HER MAJESTY THE QUEEN (DEFENDANT) ..... APPELLANT;

AND

DAVID H. HENDERSON AND NORMAN B. T. HENDERSON (PLAINTIFFS) ..... RESPONDENT.

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*Feb. 15, 16.

*May 14.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Statute, construction of—Public works—Railways and canals—R. S. C. c. 37, s. 23—Contracts binding on the Crown—Goods sold and delivered on verbal order of Crown officials—Supplies in excess of tender—Errors and omissions in accounts rendered—Findings of fact—Interest—Arts. 1067 & 1077 C. C.—50 & 51 V. c. 16, s. 33.

The provisions of the twenty-third section of the "Act respecting the Department of Railways and Canals" (R. S. C. ch. 37,) which require all contracts affecting that Department to be signed by the Minister, the Deputy of the Minister or some person specially authorized, and countersigned by the secretary, have reference only to contracts in writing made by that Department. (Gwynne J., *contra.*)

Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties, payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing. (Gwynne and King, JJ., *contra.*)

Where a claim against the Crown arises in the Province of Quebec and there is no contract in writing, the thirty-third section of "The Exchequer Court Act" does not apply, and interest may be recovered against the Crown, according to the practice prevailing in that Province.

APPEAL from the judgment of the Exchequer Court of Canada (1), upon a reference by the Minister of Railways and Canals, in favour of the plaintiffs for the amount of their claim for lumber sold and delivered, with interest and costs.

PRESENT: —Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 6 Ex. C. R. 39.

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The plaintiffs' claim was for the recovery of lumber sold and delivered to Her Majesty for the construction of the Wellington bridge and the Grand Trunk bridge over the Lachine Canal, at Montreal.

The following statement of the facts of the case, as disclosed at the trial, is taken from the judgment of His Lordship Mr. Justice Taschereau.

On the twenty-sixth of November, 1892, the Government through their officer, Edward Kennedy, Superintendent of the Lachine Canal, invited tenders for the supply of lumber and timber required in the construction of the Wellington Street Bridge across the Lachine Canal at Montreal. The respondents tendered, and, their tender being accepted, they commenced in the month of December, 1892, to supply and deliver lumber and timber to the Government officers in charge of the works. There was no formal contract entered into and nothing further than the tender and acceptance of it took place, so far as any written agreement was concerned.

Shortly after the construction commenced the respondents were requested to furnish and did furnish large quantities of lumber and timber of sizes and kinds differing from those mentioned in the invitation for tenders, and during the month of December, 1892, and the months of January, February, March and April, 1893, they, at the request and upon the orders of the officers in charge of the works, supplied and delivered at the works for the Wellington Bridge and for another bridge in course of construction by the Government in the same locality, called the Grand Trunk Bridge, a quantity of timber and lumber largely in excess of what was originally contemplated when the invitation for tenders was issued. The value of the timber and lumber so supplied and delivered amounted to the sum of $64,427.44. The value of the

approximate quantity which, in the contemplation of the Government, at the time the tender was made, would be required amounted to $14,025.25, so that the quantity of timber and lumber actually supplied and delivered by the respondents, amount to $50,-402.19 in excess of the amount mentioned in the invitation for tenders. This increase in quantity of timber and lumber so delivered and supplied was caused largely by circumstances to which it is unnecessary to refer. Suffice it to say that it is clearly proved that during the whole of the work of construction of these bridges, the officers of the Government in charge of the construction, from day to day sent their orders and requisitions to the respondents for lumber and timber. There was no distinction made by them as to whether the lumber and timber required were within the kinds and quantities of lumber and timber in the original tender, or whether it was of a different kind altogether. The respondents upon all of such requisitions delivered the timber and lumber so ordered by the officers of the Government, and at all times during the continuance of the said works, they supplied all demands made upon them for lumber and timber to be used upon the construction of the said bridges.

At the end of each of the months of December, 1892, and January, February, March and April, 1893, they prepared and furnished detailed accounts of all the lumber and timber supplied and delivered to the officers of the Crown under their orders as aforesaid, and these accounts, amounting in all to the sum of forty-three thousand, eight hundred and sixty-five dollars and six cents, were duly certified and forwarded to the Department of Railways and Canals and paid. The account for lumber and timber supplied and delivered for the month of April, 1893, was

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likewise duly prepared in detail and duly certified, but the Government refused to pay it, and upon such refusal the respondents obtained from the Minister of Railways and Canals a reference to the Exchequer Court of their claims to, amongst other sums, the amount thereof, namely $16,155.65.

The present appeal is from the judgment of the Exchequer Court, upon the reference, in favour of the plaintiffs for their claim with interest and costs.

Chrysler Q.C. for the appellant. No contract has been established binding upon the Crown, under the provisions of R. S. C. ch. 37, secs. 6, 11 and 23. No contract can be implied which would enable subordinate officers and servants of the Crown to bind the Crown indirectly, in cases where they could not do so directly; and the statute applies to a contract whether wholly or partially executed. The appellants rely upon: *Hunt* v. *Wimbledon Local Board* (1); *Young* v. *Mayor of Leamington Spa* (2); *British Insulated Wire Co.* v. *The Prescot Urban District Council* (3); *Waterous Engine Works Co.* v. *The Town of Palmerston* (4); *Wood* v. *The Queen* (5) per Richards C. J. at page 645; *Bernardin* v. *Municipality of North Dufferin* (6).

The Crown cannot be held liable for goods of which no benefit has been received, and it has been shown that a very large quantity of the lumber and timber charged for as delivered on the Government works, was not used in the works, nor required for use there, but was stolen and wasted. It is also clear that the respondents must have been aware of these misappropriations and misfeasances, from the nature of their dealings with the officials in charge of the works.

(1) 4 C. P. D. 48.
(2) 8 App. Cas. 517.
(3) [1895] 2 Q. B. 463.
(4) 21 Can. S. C. R. 556.
(5) 7 Can. S. C. R. 634.
(6) 19 Can. S. C. R. 581.

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As to the alleged omissions, for which the sum of $4,219.26 has been allowed, the evidence is wholly insufficient to warrant the opening up of accounts which have been accepted and paid: No sufficient explanation is given. If from the course of dealing a contract may be implied to pay for goods delivered under the same circumstances as those which were paid for by the Crown, and included the sum of $43,862.06, then such implied contract can only apply to goods delivered to and accepted by the officials upon the canal appointed for that purpose and upon accounts rendered to and certified by them. The claimants cannot by verbal testimony surchange and prove omissions in accounts rendered by them as full statements to date, audited and certified by the officers in charge of the work. Even if a contract should or may be implied against the Crown, there cannot be any implied contract to pay for goods not accepted, received or certified for by the agents of the department appointed for that purpose.

As to the right of the claimants to recover interest, the Exchequer Court judge states (1), that the interest was allowed upon the authority of *St. Louis* v. *The Queen* (2), and not because he had formed any decided view that the plaintiffs were entitled to it; and apart from that case, he was not at all sure that the Crown was bound by the practice prevailing in Quebec to allow interest from the service of the writ. The appellant submits that, in any result of the case, interest should not be allowed against the Crown. See *The Queen* v. *MacLean, et al* (3); *In re, Gosman* (4); *Toronto Railway Company* v. *The Queen* (5). The case of *The*

(1) 6 Ex. C. R. at page 49.
(2) 25 Can. S. C. R. 649, at page 665.
(3) Cass. Dig. (2 ed.) 399.
(4) 17 Ch. D. 771; 45 L. T. 267; 50 L. J. Ch. 624.
(5) 25 Can. S. C. R. 24; (1896) A. C. 551.

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Exchange Bank of Canada v. *The Queen* (1) is clearly distinguished.

Hogg Q.C. for the respondents, (*Greenshields Q.C.* with him). The learned judge of the court below has found, as a matter of fact, that the lumber and timber claimed by the respondents to have been supplied to the Government of Canada, and for which they bring their action, was actually sold and delivered to the Crown; and that such lumber and timber had been ordered and accepted by the officers and agents of the Crown. There is ample evidence in support of these findings of fact and it is uncontradicted. During the previous months, (December, January, February and March), lumber and timber ordered by the same officers in large quantities, for the purposes of construction of the bridges, were supplied and delivered by the respondents, although the original tender quantities had been during those months largely exceeded, and the government, knowing that the quantities then supplied, were greatly in excess of the original tender, knowing that these quantities were being procured from the respondents upon the orders and requisitions of their officers, knowing that no new tender had been authorized or asked for, raised no objections to the course of dealing between the officers and the respondents, but paid these four monthly accounts, as they were presented, upon the certificates of these officers. The effect of this conduct on the part of the Crown, was to ratify not only the course of dealing for the delivery of the lumber and timber during these previous four months, but to ratify and approve of the whole actions of the officers with the respondents respecting the obtaining and delivering of lumber and timber for the bridges, and the Crown is bound in like manner to pay the present account,

(1) 11 App. Cas. 157.

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both for lumber and timber supplied in April and for other material delivered during the five months, but by error omitted from their accounts as rendered. This material was, according to the evidence of the respondents, delivered during the whole period of the dealings between the parties, and ascertained by report of the referee, supported by evidence and confirmed by the judge in the court below. The twenty-third section of the Railways and Canals Act applies only in the case of contracts in writing and is no answer to a claim made for payment for goods actually delivered and accepted and used by the Crown. See *Wood* v. *The Queen* (1).

The respondents were not responsible for the acts and dealings of the government officers and workmen with the lumber and timber after it had been delivered, and any such evidence as that produced by the Crown, as to misappropriations and malfeasances by its own officers can have no effect. The contentions based upon such evidence must fall to the ground.

This matter is governed by the law and practice in force in the Province of Quebec as to interest and we are entitled to have interest from the date of the judicial demand (2) *i. e.*, the filing of the reference in the Exchequer Court.

TASCHEREAU J.—(After stating the facts of the case.) This is an appeal from the judgment of the Exchequer Court of Canada, upon a reference by the Minister of Railways and Canals, of a claim made by the respondents for lumber sold and delivered to the Crown for the construction of bridges over the Lachine canal at Montreal.

The Exchequer Court has found as a matter of fact that the lumber and timber claimed by the respond-

(1) 7 Can. S. C. R. 634. (2) Arts. 1067 and 1077 C. C.

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ents to have been so supplied to the Government, was actually sold and delivered to the Crown, and that such lumber and timber had been ordered and accepted by the officers and agents of the Crown. The evidence is all one way as to this fact.

But the Crown base their principal defence to the respondents' claim on the twenty-third section of the Act respecting the Department of Railways and Canals (1), which enacts that

> No deed, contract, document, or writing relating to any matter under the control or direction of the Minister, shall be binding upon Her Majesty unless it is signed by the Minister, or unless it is signed by the Deputy of the Minister, and countersigned by the secretary of the department, or unless it is signed by some person specially authorized by the Minister, in writing, for that purpose.

We are of opinion with the Exchequer Court, that this enactment has no application. The word "contract" therein, means a written contract. Here the lumber claimed for was delivered under verbal orders from the Crown officers, and the statute does not apply to goods actually sold, delivered and accepted by the officers of the Crown, for the Crown.

The cases of *Hunt* v. *Wimbledon Local Board* (2), and *Young* v. *Mayor of Leamington Spa* (3), have no application. There is no statute here imperatively requiring that all contracts by the Crown should be evidenced by a writing, and in the absence of such a special statute the Crown cannot refuse to pay for materials bought by its officers in the performance of their duties and delivered to them for public works.

If Parliament had intended that no oral contract should be binding on the Crown, it would have been so easy to say so in unambiguous terms that we should not, by a forced construction of language in the section

(1) R. S. C. Ch. 37.
(2) 4 C. P. D. 48.
(3) 8 App. Cas. 517.

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in question, make it say what it does not unambiguously say.

It is obvious that the every day business of the railways and canals of the country from the Atlantic to the Pacific could not be carried on, if for every small article required, every nail to be bought, accident or no accident, emergency or no emergency, necessity or no necessity, the officers of the department on the spot could not legally contract for the Crown.

If this construction of the Act is contrary to the intentions of Parliament, the remedy lies in Parliament's own hands.

The contention that some of this lumber was stolen or wasted need hardly be noticed. After delivery it was not the respondents' duty to see that it was not stolen or wasted. It was then the property of the Crown and in the Crown's possession. If the Crown did not get the benefit of it, it is not the respondents' fault.

There is an item of $4,219.26, claimed by the respondents which the Crown, upon this appeal, specially objects to. It appears that after their accounts had been rendered, the respondents discovered that certain quantities of lumber and timber which had been delivered on the works, had by error been omitted from the said accounts, and they add the amount thereof in their claim against the Crown. In the Exchequer Court the ascertainment of the quantity and value of these omitted items was referred to the registrar, who after investigation, reported that they amounted to the said sum of $4,219.26. The learned judge confirmed that report. There remains for us but a question of fact involved on this branch of the case, and upon that question of fact, the finding of the Exchequer Court, for which there is ample evidence, cannot be disturbed.

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A third ground of appeal taken by the Crown is upon the question of interest which the judgment appealed from allows to the respondents upon the amount of the judgment since the date of the reference to the Exchequer Court.

Upon this point also the appeal fails. The law of the province of Quebec rules this case, and according to that law, such interest must be allowed upon a claim of this nature. This is not a case upon a written contract, so that section thirty-three of the Exchequer Court Act does not apply.

GWYNNE J. (dissenting.)—The claimants in their statement of claim allege that on the 9th of December, 1892. Her Majesty acting through the proper officers of the Dominion of Canada in that behalf entered into a written contract with the claimants whereby they agreed to supply certain specific quantities and description of timber at certain specific prices for the construction of a certain public work of the Dominion of Canada called the new Wellington Bridge over the Lachine Canal at Montreal. They then allege that subsequently to the making of the said contract Her Majesty acting through the officers aforesaid commenced the construction of another bridge called the Grand Trunk Railway Bridge over the said Lachine Canal at Montreal. They then allege:

5. That during the construction of the said bridges the claimants received requisitions from the said officers from time to time for the supply and delivery of timber and lumber, and in compliance with said requisitions they supplied and delivered to Her Majesty's said officers during the month of December, 1892, and the months of January, February, March and April, 1893, a large quantity of timber of various kinds and dimensions to wit, 3,613,000 feet board measure.

6. That the claimants from time to time during the construction of the said bridges rendered accounts to Her Majesty's said officers of the timber and lumber so supplied and delivered as aforesaid which

accounts were received, approved and duly certified by the said officers for payment by Her Majesty.

7. That the total amount of the accounts for the timber and lumber so delivered as aforesaid was the sum of $67,474.43 on account of which Her Majesty paid and the claimants received the sum of $43,-862.06 leaving a balance due to the claimants of $23,612.37 for which balance with interest thereon Her Majesty is indebted to the claimants.

This claim in so far as it relates to timber and lumber delivered under the written contract of December 9th, 1892, is not disputed. That contract is not questioned. It is admitted, and in fact has been overpaid. It is only as to the amount now claimed by the claimants in excess of the sum of $43,-862.06 which they acknowledge to have received, that the Attorney General of the Dominion resists the present claim. Much of that sum if it had not been paid in the manner hereafter appearing might have been open to the same objection as that which is offered to the portion which is demanded in excess of what has been paid; but having been paid the Dominion Government do not now assert any claim in respect thereof. The defence offered to so much of the claimants demand as has not been paid relates wholly to timber and lumber which the claimants allege that they have supplied and delivered under requisitions which they allege that they received "from the *said* officers," that is to say, "from the proper officers in that behalf"

The Attorney General of the Dominion after setting out the written contract alleges that save as in and by that contract Her Majesty did not purchase from the claimants any timber or lumber, and as to the alleged requisitions in the statement of claim mentioned he specially pleads that

Her Majesty did not authorise the engineer in charge of the work, nor the superintendent thereof nor any other officer of Her Majesty

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to contract for, or order, or give requisitions for timber or lumber except as and when authorised by the Minister of Railways and Canals acting on behalf of Her Majesty, and the alleged requisitions if any were given which Her Majesty does not admit, but denies, were not in fact authorised by the said Minister of Railways and Canals.

And he further pleaded that

if it should appear in the evidence that Her Majesty's officers did in fact duly certify and approve of some of the accounts, then Her Majesty avers that the accounts so certified and approved amounted to the sum of $43,862.06, and that the said accounts were duly paid by Her Majesty and the said sum was received by the claimants in satisfaction and discharge of the claimants' said accounts so certified and approved, and Her Majesty avers that except as to said accounts so satisfied and discharged no accounts rendered by the claimants were delivered to Her Majesty nor were any of the said accounts approved or certified for payment by Her Majesty's officers.

Now it appeared in the evidence of Mr. Schreiber, the chief engineer, and who is also Deputy Minister of Railways and Canals, that a Mr. E. H. Parent was engineer in charge of the construction of the work for supplying the timber for which the contract of the 9th December, 1892, was entered into and one Mr. Kennedy, a Civil Engineer, was appointed overseer of the work under Mr. Parent. Neither Mr. Parent nor Mr. Kennedy had any authority whatever to enter into any contract for supplying timber or lumber for any public work or to order or make requisitions for the delivery of any timber in relation to the particular work mentioned in the contract of the 9th December, 1892, other than that covered by that contract. It was part of Mr. Parent's duty as engineer in charge of the work to certify upon the accounts from time to time presented by the vendors of the timber that the prices charged therein were in accordance with the prices specified in the contract which was in his possession, and a stamped form to be put upon the accounts was in use for that purpose thus:—"Prices just and fair" which he signed. It was part of Mr.

Kennedy's duty as overseer of the work to sign a certificate on each account in a stamped form, "I certify the above account to be correct in all details and particulars." It was also the duty of some subordinate officer under Mr. Kennedy employed to receive and measure the lumber contracted for, as and when delivered, to sign a certificate upon the claimants' accounts presented for payment also in a stamped form as follows: "Received above goods." These certificates in these forms were required for the security of the department and for the information of the Chief Engineer at Ottawa whose approval of each account and his certificate of such approval were necessary in order to obtain payment of the accounts. The perfect accuracy of these certificates was most important as the Chief Engineer acted upon the faith of their accuracy in approving of the accounts and certifying for their payment. At the close of the month of December, 1892, the claimants rendered an account for timber delivered which at the prices named in the contract amounted in the whole to $6,421.66. This account was certified in the respective forms above mentioned, signed by Mr. Parent and Mr. Kennedy, and also by two persons whose names were subscribed to the words "Received above goods."

In the month of January, 1893, the claimants presented an account for lumber delivered in that month to the value in the whole of $7,240.14 which was certified in the same manner and by the same persons. respectively as was the account for December, 1892. The claimants in like manner presented an account for the month of February, 1893, amounting to $14,728.26. This account was certified by Mr. Parent and Mr. Kennedy in the respective forms above mentioned and the words "received above goods" were signed

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as follows:—"C. McGinley, culler"; "Thomas McConnomy, storeman"; "P. Coughlan, clerk and culler." The claimants also presented an account for timber delivered in the month of March, 1893, amounting to $15,472. This account was certified by Mr. Parent and Mr. Kennedy in the respective forms above mentioned, and the certificate for receipt of the goods was signed by Thos. McConnomy, storeman; E. H. Mox, C. McGinley, timber culler. All of these accounts were upon the faith of the *bona fides* and accuracy of the above certificates approved and certified for payment by the Chief Engineer, and accordingly were paid to the amount in the whole of $43,862.06 which is in the statement of claim acknowledged to have been paid. In the month of April, 1893, the claimants presented an account as for goods delivered in that month to the amount of $16,155.65. This account was certified in the above form by Mr. Parent who, however, qualified that certificate by adding the following: "All purchased without requisition, but according to contract, except sawn lumber, charged $30 per M. ft."; it was also certified by Mr. Kennedy in the prescribed form for him to certify in, and the receipt of the goods was signed "C. McGinley, culler." This account the Chief Engineer refused to approve and certify for the reason that he began to think there was something wrong and upon looking into the matter, on his attention having been drawn to it, he did not think such a quantity of timber as was charged for could have been delivered by the claimants or required by the Government, and he formed the opinion that it never could have been measured, and further that more timber had been paid for in the accounts which had been settled than ever could have been required or delivered. The claimants were therefore referred to the Court of Exchequer under an

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order made by the Minister of Railways and Canals in pursuance of the provisions of section 23 of 50 & 51 Vict. ch. 16.

Now the whole of this account for April amounting to $16,155.65 is for lumber alleged to have been delivered in excess of and outside of the contract of December, 1892, $12,642.50 of that amount is for sawn lumber and $1,227.70 for tongued and grooved boards, neither of which articles were called for or covered by that contract. These two sums make $13,870.20. Then as to the other items in the account amounting to $2,285.45 part is for timber of different sizes from those named in the contract of December, but charged for at the prices named in that contract for the sizes there contracted for, and the residue is for similar articles to, but in excess of, the quantities named in the contract of December, 1892, at the prices however named in that contract, in fact fully two-thirds of the accounts which had been paid was for lumber in excess of that which was covered by the contract, and very largely for lumber of a different description from that named in the contract of December, 1892. The claimants were well aware of this. The claimant, Norman B. T. Henderson, who gave evidence on his own behalf, says that the timber covered by that contract amounted to about $13,600, all in excess of that he delivered upon the verbal and written orders of McGinley and others, and the directions of Mr. Kennedy. He said that in the very first account presented he had distinguished the timber coming under the contract from that outside of it, as to which latter he charged prices he considered fair and just, but that Mr. Kennedy refused to certify them unless he should insert prices named in the contract, and he therefore took back his account and prepared it in the shape it is as certified. Now, upon referring to that acccount of

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December, 1892, we find lumber there which is not in the contract at all, namely, sawn lumber, and the charge there inserted for it is $20 per M, that is the highest price named for any lumber covered by the contract, and this item alone amounts to $2,908.63; accordingly in his subsequent accounts for January, February and March, although the fair prices for some of the lumber supplied was less, and for some more than any price named in the contract for the lumber thereby covered the claimants always inserted a price named in the contract. In the April account, however, they charge $30 per M, although in the prior accounts they had for the reason already given charged only $20 per M. It may be as well to give Mr. Henderson's evidence in his own words. He says:

> I might say that in December when we made out the account, first we made out an account for the contract stuff at contract prices, and another account for the stuff for the temporary work at different prices, what we considered then fair prices, that we hadn't a contract for, and when we took it in to Mr. Kennedy he said I can not pass those now because you have altered the prices. We had not agreed on any price—*that we ought to put them in at contract prices and fight the Government afterwards for the other prices.* If I did not do that we could not get our money. We wanted our money pretty bad and we agreed with Mr. Kennedy to make all the stuff out at contract prices in the mean time any way.

Whatever may have been Mr. Kennedy's motive for this arrangement as testified by Mr Henderson, it is obvious that it was very improper and well calculated, as Mr. Henderson must have seen, to conceal from the department the fact that irregular orders, unauthorized by the Minister were being given to the claimants for the supply of lumber for which no contract had been entered into with the minister. When Mr. Parent qualified his certificate by the words,

> all purchased without requisition, but according to the contract, except sawn lumber, charged for at $30 per M."

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he must have meant that as regards the whole of this April account no requisition had been given, that is to say that no order had been given by any person having authority so to do, for the lumber charged for in the account, but that the prices charged were contract prices for the lumber there except as to the sawn lumber, and this was not in the contract of December, 1892, at all. It is in evidence that Lavery and Huot, two carpenters employed under the overseer, Mr. Kennedy, had directions from him to order whatever lumber they should require whenever they required it, and that they did so repeatedly but verbally, and through McGinley, and McGinley gives evidence that Mr. Kennedy had directed him to get from the claimants whatever lumber the carpenters might require, and that he did so repeatedly on slips of paper, a number of which have been produced by the claimants, most of them having no date. The form of all will appear save as to date, from that of two subjoined which do bear a date the one of the 1st and the other of the 3rd April, 1893. That of the 1st of April is as follows in pencil:

HENDERSON BROTHERS.
15 pcs. 25 ft. S., 2 sides.
16 " 12 in. thick.
15 " 37 ft. "
For Huot, 1,000 3-in. deals.

C. McG.

And that of the 3rd April as follows:

HENDERSON BROTHERS.

Four loads of boards, good quality. C. McG.

Now, this man McGinley, who thus signed these orders, entered the employment of the Government on the 18th January, and left it on the 18th April, 1893. He recognized his signatures under the words, "received above goods" on the accounts for February,

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March and April. When he subscribed these words on the April account he was not in the service of the Government. He never checked the account for the purpose of seeing whether it was correct or not. He signed it because he was asked to do so by an assistant of Mr. Kennedy's. Neither did he check the accounts for February and March which he had also signed; the only account which he ever checked was that of January, which he assisted Mr. Coughlan to check. All of the others he signed merely because he was asked to do so. Mr. Coughlan, whose name is subscribed to the certificate of receipt of goods on the February account says that he never checked that account, and that he signed just because Mr. Kennedy asked him to do so. He was then employed as time keeper. The claimants now in addition to the April account amounting to $16,155.65 claim two other sums, namely, one for $4,219.26, which they allege to be for lumber delivered, but by some error omitted from some or one of the accounts rendered for December, January, February or March, but what are the particular items and in what month omitted they cannot say, and a further sum of $2,077, which they claim as the loss sustained by them by reason of their having in accordance with Mr. Kennedy's suggestion when their first account was submitted to him in December, 1892, charged prices named in the contract for lumber not called for or covered by the contract, and which was of greater value than any named in the contract.

The learned Judge of the Exchequer Court has allowed the first two items less the sum of $478.80 for lumber shown to have been sent back to the claimants, making $19,986·11, with interest at 6 per cent from the first of October, 1896, amounting in the whole to $21,021.18, from which however is to be deducted the sum of $1,024.22 being for that amount allowed

on a counter claim. The learned judge was of opinion that section 33 of ch. 37 of the Revised Statutes of Canada has no application in the present case for the reasons expressed by the late Sir Wm. B. Richards in the Court of Exchequer in *Wood* v. *The Queen* (1). That case proceeded upon sections 7 and 15 of 31 Vict. ch. 12, which were substantially the same respectively as sections 11 and 23 of ch. 37 R. S. C.

The question there came up on demurrer, and no question arose as to the authority of the person or persons who had employed the suppliant to do the work for which the petition of right was filed. The claim was for services alleged to have been rendered to the Government of the Dominion in preparing plans, models, specifications and designs for the laying out, improvement and establishment of the Parliament Square in the city of Ottawa, and for superintending the work and construction of said improvements. To this claim two pleas were pleaded which were demurred to. In one it was pleaded that no such contract as was required by the 7th section was ever made or entered into with suppliant, and in the other that the employment alleged by the suppliant would have involved the expenditure of a large sum of money and that by section 15 of the Act such expenditure would have required the previous sanction of Parliament, and that no such sanction had been given. The learned Chief Justice allowed the demurrer as to the former of these pleas, and disallowed it as to the latter. As to the former he held that while the plea would have been good if the contract alleged in the petition of right was still executory it did not meet the petition of right which alleged that the contract had been executed; his laguage is:

(1) 7 Can. S. C. R. 634.

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I am of opinion that the contract set out in the suppliant's petition is not binding as such, and under it he would have no right to recover damages for not being allowed to complete the work referred to in his petition. I do not think, however, that the 7th section would prevent the suppliant recovering for the actual value of the work done by him *and accepted by the department.* I see no reason why the law may not imply a contract *to pay for work done in good faith and which the department has received the benefit of.* Suppose instead of work done the contract had been to furnish a quantity of lumber—the lumber had been supplied and worked up by the workmen of the department in finishishing one of the public buildings. Suppose for some reason the department repudiated the verbal contract and refused to be bound by it, could it be said that the property of the suppliant *could be retained and used for the purposes of* the department and he not be paid for it because the statute said the contract on which it was furnished was not deemed binding on the department. I should say not, the contract which is binding is that which arises from the nature of the transaction, having received the benefit of the contractor's property he ought to be paid for it under the new contract which the law implies. * * * If only the seventh section were considered I should *as at present advised* say the suppliant is entitled to recover what the services rendered by him were worth under the implied contract. It may be that on further consideration my views as to the suppliant's right on this point would be less favourable (1).

Now, as it appears to me what the learned Chief Justice intended to convey and has conveyed by this language is that, on demurrer to a plea which impliedly admits that the work sued for had been executed for the department as in the petition of right alleged but not under such a contract as that mentioned in the 7th section of the Act, it must be held that the plea offers no defence to the suppliant's right to recover, under such implied contract what the services rendered by him were worth, but that when the facts came to be considered under the other pleas on the record the learned Chief Justice's opinion as to the suppliant's right to recover might be less favourable. The point adjudicated upon was simply a point of pleading. This language is similar in effect to the pre-

(1) 7 Can. S. C. R. at page 645.

liminary language of Blackburn J., at page 33, in *Thomas* v. *The Queen* (1) the petition of right in that case alleged an executed oral contract for breach of which the suppliant prayed relief. The question arose upon a demurrer to the petition of right and was simply whether a petition of right would lie for breach of contract, or to recover money claimed to be due by way of debt or damages, and such being the point raised by the demurer the learned judge premises his judgment which was the judgment of the court thus:

> We leave it for future discussion to determine who have authority to make contracts on behalf of Her Majesty, and whether the contracts upon which the suppliant proceeds were in fact made by any one on behalf of Her Majesty, and if so made, whether they were made within the scope of that person's authority. On these points we express no opinions.

But the language plainly intimates that even in the case of an alleged executed contract it remains as a material point to be considered whether the person who made the contract had authority to act on behalf of Her Majesty and whether in making the contract he acted within the scope of his authority.

Then upon the demurrer to the other plea in *Wood* v. *The Queen* the learned Chief Justice, while holding that the plea that the expenditure had not been authorized by the legislature, was good, adds the following, plainly because these judgments upon demurrer did not dispose of the suppliant's right to recover upon the whole record, but only disposed of points of pleading. He says:

> I assume the parties desire the opinion of the court on the broad question whether the suppliant can recover, and in the view I take of the 15th section the suppliant can only recover if the work and services rendered come under the exception referred to in that section and in which necessity would also justify the omitting to advertise for tenders under the 20th section.

And again,

(1) L. R. 10 Q. B. 31.

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It was contended on the argument that Parliament has made appropriations for these works and so sanctioned the expenditure. If that be so and the work done was of the kind that might properly be executed by the officers and servants of the department, then I apprehend no contract would be necessary to bind the department for the work done, and so suppliant should recover for work so done, and in my view also for the work actually done if the expenditure was previously sanctioned by Parliment, that, of course, is a matter of fact and must be proved as any other matter of fact.

Now these observations of the late learned Chief Justice were made by him not as a judgment pronounced upon matters before him for judication, for all that was so before him consisted merely of questions of pleading, but as an expression of opinion as to the suppliant's rights upon the facts as stated by him as derived from the pleadings before him on the demurrers and some statements of counsel in argument as to a particular fact. Now, in the petition of right it was alleged and impliedly admitted on the pleas demurred to that it was *by the Government of the Dominion of Canada* the suppliant was employed to do the work which he had done, and for payment for which he was suing, and the opinion of the learned Chief Justice was that for work *so executed* the suppliant was entitled to recover without a contract executed in the form prescribed in the 7th section of the Act. The judgment on the demurrer disallowing the plea and the opinion at the close, as above, rest wholly upon the distinction made between the case of an executory and an executed contract. Now, with the greatest difference for the opinion of the late learned Chief Justice Sir W. B. Richards, for which I have the highest respect, I am unable to concur in this distinction in a case like the present. It is not, in my opinion, warranted by the decided cases. The cases which have arisen in England in respect of claims for work done for the corporations called "Local Boards," and in the Pro-

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vince of Ontario in respect of claims against municipal corporations for work done for them without the formality of a contract under the seal of the corporation have no application in the present case. In *Bernardin* v. *Municipality of North Dufferin* (1) I endeavoured to point out the distinction between such cases and *Hunt* v. *Wimbledon Local Board* (2), *Young* v. *The Mayor, etc., of Lemington Spa* (3), and such like cases, namely that, in the former cases, the courts proceeded upon this principle that the right to recover against a corporation for work done for them on a verbal contract or on a *quantum meruit*, was regarded as an exception judicially established from the common law rule that corporations were bound only by instruments executed with their corporate seal, whereas in *Hunt* v. *Wimbledon Local Board* and such like cases they were governed by the expresss provisions of Acts of Parliament to which the courts would recognise no exception. I again drew attention to this subject and expressed the same opinion in *Waterous Engine Works Co.* v. *The Town of Palmerston* (4), and I have seen no reason to change the opinion there expressed. I stated the rule (5) as established by the courts to be

> that where the managing body of a corporation aggregate contracts by parol for the execution of any work in respect of a matter within the purposes for which the corporation was created and the work has been executed in accordance with the contract and accepted as complete it would be a fraud in the corporation to refuse to pay for the work so executed the stipulated price or, in the absence of a stipulated price, the value thereof, and so to repudiate the contract upon the ground that it was not executed with the corporate seal.

Such cases have no application, in my opinion, in cases against Her Majesty as representing the Dominion Government and in the interest of the

(1) 19 Can. S. C. R. 581.
(2) 4 C. P. D. 48.
(3) 8 App. Cas. 517.
(4) 21 Can. S. C. R. 556.
(5) *Bernardin* v. *Mcpty. North Dufferin* [19 S. C. R. at page 611.]

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public. Now *Frend* v. *Dennett* (1), *Hunt* v. *Wimbledon Local Board* (2), and *Young* v. *Mayor etc., of Leamington Spa* (3), and the same case in the House of Lords (4) were all cases of executed contracts, and it was held that the language of the statutes which governed these cases were imperative, and could not, for that reason, be relaxed in any particular by the courts. Now, the clause of the statute under consideration in the present case, viz., sec. 23 of ch. 37, R. S. C., is fully as imperative as the clause of the statute referred to in the above cases. It enacts in the most express, and in my opinion, most unmistakable language that *no* contract which relates to any matter under the control or direction of the minister shall be binding on Her Majesty *unless* it is signed by the Minister, etc., as in the section is stated. The expression

no contract relating etc., etc., shall be binding on Her Majesty, unless, etc., etc.,

is precisely equivalent to

every contract relating, etc., in order to be binding on Her Majesty *shall be* signed by the Minister, etc., etc., etc.

It is, however, contended, upon grounds which appear to be hypercritical in the extreme, that the words "no contract" in the twenty-third section of the Dominion statute (5) are to be read as if the expression used had been

no contract *in writing* relating etc., etc., shall be binding, etc., etc., unless, etc., etc.

This introduction of words, not used in the Act, which would have the effect of qualifying in a most material manner the plain ordinary and natural meaning of the language which has been used is rested upon the fact that the word "contract" is used in the same

(1) 4 C. B. N. S. 576.
(2) 4 C. P. D. 48.
(3) 8 Q. B. D. 579.
(4) 8 App. Cas. 517.
(5) R. S. C. Ch. 37.

sentence and in connection with the words "deed, "document" and "writing." which are all written instruments, and it is argued that therefore the words "no contract, etc.," and it must be read as if the expression used had been "no written contract," etc., and that thus parol contracts are by implication excepted from the section, and that being so excepted they are valid. But if valid they would be equally so to maintain a suit for executory as for executed contracts, and so the distinction drawn in *Wood* v. *The Queen* (1) between executory and executed contracts would be unnecessary and irrelevant. If the section could be read as containing the words "no written contract, etc., etc., etc., a matter which is sufficiently provided for in the words "no deed, document or writing," then it must be admitted that the section contains a very emphatic pleonasm—a defect in composition not lightly to be attributed to an Act of Parliament.

The only object and effect of reading the section as if it contained the words "no written contract," etc., etc., is to support the argument that parol contracts are excepted from the operation of the section; but it cannot be questioned that the words "no deed, document, writing," etc., as used in the section, admit grammatically of no exception whatever. *Every* "deed," *every* "document," and *every* "writing," "relating to," etc., in order to be binding upon Her Majesty must be signed as required in the section. So precisely in like manner the words "no contract," etc., admit grammatically of no exception, and so *every* contract relating to, etc., etc., in order to be binding on Her Majesty, must be signed as required by the section. It is true no doubt that the contract to be signed as required by the section must be in writing, and in that sense it may be admitted that it is to written contracts only that the section applies, namely, as the

(1) 7 Can. S. C. R. 634.

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only ones which can by signature as required be made valid and binding upon Her Majesty. This is very different from reading the section, as if the words used were "no written contract relating to, etc., shall be binding, etc., unless, etc, etc.," and then construing those words as making parol contracts relating to matters under the control and direction of the minister quite valid and binding by implication. For my part I find it impossible to put any such construction upon the section, or any other than this, that *no* contract shall be valid unless signed, etc., and therefore, that no valid parol contract can be made relating to matters under the control and direction of the Minister. There is not, in my opinion, under the constitution of the Dominion of Canada, any mode by which authority can be conferred upon any individual to bind Her Majesty by a parol contract having the effect of imposing a burden upon the public funds of the Dominion other than by an Act of Parliament. It is the duty of everyone who deals with persons who affect to bind Her Majesty as representing the Dominion Government by contract relating to the public service to assure himself of the power and authority of such person to enter into the proposed contract. Nor is there any hardship in this, for everyone runs the risk of the person with whom he enters into a contract having power and authority in law to enter into the particular contract; and if he enters into a contract with a person who affects to bind another, he must be content to depend upon the responsibility of him with whom he contracts, if it should turn out that he had no authority to bind the person whom he affected to bind. The vast importance of the question involved in the present case must be my excuse for having dealt with it at such length. The looseness, the irregularities, not to say the mal-

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feasance of some of the subordinate employees of the Government disclosed in the present case, in which the Plaintiffs seem to have taken part as appearing by their own acknowledgment of the arrangement made by them with Mr. Kennedy in December, 1892, as to the mode of presenting their monthly accounts until a more favourable time for fighting the Government should arise, seem to point to the necessity of having a final adjudication of two very important questions, namely, 1st: Whether in view of the provisions of chapter 37, R.S.C., any *implied* contract can arise from any, and if any, from what circumstances, whereby the public funds of the Dominion can be burthened by proceedings against Her Majesty as representing the Dominion Government, and 2ndly: Whether any parol contract entered into by any person, and if so, by whom, relating to matters under the control or direction of the Minister can be binding upon Her Majesty as representing the Dominion Government. In my judgement chapter 37, R.S.C., was framed as it has been with the view, in so far as the Department of Railways and Canals is concerned, of preventing the public funds of the Dominion being affected, by such loose, improper and unauthorized proceedings as have been disclosed in the present case, and that if this appeal should fail, the object of the Statute would be frustrated. I have not drawn attention to the fact, although it appears, I think, to have been abundantly established in evidence that fully nine hundred thousand feet of lumber have been charged for by the claimants more than have been used or required by the Government works. As to that quantity the Government have derived no benefit, and the whole of the present demand of the claimants in money value covers less than the 900,000 feet. There is, therefore, this element wanting which

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was in *Wood* v. *The Queen* (1) upon which the learned Chief Justice there laid so much weight. However, the points with which I have dealt seem to me to involve matters of such importance as to make it unnecessary to dwell upon this latter, which is one of such minor consideration. I am of opinion that the appeal should be allowed with costs, and that the claim of the claimants in the Exchequer Court should be dismissed with costs, and that the judgment in favour of Her Majesty upon the counter claim should be affirmed.

SEDGEWICK J.—I am of opinion that the appeal should be dismissed with costs for the reasons stated in the judgment of His Lordship Mr. Justice Taschereau.

KING J.—I am of opinion that the appeal should be allowed with costs.

GIROUARD J.—I concur in the judgment dismissing the appeal with costs for the reasons stated by His Lordship Mr. Justice Taschereau.

Appeal dismissed with costs.

Solicitors for the Appellant: *Chrysler & Bethune.*

Solicitors for the Respondents: *O'Connor, Hogg & Magee.*

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(1) 7 Can. S. C. R. 634.