give the suppliant any remedy against the Crown under the Petition of Right Act, 1876.

"2. That the order in council of the 30th of August, 1877, mentioned in the fourteenth paragraph of the petition, does not make a settlement and account stated between the government of Canada and the said James Tibbits, nor make any liability on the part of Her

Majesty to answer to the said James Tibbits or the sup- 1884
 pliant, because the said accounting is alleged to be of THE QUEEN
 moneys claimed by the said James Tibbits not upon v.
 contract. DUNN.

"3. That the order in council of the 30th of August, Fournier J.
 1877, does not establish any sum as due from the pro- in the
 vince of New Brunswick to the late province of Canada, Exchequer.
 for want of the assent of the Province of New Brun-
 swick.

"4. That as the order in council provided that the
 amount payable to the said James Tibbits should be
 retained until the amount of his indebtedness to the
 government of Quebec should be ascertained, it is not
 alleged that such indebtedness has been either ascer-
 tained or paid.

"5. That the British North America Act does not create
 any liability on the part of the Dominion directly to
 creditors of a province for debts due by the province at
 the time of the union ; and lastly, that any payments
 made to the suppliant on account of his claim were acts
 of bounty of Her Majesty, and not the payment of a legal
 debt.

"From this statement of the suppliant's petition and
 of the demurrer it is evident that the principal question
 which arises in this case is : Whether a petition of right
 lies under the above circumstances. As to the existence
 of the claim how can it be denied, after the passing of
 the order in council of the 30th of August, 1877, form-
 ally and finally determining the amount of the claim,
 it seems somewhat strange, after such recognition
 on behalf of the government of this claim, that the
 suppliant should be compelled to have recourse to this
 court in order that the claim be adjudicated upon. The
 defences which have been set up, on behalf of the
 Dominion Government, would surprise me still more
 were it not perfectly well known that, as a matter of

1884
 THE QUEEN
 v.
 DUNN.
 Fournier J.
 in the
 Exchequer.

fact, it is the province of New Brunswick which is opposing the payment of the suppliant's claim, and, the crown is here represented by counsel chosen by New Brunswick, and the objections now relied on were made more in the interest of the province than of the Dominion, for the order in council passed by the Dominion Government made a settlement of account with regard to this claim, and a portion of it has already been paid.

"As appears by the above statement of facts, the origin of this claim arose, as already stated, from a conflict between the late province of Canada and that of New Brunswick, and in consequence thereof the latter province was interested in the settlement of this matter. Yet, as it is alleged in the petition, the province does not seem to have taken any heed of the matter until the suppliant was forced to have recourse to this court to claim what he alleges is due to him, and even now the province does not appear as a respondent, Her Majesty, as representing the Dominion Government, being the only respondent in the case now before me.

"It cannot be denied that, under the 111th section of the British North America Act, the Dominion of Canada is liable for the debts and obligations of each province existing at the time of the union. It may be that this section alone would not give, to a creditor of the province, the right of action against the Dominion government. But in this case the government of Canada, in the exercise of the duties imposed upon them by section 111, have thought proper to have a settlement made, and an account stated by order in council of the 30th of August, 1877, of this claim which was pending against the government of New Brunswick and that of Canada since 1842. The Constitutional Act has not provided for any particular procedure to be followed in adjudicating upon such claims. I cannot presume that

the province of New Brunswick was not called upon to defend her rights; on the contrary, admitting the averments of the petition to be true, I must take it as proved that the same procedure was adopted with regard to the province of New Brunswick as was followed with the provinces of Ontario and Quebec. A frequent and lengthy correspondence took place between the Dominion government and the provinces; the latter were requested to give their consent, but the province of New Brunswick appears to have kept aloof, and not to have wished to be a party to the proceedings.

1884
 THE QUEEN
 v.
 DUNN.
 —
 Fournier J.
 in the
 Exchequer.
 —

“Should this abstention, on the part of New Brunswick, prevent the Dominion government from effecting a settlement of this matter? Certainly not, and, especially if we take into consideration that the Imperial statute has not provided any particular procedure to be followed in settling such claims, the course which has been adopted by the Dominion government was, in my opinion, the only one left to them. It was impossible for the suppliant to proceed or take action against a province which had ceased to exist, and the Petition of Right Act, such as the one now in force, was not then in operation. The suppliant had therefore but one course left to him, and that was to petition the Dominion government, relying on section 111 of the British North America Act.

“It might be said, if the order in council passed on the 30th of August, 1877, founded upon the above section of the statute, was due to the initiative of the government, and passed simply in the ordinary discharge of a public duty, that it would not have given a right to the suppliant to claim his balance by petition of right, as was contended by the counsel for Her Majesty. But it is evident that the order in council was only passed after frequent and pressing solicitation on the part of those who were interested, and that it

1884.
 THE QUEEN
 v.
 DUNN.
 Fournier J.
 in the
 Exchequer.

contained conditions to be complied with by these interested parties, and these conditions being accepted and performed by them a valid contract subsisted between the government and themselves, and it is upon such a contract that the question arises: Does a petition of right lie against Her Majesty? This, in my opinion, is the sole question to be decided on this demurrer.

“The government of the Dominion of Canada, interested in the settlement of this claim, stipulated by their order in council that the suppliant or his grantor (*auteur*) should first obtain the consent of the Provinces of Ontario and Quebec in order to be paid the amount due to the suppliant by the old province of Canada, as stated in the order in council. The suppliant avers that he has obtained the consent stipulated; now does not the time occupied and necessary expenses incurred to obtain this consent constitute a valid consideration given by the suppliant and accepted by the government to induce them to pay the claim in question?

“This order in council has, in my opinion, created a contract for which the government have obtained a legal consideration, and although the consideration for the amount which the government had to pay may appear small, still the following passage from Addison on Contracts is an authority that it is sufficient (1):

“By the civil law if any one agreed to perform or effect anything, (whether that consisted in giving or doing something) on the understanding that another in his turn should do something, or give or deliver something, or *vice versa*, the person in whose favor the thing had been so delivered or done, was not permitted to be deficient in performing what was stipulated on his part, but was compelled to performance, so that, if there was a cause or consideration *facti vel traditionis*,

a corresponding obligation or duty arose. So, by the common law, if anything is performed which the party is under no obligation to perform, or if anything is given or done at the request of the promissor as the consideration or inducement for this promise, whereby the promissor, or party making the promise, has obtained or secured for himself some benefit or advantage, or where, by the promisee, or party to whom the promise has been made, has sustained *some trouble or loss, or suffered some injury or inconvenience, there is a sufficient consideration* to render this promise obligatory in law and capable of sustaining an action. The mere surrender or delivery of a letter or other written document which the promisee has a right to keep and retain in his possession, is a sufficient consideration for the promise, although the possession of it may turn out eventually to be of no value in a pecuniary point of view, or no benefit may have resulted to the one party nor prejudice to the other from the surrender and delivery of the document."

The suppliant and his grantor certainly come within the case mentioned in the above authority. They were under no obligation to the Dominion government to take the necessary steps with the Ontario and Quebec governments to obtain the required consent. They took these steps at the request of the Dominion government, and the necessity to take them was imposed upon them as a condition precedent to their getting paid the amount of their claim, In executing this condition they necessarily incurred trouble and expense, and all this is sufficient, under the above authority, to render the promise on the part of the government obligatory in law, and to form a contract which, between subject and subject, would be capable of being enforced by a suit at law, and which, as between a subject and the government, is a good cause for a

1884

THE QUEEN
v.
DUNN.Fournier J.
in the
Exchequer.

1884
THE QUEEN
v.
DUNN.

petition of right. The objection founded on the want of consent of the province of New Brunswick cannot be entertained.

—
Fournier J.
in the
Exchequer.

The province of New Brunswick could not, by refusing to recognize this claim, or by neglecting to take part in the proceedings adopted by the federal government in order to effect a settlement, prevent the latter from doing justice to the suppliant. This settlement having been effected between the suppliant and the government by means of the order in council above mentioned, it cannot now be in the power of the Province of New Brunswick to nullify its effect by simply stating that she never consented to this settlement.

“The question at present to be determined is not whether the province could have had or not the means of proving that there was nothing due on this claim, but the question is whether the Federal Government has made a settlement and stated an account, and having done so whether it is not obligatory on both the parties to the settlement. This I have endeavored to show they have by what I have already said.

“The defence has also attempted to derive an advantage from the fact that there is a clerical error in a copy of the petition and to rely upon it as a ground of demurrer to the petition. The order in council imposed on Tibbits the obligation to pay off an alleged indebtedness which the Province of Quebec claimed for certain dues on timber cut on the disputed territory and in the 17th paragraph of the petition, the suppliant avers, by error of the copying clerk no doubt, that he, the suppliant, had paid whatever was owing to the Province of Quebec, instead of stating that the same had been settled by Tibbits. This is clearly an error, for there is no allegation in any of the paragraphs of the petition that the suppliant Dunn had ever been indebted to the

Province of Quebec. There is only a reference that Tibbits owed certain sums for timber dues which had not been settled pending the settlement of this claim. We must therefore read paragraph 17 as alleging that James Tibbits, and not the suppliant, whose name is inserted by error, has fulfilled the obligation of satisfying the Province of Quebec. Notwithstanding this error the purport of the paragraph is easily ascertained and the objection founded on this error has no value.

1884
THE QUEEN
v.
DUNN.

Fournier J.
in the
Exchequer.

"I cannot either entertain the objection founded on the fact that because a transfer has been made by Tibbits of his claim to the suppliant, of which the government received due notice, Her Majesty is not answerable to the suppliant therefor. No doubt it was in the Crown's option to refuse its consent to such a transaction, but so far from doing so, the Crown has formally acquiesced in the same by paying to the suppliant large sums of money on account after the transfer had been communicated to it.

"As upon demurrer all facts alleged must be considered as duly proved I am of opinion for the reasons above stated that the allegations in the petition are sufficient in law to justify the prayer, and I therefore dismiss the demurrer with costs."

From this judgment the Crown appealed to the Supreme Court of Canada.

A. G. Blair Atty. General of New Brunswick, (*W. D. Hogg* with him) for appellant.

Laflamme Q.C. (*A. F. McIntyre* with him) for respondent.

The points relied on by counsel sufficiently appear in the judgments.

The following authorities and cases were cited and relied on:

1885
 THE QUEEN
 v.
 DUNN.
 —

For appellant: *Chitty* on Contracts (1); *Evans* v. *Verity* (2); *Lemere* v. *Elliott* (3); *Rustomjee* v. *The Queen* (4).

For respondents: *Grant* v. *Eddy* (5); *Canada Central Railway Co.* v. *The Queen* (6); *Isbester* v. *The Queen* (7); *Addison* on Contracts (8).

Sir W. J. RITCHIE C.J.—After giving a synopsis of the petition continued as follows:—

Tibbits, without alleging or showing any indebtedness to him from the Province of New Brunswick, the old Province of Canada, or the Dominion, claims a right to recover from the Dominion an amount alleged to be due from the Province of New Brunswick, not to himself, but to old Canada. This claim is based on an order in council in which the Dominion Government admit and declare there is an amount due from the Province of New Brunswick to old Canada, the said order declaring that the Province of Quebec had consented that the amount coming from the Province of New Brunswick should be paid to the parties entitled to the same and mentioned in the statement thereto annexed, and agreed with Tibbits and the other licensees that upon the consent of the Government of Ontario and Quebec being given thereto, the said amount should be paid to the respective claimants *pro rata* according to the amounts of their respective claims, subject to certain special conditions therein mentioned, that by a statement annexed to said order it appeared that Tibbits was one of the said claimants for a sum of \$20,897.14 which was thereby awarded to him. That the order in council was communicated by the Government to Tibbits and at his and the other claimants'

- (1) Pp. 601, 604.
- (2) 1 Ry. & M. 239.
- (3) 6 H. & N. 656.
- (4) 2 Q. B. D. 69.

- (5) 21 Gr. 588.
- (6) 20 Gr. 273.
- (7) 7 Can. S. C. R. 696.
- (8) 8 Ed. p. 5.

request and solicitation the Governments of Ontario and Quebec, to whom also said orders had been duly communicated by the Government of Canada by orders duly passed and communicated to said governments, ordered the payment by the Government of Canada of said sum of money to Tibbits.

1885
 THE QUEEN
 v.
 DUNN.
 Ritchie C.J.

The order in council provided that so much of the amount payable to Tibbits as should be necessary to meet a certain alleged claim of the Province of Quebec against Tibbits should be retained until the amount of his indebtedness to the Government of Quebec should be ascertained.

It is then alleged that all matters of account between the Government of Quebec and the suppliant have long since been settled by the payment by suppliant of all amounts due by him to Government of Quebec, so that government has no longer any claim to such moneys. Unless Tibbits could show that he had a valid claim against New Brunswick, Canada or the Dominion, I am at a loss to understand what right he has to this money, or how, in the absence of any indebtedness of New Brunswick or the others to him, he can make out a legal claim enforceable against the Crown to the money in question.

Apart from the orders in council and the statement of the report of Mr. Dawson and Mr. Langton, none of which could establish an indebtedness from New Brunswick to Canada, no indebtedness of New Brunswick to Canada is shown, still less is any indebtedness of New Brunswick, Canada or the Dominion to Tibbits alleged or shown. The learned judge who heard this case thus states the question :

The question at present to be determined is not whether the province could have had or not the means of proving that there was nothing due on this claim, but the question is whether the Federal Government has made a settlement and stated an account, and

1885 having done so whether it is not obligatory on the both parties to
 THE QUEEN the settlement. This I have endeavored to show they have by what
 v. I have already said.

DUNN. In the absence then of an indebtedness from New Bruns-
 Ritchie C.J. wick, or Canada, or of the Dominion, to Tibbits, where is
 — there any foundation for a legal liability of or right in
 the Crown to hand over this money to Tibbits, or any
 contract capable of being judicially enforced alleged in
 the petition of right? Or, in the absence of any such
 indebtedness, how could an indebtedness of New
 Brunswick or Canada to Tibbits for the sum claimed be
 incurred by reason of the orders in council set out in
 the petition? The learned judge says the federal govern-
 ment made and settled and stated an account, but of
 what and with whom? Certainly not with Tibbits,
 with whom there was no pre-existing indebtedness so
 far as the petition of right is concerned, none is alleged
 to have existed, and consequently neither the province
 of New Brunswick, or the province of Canada, or the
 Dominion of Canada, had any account to settle or state
 with Tibbits. The cases are very clear that without a
 debt or liability no account could be stated or settled.
 An account stated must refer to a debt due.

It is only necessary to refer to a few authorities to
 prove this conclusively.

Thus in *Bates v. Townley* (1), Platt B. says:

An account stated is the settlement of account, in which both
 parties or their agents agree upon the amount due from one to the
 other.

In *Kirton v. Wood* (2), per Tindal L. J. :—

On account stated you must show some precise sum.
 See also *Lane v. Hill*, (3); *Wayman v. Hilliard*. (4);
Wilson v. Marshall, (5); *Lemere v. Elliott* (6).

(1) 2 Ex. 160.

(2) I. M. & R. 253.

(3) 18 Q. B. 256.

(4) 7 Bing. 101.

(5) 2 Ir. R. C. L. 356.

(6) 6 H. & N. 656.

In *Wilson v. Marshall* (1) :

1885

The defendant promised the plaintiff orally, that if certain goods were supplied to A. a third party, he would see the plaintiff paid for them. The plaintiff accordingly supplied the goods, and A. left the country without having paid for them. The defendant subsequently orally acknowledged his liability to the plaintiff for the price of the goods.

THE QUEEN
v.
DUNN.
RITCHIE C.J.

Held, that the plaintiff was not entitled to recover in any action upon the account stated founded upon the acknowledgment; for, although the admission of liability to pay a liquidated sum is *prima facie* evidence of an account stated, evidence had been properly given to show the nature of the consideration upon which it was founded, and it appearing that the sum acknowledged was not the subject of a direct liability from the defendant to the plaintiff, a verdict for the defendant had been rightly entered.

Although an account stated may be founded upon a mere equitable liability, it must be a direct liability from the defendant to the plaintiff.

In that case *Pigott C. B.* says :—

Although, however, the account stated may be founded upon a debt or liability, as an equitable liability, (2) still there must be such debt or liability from the defendant to plaintiff. *French v. French* (3); *Petch v. Lyon* (4); *Lubbock v. Tribe* (5); see the judgment of Parke B., *Hopkins v. Logan* (6); *Lewis v. Elliott* (7); *Gough v. Findon* (8); Chitty on contracts (9).

The admission of a liability to pay a liquidated sum is *prima facie* evidence of an account stated. But the consideration of an account stated, (as in the case of *French v. French* and in the other cases of this class above cited) is always examinable, and it appears to me that if the sum acknowledged be not the subject of a direct liability from the defendant to the plaintiff, but the result of a collateral liability, for which only an action for damages would lie then consistently with the nature of the action upon an account stated such an action cannot be sustained as upon an account stated founded upon such a demand.

I need not further refer to the peculiar nature of that action. It is explained in several of the cases cited at paragraph 4 especially

(1) 2 Ir. R. C. L. 356.

(5) 3 M. & W. 607.

(2) See judgment of Blackburn J., 4 B. & S. 506.

(6) 5 M. & W. 241.

(3) 2 M. & G. 644.

(7) 6 H. & N. 656.

(4) 9 Q. B. 147.

(8) 7 Exch. 46.

(9) Ed. 1863, P. 589.

1885 in Mr. Justice Blackburn's judgment, *re Laycock Pickles* (1), and in
 THE QUEEN the judgment of Parke B., *Lubbock v. Tribe* (2), and *Hopkins v.*
 v. *Logan* (3).

DUNN.

Ritchie C.J.

In *Lemere v. Elliott* (4) Martin B. says :—

The old form of a count on an account stated was this :

"And whereas the said C. D. afterwards, to wit, on, &c., accounted with the said A. B. of and concerning divers sums of money from the said C. D. to the said A. B. before the time due and owing and then in arrear and unpaid. And upon that account the said C. D. was then and there found to be in arrear and indebted to the said A. B. in the sum of &c."

Wilde B.—

In *Porter v. Cooper* (5) Parke B. said :—"I agree with what has fallen from my brother Alderson in the course of the discussion, that in the later cases the courts have deviated far from what was the original meaning of an account stated. I take the rule to be this: that if there is an admission of a sum of money being due for which an action will lie, that will be evidence to go to the jury on the count for an account stated."

Pollock C. B. :—

An I O U professes to be the result of an account stated in respect of a debt due, and it is important not to make fiction supply the place of truth and say that an account has been stated in respect of a debt, when in reality there was none.

Martin B. :—

An account stated as that stated in the old form of declaration to which I have referred. No doubt what is said by Parke B. in *Porter v. Cooper* is the essence of it namely, that there must be an admission of a debt due. In *Whitehead v. Howard* (6), it was also said that there must be a real existing debt due.

Wilde B.—

I am of the same opinion. There was no sum admitted to be due for which an action would lie, and upon the substance of the transaction there was no debt to support an account stated.

I am constrained to the conclusion that on the facts alleged in the petition the Crown entered into no legal

(1) 4 B. & S. 507.

(2) 3 M. & W. 664.

(3) 5 M. & W. 248.

(4) 4 H. & N. at p. 657.

(5) 1 C. M. & R. 387, 394.

(6) 5 Moore 105.

or binding contract with Tibbits to pay him the money claimed enforceable by petition of right. I have had an opportunity of reading a carefully prepared judgment in the case by my brother Gwynne, in which he has discussed the question raised so fully and exhaustively that it would be waste of time to add anything further.

1885
 THE QUEEN
 v.
 DUNN.
 Ritchie C.J.

I am therefore of the opinion that the appeal should be allowed.

FOURNIER J'.—I am sorry to say, that after hearing the reasons given for allowing the demurrer I am not yet convinced that the petition is not sufficiently framed to allow the parties to be heard on the merits.

The origin of the claim has not been referred to in the reasons I have heard. Now, this claim arises out of a license to cut timber by the Crown. That was a perfect contract between Tibbits and the Crown, and when the latter could only get his timber upon paying penalties, he was obliged to give up, and subsequently tried to get relief for the damage and loss he had sustained through the breach of contract. The Quebec government were willing to pay, but New Brunswick would not take any part in a settlement, and prevented, as much as it was in their power, a settlement.

Now, the Dominion Government, in view of the power given to it by the 111th section of the British North America Act, took upon itself to settle this claim, as I think they had power to do. I am very willing to admit that before a settlement is made the party must show he has a claim. Now, I adhere to my former opinion, that the petition has alleged enough to show that the suppliant has a claim not only by alleging all and setting out all the facts since it originated, but also by stating, in the most positive way, that there has been an account stated and settled, and in support of

1885
THE QUEEN
v.
DUNN.
—
Fournier, J.
—

that allegation he relies on the order in council, in virtue of which it is admitted he received payments on account. The New Brunswick Government is not represented in the case, but is acting as if it were. I do not think the Dominion Government would have ever consented to deny their liability under the most solemn Act they can pass, had it not been urged to do so in the interests of New Brunswick. In settling with Tibbits, I am of opinion that the Government of Canada, in case New Brunswick refused to proceed, had, under the British North America Act, a right to proceed *ex parte*. There is, it is true, no procedure provided by the Act, but if a province refused to settle, simply because they have no desire to pay, I think power is given to the Dominion to settle. The Dominion has admitted there was a debt and they bound themselves to pay it. Now, I do not say that because the Dominion have agreed to pay that the Province of New Brunswick is bound to recoup the Dominion Government. That is a matter which may be discussed hereafter. The suppliant in this case has furnished the consideration he was bound to furnish, viz., the obtaining of the consent of the provinces, which cost him time and expense, and that is a legal consideration for a contract. I cannot understand how the government can relieve itself from such a solemn obligation. I gave a written judgment in the court below to which I adhere, and the appeal, in my opinion, should be dismissed.

HENRY J. — We often hear the maxim repeated "That the Crown can do no wrong." But if the Crown is to be judged by the action of the government in this case I think we can come to the conclusion that the Crown can do wrong. That they can solemnly promise to pay and then refuse to pay is *prima facie* evidence that the Government, at all events, can do wrong. This is involved in this case, and what is it founded on ?

Plaintiff was engaged in cutting timber and had obtained a license from the Province of Quebec and entered upon the business. New Brunswick, alleging claim to land upon which the timber was cut, had it seized, and it was released only on payment of fines. The respondent's assignor continued business for some years and then abandoned it. Finally the line between New Brunswick and Quebec was settled. After this it became a question as to how the accounts stood between the provinces on account of this land. A commission was appointed to ascertain this. One of the commissioners did not report, the other did and reported a large sum due by New Brunswick, and the account was subsequently investigated by the Auditor General and approved. Under these circumstances we can fairly assume that there was a debt, although there was no binding obligation on New Brunswick.

Setting out with that, when confederation took place, the Dominion was saddled with the responsibility of paying the liability of each of the provinces. That being the case and the Government of Quebec finding that Tibbits had a legal claim and that New Brunswick had so much to pay, were willing that the Dominion Government should appropriate that amount to pay him and others similarly situated.

Here then was a debt and liability admitted by the Province of Quebec to Tibbits which they requested the Dominion Government to pay, and they gave an order to the Dominion Government to pay the money. Now suppose the Dominion Government were in a position to say to Quebec "we have paid that money." Could Quebec object to it? Could it be said the money had been paid illegally? It is admitted they paid portions of this amount and made a statement of account showing a balance due Tibbits, but through some influence the Government of New Brunswick have been mixed up

1885
 THE QUEEN
 v.
 DUNN.
 Henry J.

1885
 THE QUEEN
 v.
 DUNN.
 Henry J.

with the case and raised objection to the payment of the balance. Why New Brunswick should have interfered and object to the Dominion paying what, at the request of Quebec, they had undertaken to pay, I cannot understand. The Dominion Government say that New Brunswick was opposed to the demand, and they, therefore, declined to pay the balance due to Tibbits. I am of opinion that it is too late to allege that as a defence. I cannot conceive any immediate interest New Brunswick had in the transaction or any right to interfere. We all know that an equitable consideration is sufficient on an account stated. We are told that there must be an indebtedness. The amount is not in doubt here. It has been well ascertained and fixed and the documents in the department shows the amount due. I think there was a good account stated. If a party is liable merely for damages but an account is stated and payments made on account would it not be a good account upon which an action would lie? I think there was a good claim and I am very much inclined to think that if a private individual had stated that account he would have been told "Sir, you understood the matter and accepted an order from one party to pay money to another, you paid a part of it and stated an account showing a balance due and have entered into a binding contract to pay it."

I think the respondent has a good claim against the Dominion Government for that balance and that demurrer should not be set aside.

TASCHEREAU J.—I am of opinion to allow this appeal. The petition of right shows no ground for a recovery against the Crown. There is no allegation that the Province of New Brunswick was indebted to the suppliant at the date of confederation. Even then it is doubtful if under section 111 of the British North

America Act, he would have had a right of action against the government. Then there is no allegation that the seizure of the timber by New Brunswick was a wrongful act on the part of that government, for it is not averred that the timber was not cut on these lands of New Brunswick, and if cut on such lands it would then have been legally seized and legally taken out of the suppliant's possession; and if not cut on its lands then the seizure of this timber by New Brunswick would have been a tort, and not a debt or liability of the province under section 111 of the British North America Act.

1885
 THE QUEEN
 v.
 DUNN.
 —
 Taschereau,
 J.
 —

The order in council embodies no contract between the Crown and the suppliant, but merely an arrangement between the Dominion and the Provinces of Quebec and Ontario.

I fully concur in Mr. Justice Gwynne's notes of which I have had communication.

GWYNNE J.—I am of opinion that this appeal must be allowed, and that judgment must be ordered to be entered in the Court of Exchequer, allowing the demurrer. I find it difficult to understand upon what foundation it is that the suppliant's claim is intended to be rested, for Mr. Laflamme, as I understood him, at one time contended that the order in council of the 30th of August, 1877, operated as an acceptance by the Dominion Government of an order of the provinces of Quebec and Ontario to pay Tibbits a sum of money due by those provinces to him, out of their moneys in the hands of the Dominion Government, and their undertaking with Tibbits to pay him such sum. At another time he contended that the order in council operated as an adjudication by the Dominion Government which, as was contended, they were competent to make of a sum of money as being due from New Bruns-

1885
 THE QUEEN
 v.
 DUNN.
 ———
 Gwynne J.

wick to old Canada and by the latter to Tibbits, and as a promise to Tibbits; founded thereon, to pay him; at another time, while expressly admitting that the petition of right must fail if it asserted a claim against the Dominion Government by way of indemnity for the original loss sustained by Tibbits in the exercise of his license rights, still he contended that the Dominion Government, as representing old Canada, was originally liable to Tibbits to pay him the amount claimed as a debt due to him by old Canada, and that the Dominion Government, by the order in council, ascertained and determined, as it is contended it was competent for them to do, that the amount claimed was such a debt. Again, he contended that the Dominion Government, in passing the order in council, acted in the double capacity of being itself the representative of the old provinces prior to confederation, and as being an arbitrator between the government of the province of New Brunswick and the governments of Ontario and Quebec, as representing old Canada; and as to the words in the order in council: "Subject to certain conditions therein mentioned," he contended that taking paragraphs 17 and 25 of the petition of right together, they comprehended an allegation that all conditions were fulfilled, or that their fulfilment was waived. Now, that the order in council in itself, irrespective of there having ever been any prior obligation or debt imposed upon, or incurred by either of the old provinces in existence, prior to confederation, is the sole foundation upon which the petition of right rests the suppliant's claim, and that this claim is for payment out of moneys alleged to have been due from New Brunswick to old Canada prior to confederation to the suppliant, as assignee of Tibbits, all sums of money not alleged as having been due to him, prior to the making of the order, but which, as the petition insists,

became by the order in council a debt, due from the Dominion Government to Tibbits, appears to me, to be the only case to be collected from the petition, as being sought to be made by it. If the allegations in the petition leave any doubt upon this point, such doubt seems to me, to be wholly removed by the prayer of the petition, which is that the government of Canada may be declared, under the said order in council to be indebted in the said sum of \$25,400, with interest thereon at six per cent. per annum, and may be ordered to pay the same to your suppliant. What the petition alleges in substance, is that the government of old Canada, prior to confederation, in the years 1842 and 1844, issued licenses to one Tibbits, to cut timber upon certain lands lying on the confines of the provinces of old Canada and New Brunswick, which lands the petitioner calls, disputed territory, that is to say, claimed by old Canada and New Brunswick respectively—that the government of New Brunswick in the assertion of their claim, seized the timber when passing down through New Brunswick to the sea, and detained the same, until Tibbits paid certain charges demanded by New Brunswick—that the sums so imposed upon, and paid by Tibbits, made the cutting of timber so unprofitable, that Tibbits ceased cutting any more—that the boundary being still in dispute, the matter was referred to arbitrators, who made an award determining certain boundaries, which boundaries an Imperial Act 14th and 15th Vic., ch. 63, fixed as the boundary between old Canada and New Brunswick—and that the Act directed that the net proceeds of the funds in the hands of old Canada and New Brunswick respectively, arising from the territory in dispute between the provinces, should be applied: 1st, to defray the expenses of the arbitration; 2nd, to defray the necessary expenses of running the boundary line as settled, and in case

1885
 THE QUEEN
 v.
 DUNN.
 Gwynne J.

1885
 THE QUEEN
 v.
 DUNN.
 Gwynne J.

such funds should prove insufficient the expenses to be borne equally by the respective governments, and 3rd, the balance of the funds to be applied towards the improvement of the land and water communication between the rivers St. John and St. Lawrence.

Now stopping here for a moment, it is to be observed that there is no allegation whatever that any legal demand had accrued to Tibbits, either against old Canada or New Brunswick, for the seizure by New Brunswick of the timber cut by him under the Canada licenses or for any other cause whatever. For all that appears the act of the New Brunswick authorities in seizing that timber may have been quite illegal. There is nothing from which it can be collected that the land upon which the timber was cut did not prove to be in old Canada; and as to the moneys received by New Brunswick, in respect of the timber seized, they were appropriated to specific purposes by the Imperial Act. It is not, however, upon the fund consisting of the proceeds of moneys arising from the territory which had been in dispute that the claim of the suppliant as the assignee Tibbits is made, but upon a sum of money alleged to have become due from New Brunswick to old Canada for the excessive outlay of the latter province in running the boundary fixed by the Act, the expense of which was directed by the Act to be borne equally by old Canada and New Brunswick respectively.

The petition then proceeds to allege that in the fall of 1855 a joint commission consisting of Messrs. Dawson and Cutler was appointed by the two provinces (old Canada and New Brunswick) to investigate and report upon the funds accrued from the disputed territory, and upon all questions of bonds to be prosecuted and enforced (referring to bonds given by certain licensees), or claims to be remitted in connection there-

with; and the running of the boundary line having been finished, that the commissioners were required to ascertain the amount spent on that survey by each government and strike a balance between the provinces on the transactions. The petition then alleges that no such report was ever made by the said commissioners jointly, but that the said Dawson, by a report made by him alone, dated the tenth day of August, eighteen hundred and sixty-three, found that the sum of twenty thousand two hundred and sixty-three dollars and thirty-one cents was due by New Brunswick to Canada as a balance of all the transactions, the amount expended by the province of Canada in respect of the said boundary survey, having been largely in excess of the sum expended by the province of New Brunswick in respect of the same object, and that the same figures were afterwards arrived at by Mr. Langton, Dominion auditor, in a memorandum of his upon the matter, made on the 31st day of May, 1871, as showing a correct balance as aforesaid.

1885
 THE QUEEN
 v.
 DUNN.
 Gwynne J.

Now, here it is to be observed that the petition does not allege, as a matter of fact, that the province of New Brunswick, prior to confederation, was indebted to the province of old Canada in the sum of \$20,263.31 for monies expended by the province of old Canada in excess of the equal share of that Province in the cost of the boundary survey, but that Mr. Dawson had so found; and it is not alleged that Mr. Dawson alone, by a report of his not joined in by his co-commissioner, had, or could have, established such sum to have been due from New Brunswick to old Canada. It may be quite true that Mr. Dawson's report was a correct finding, that New Brunswick was indebted in such amount to Canada, but the fact of the existence of the debt is not alleged; all that is here alleged being that Mr. Dawson, in a report made by him, asserted the existence

1885
THE QUEEN
DUNN.
Gwynne J.

of the debt, and that Mr. Langton, Auditor-General of the Dominion after confederation, concurred in the figures as reported by Mr. Dawson. However, not to rest upon the nakedness of this allegation in the petition, we may assume it to be alleged that New Brunswick was at the time of confederation indebted to old Canada in the above amount, for the case made by the petition upon the basis of the existence of such debt, is in the 12th paragraph of the petition of right stated to be, that under the British North America Act the indebtedness of the said province of New Brunswick to the said province of Canada, became a liability of and was assumed by the Dominion of Canada, and thereafter the said Dominion became bound to recover the same amount so due from New Brunswick and to credit the same to the old province of Canada, now the provinces of Ontario and Quebec respectively. With what view this paragraph was inserted in the petition, and what bearing it can have upon the case sought to be made for the suppliant, I find it difficult to understand: for, if, as is alleged in the paragraph the said debt of New Brunswick to the Province of old Canada became upon confederation a liability of and was assumed by the Dominion of Canada, the dominion became the debtor in lieu of old New Brunswick, and in such case could not be the creditor of, and entitled to recover the amount from, the Province of New Brunswick as constituted by the Confederation Act as debtor of the Dominion, and if, as is also alleged in the paragraph, the Dominion became bound to credit the same amount to the provinces of Ontario and Quebec that could only be by force of some provision of the British North America Act, and the obligation if existing and enforceable by process of law can only be so at the suit of the provinces of Ontario and Quebec, or of one of them.

The petition then alleges that Tibbits frequently

requested of the Governments of Canada and of the provinces of Ontario and Quebec—that the balance due by New Brunswick might be obtained and paid over to himself and the several parties who had been licensees in the disputed territory, by way of compensation to them for the serious losses they sustained. Now, as there is no previous liability alleged as having accrued to Tibbits, either from old Canada or from the Dominion of Canada, or from the provinces of Ontario or Quebec to pay any sum by way of compensation to Tibbits for any losses he may have sustained by reason of New Brunswick having seized his timber, the requests which are in this paragraph alleged to have been made must be taken to have been made to the governments named in the paragraph for the gratuitous application of moneys alleged to have been due from the old province of New Brunswick to old Canada, by way of compensation for losses with the occurring of which it is not alleged that old Canada, or Ontario, or Quebec, had anything to do, and in respect of which it is not alleged either that the old Province of New Brunswick or the Dominion of Canada, as representing it, had incurred any liability. The petition then proceeds in its 14th, 15th, 16th, 17th, 24th and 25th paragraphs, to state the facts upon which, as is contended, the right of the suppliants to recover as assignee of Tibbits, which in paragraphs numbering from 18 to 23 inclusive, he is alleged to be, is founded.

In the 14th paragraph it is alleged that the Privy Council of Canada on the 30th day of August, 1877, passed an Order in Council whereby it was acknowledged and declared that the said sum of \$20,263.31, with interest thereon at six per cent. per annum from the 12th November, 1856, was then due by the province of New Brunswick to the late province of Canada in

1885
 THE QUEEN
 v.
 DUNN.
 Gwynne J.

1885
 THE QUEEN respect of the matters aforesaid, which said sum, with
 interest, amounts to \$45,491.13.

v.
 DUNN.
 Gwynne J. In the 15th paragraph it is alleged that the said Order
 in Council declared that the province of Quebec had
 consented that the amount coming from the Province
 of New Brunswick should be paid to the parties entitled
 to the same, and mentioned in a statement thereunto
 annexed and agreed with the said Tibbits and the other
 licensees that upon the consent of the Governments of
 Ontario and Quebec being given thereto the said
 amounts should be paid to the respective claimants
pro rata, according to the amounts of their respective
 claims, subject to certain special conditions therein
 mentioned, and that, by a statement annexed to the said
 Order in Council it appeared that one James Tibbits
 was one of the said claimants for and in respect of a
 certain sum or balance of \$27,897.94 as therein set forth
 and which was thereby awarded him. Reading this 15th
 paragraph grammatically, it simply alleges that the said
 Order in Council declared that the Province of Quebec
 had consented, &c. &c., and agreed with Tibbits and the
 other licensees that upon the consent of the Govern-
 ments of Ontario and Quebec being given thereto the
 said amount should be paid to the respective claimants
pro rata, according to the amount of their respective
 claims, subject to certain special conditions therein
 mentioned. This, it has been contended, is a narrow
 and incorrect reading of the paragraph, and it is con-
 tended on behalf of the suppliant that what the para-
 graph alleges is: that the Order in Council declared,
 &c., &c., and agreed with the said Tibbits, &c., &c.,
 and so reading it the contention is that the paragraph
 in substance alleges that the Privy Council of Canada,
 by the said Order in Council, "agreed with the said
 Tibbits and the other licensees, that upon the consent
 of the Governments of Ontario and Quebec being

given thereto the said amount, should be paid to the respective claimants, *pro rata*, according to the amounts of their respective claims, subject to certain special conditions therein mentioned.

1885

THE QUEEN
v.
DUNN.

Gwynne J.

There is no allegation of the existence of any debt as having been due to Tibbits from the province of old Canada, which would justify the appropriation of any moneys belonging to old Canada by way of payment of any sum of money to Tibbits. No claim whatever of Tibbits against the Province of old Canada, either of the nature of a debt due to him or of damages recoverable by him as for the breach of any contract made with him is alleged. Assuming, therefore, the paragraph to be susceptible of the construction contended for by the suppliant, namely, as alleging that the Privy Council of Canada, by the Order in Council, agreed with Tibbits and the others, &c., &c., it amounts merely to an allegation that the Privy Council of Canada agreed with Tibbits and the others, that the amount due from New Brunswick to old Canada should be appropriated in payment to Tibbits and the others, *pro rata*, of the amounts of their respective claims as stated in a memorandum annexed to the Order in Council, not in discharge of any liability of old Canada to any of them, but gratuitously upon the Governments of Ontario and Quebec, assenting to such gratuitous appropriation of such fund and subject to certain special conditions in the Order in Council mentioned. If it were necessary for the decision of this case to pass upon the validity of such an Order in Council, I, for my part, am prepared to hold that an Order of the Privy Council of Canada assenting to such gratuitous appropriation of monies belonging to old Canada upon the consent of the Governments of Ontario and Quebec being given to such gratuitous appropriation, does not constitute a debt due from the Dominion of Canada to Tibbits or

1885³²
 THE QUEEN
 v.
 DUNN.
 —
 Gwynne J
 —

give to Tibbits any claim against the public funds of the Dominion of Canada or of old Canada, under the control of the Dominion or against the Dominion Government, as representing old Canada or otherwise howsoever, which is recognizable or enforceable on a petition of right against Her Majesty. The Privy Council of Canada has not, by the constitution, any such absolute power of affecting the Dominion of Canada, or its public funds, with any liability under such a state of facts, and unsupported by any legal consideration. But it is unnecessary in this case to pass upon that point, for the only agreement alleged, if there is any, is to appropriate monies alleged to be due from New Brunswick to old Canada in payment to Tibbits, and others *pro rata*, certain sums mentioned in a memorandum annexed to the Order in Council, not merely on the consent of the Governments of Ontario and Quebec to such payment, but upon certain special conditions alleged to be mentioned in the Order in Council, and there is no allegation whatever as to the nature of those conditions, nor of their fulfilment, nor as to what would be the *pro rata* amount payable to Tibbits out of the particular fund mentioned, nor that such sum, or any part of it, remains unpaid. The 16th paragraph alleges, that the said Order in Council was communicated by the said government to Tibbits, and that at his, and the other claimants' request, the Governments of Ontario and Quebec, to whom the said Order in Council had also been communicated by the Government of Canada by Orders in Council duly passed, and communicated to the said government, ordered the payment of the said sum of money and interest to the said James Tibbits.

This paragraph is only material inasmuch as upon it the right of Tibbits, and of the suppliant as his assignee, to recover upon this petition of right is put

by the judgment of the Court of Exchequer upon the contention that Tibbits and the others having, as is alleged in the paragraph, procured the Governments of Ontario and Quebec to pass the Orders in Council, whereby they ordered the payment of the said sum of money to Tibbits, constitutes sufficient consideration, independently of the existence of any other, to support the promise by the Dominion Government to pay the said sum to Tibbits, which (as is also contended) is contained in the Order in Council. Whether the Order in Council can be construed as containing any such contract or promise, as made with, or to Tibbits, it is not necessary to decide, for, assuming it to be susceptible of that construction, I am of opinion that the consideration relied upon, however sufficient it might be to support a promise by a subject to a subject, to pay a sum of money, as to which I express no opinion, such a consideration cannot support a promise made by the Privy Council of Canada, so as to create a debt not founded upon any other consideration as due to Tibbits by the Dominion Government, recoverable by petition of right against Her Majesty as executive head of the Dominion Government. The public funds of the Dominion cannot be affected with a liability upon any such consideration. The 17th paragraph alleges that it was provided by the said Order in Council, that so much of the said amount as might be payable to the said Tibbits, as should be necessary to meet a certain alleged claim of the Province of Quebec against him, should be retained until the amount of his alleged indebtedness to the Government of Quebec should be ascertained either by agreement of the parties, or by some process of law, and the paragraph then proceeds thus:—

But as your suppliant alleges all matters of account between the said Government of Quebec and your suppliant have long since been

1885
 THE QUEEN
 v.
 DUNN.
 Gwynne J.

1885 settled, by the payment by your suppliant of all amounts due by
 THE QUEEN him to the said Government of Quebec, so that the said govern-
 v. ment has no longer any claim to such monies or any part thereof.

DUNN.

Gwynne J.

Then, the 24th paragraph alleges that the Govern-
 ment of Canada have acted upon the Orders in Council
 passed as aforesaid by the Governments of Ontario and
 Quebec, and have paid on account of the monies of as
 aforesaid payable to Tibbits under the said Order in
 Council of the 3rd August, 1877, certain amounts set
 out and amounting in the whole to \$10,239.32; and by
 the 25th paragraph the suppliant submits that on the
 said 30th day of August there was a settlement made and
 an account stated between the said Government of
 Canada and the said Tibbits, whereby the said amount
 of \$27,897.94 was established on the amount then due to
 the said Tibbits, up to 12th day of August of that year,
 for the causes aforesaid, which sum with interest from
 the date last aforesaid was agreed to be paid by the
 said government, so soon as authority thereunto should
 have been received from the said Governments of
 Ontario and Quebec.

Now, assuming the 17th paragraph to allege that all
 matters of account between the Government of Quebec
 and Tibbits, instead of "between the said government
 and your suppliant" as the paragraph does allege, had
 been settled by the payment by Tibbits of all amounts
 due by him to the said Government of Quebec, &c., &c.,
 &c., it is contended that this paragraph, so read,
 together with what is alleged in the 25th paragraph,
 amounts to an averment that all conditions mentioned
 in the Order in Council of the 30th of August, 1877, were
 fulfilled or waived, but there is no allegation that this
 condition referred to in this paragraph was the sole
 condition mentioned in the Order in Council, to which
 the words therein "subject to certain special conditions
 in the said order mentioned" apply; and as for the 25th

paragraph, what is contended for in it is that what took place on the 30th August, 1877, when the Order in Council of that date was passed, was an account stated between the Government of the Dominion of Canada and Tibbits, whereby the sum mentioned in the order was found to be due from Canada to Tibbits, but as there is no previous transaction in the nature of a debt or contract alleged to have existed between the Government of Canada and Tibbits, in respect of which a valid account stated, could be had, it is futile to contend that the suppliants claim can be sanctioned as upon an account stated; moreover, the Order in Council which is relied upon as the sole evidence to establish the liability of the Government of Canada to Tibbits, does not establish or profess to establish the sum of \$27,897.94, or any sum as then due by the Government of Canada or by any person to Tibbits; all that it professes to do is to refer to that sum as an amount mentioned in a memorandum annexed to the order, as an amount claimed by Tibbits to be the amount of his losses in getting out the timber which the authorities of New Brunswick seized, and to order that if the Governments of Ontario and Quebec should consent to the appropriation of the sum alleged in the order to be due from New Brunswick to old Canada towards the payment of such losses, and like losses of other persons similarly situated with Tibbits the same should be paid to Tibbits and the other licensees *pro rata*, that is in proportion to the amounts of their respective claims for their losses. And as for the allegation in the 24th paragraph, the payments therein alleged to have been made may have been the whole amount by the order directed to be paid to Tibbits as his *pro rata* share of the fund so appropriated, and, moreover, such payments having been so far as appears by the petition of right made wholly *ex gratia* unfounded upon any legal con-

1885
 THE QUEEN
 v.
 DUNN.
 Gwynne J.

1885
THE QUEEN
v.
DUNN.
Gwynne J.

sideration, such payments could never impose a legal obligation, giving to Tibbits or his assignee any claim enforceable by petition of right for the recovery from Her Majesty as executive head of the Dominion of Canada, or any further portion of his alleged losses. Upon the whole, I am of opinion that the petition of right fails to disclose any case sufficient to warrant a judgment against Her Majesty.

Appeal allowed with costs.

Solicitor for appellant: *Geo. F. Gregory.*

Solicitors for respondent: *Robertson, Ritchie & Fleet.*
