1898

April 4.

IN THE MATTER OF THE PETITION OF RIGHT OF
WILLIAM ANDREW YULE, LIEUTENANT-COLONEL IN HER MAJESTY'S MILITARY SERVICE NOW STATIONED AT HAMILTON, BERMUDA, THE SOLE SURVIVING EXECUTOR, AND AS SUCH NOW VESTED WITH THE ESTATE TO THE LATE WILLIAM YULE, IN HIS LIFETIME OF CHAMBLY, IN THE PROVINCE OF QUEBEC, ESQUIRE, AND CHARLES W. E. GLEN, DOCTOR OF MEDICINE; MYRA LALAISE DUPUY, SPINSTER, BOTH OF CHAMBLY CANTON, IN THE PROVINCE OF QUEBEC; FRANCES JANE DUPUY AND CHARLOTTE A. DUPUY, SPINSTERS, BOTH OF THE CITY OF KINGSTON, IN THE PROVINCE OF ONTARIO, } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Constitutional law—8 Vict. (P.C.) c. 90—British North America Act, 1867, s. 111—Liability of Province of Canada existing at time of Union—Jurisdiction—Arbitration—Condition precedent to right of Action—Waiver.

By the Act 8 Vict. (P.C.) c. 90, Y. was authorized at his own expense to build a toll-bridge with certain appurtenances over the River Richelieu in the Parish of St. Joseph de Chambly, P.Q., such bridge and appurtenances to be vested in the said Y., his heirs, etc., for the term of fifty years from the passing of the said Act; and it was enacted that at the end of such term the said bridge and its appurtenances should be vested in the Crown and should be free for public use, and that it should then be lawful for the said Y., his heirs, etc., to claim and obtain from the Crown the full and entire value which the same should at that time be worth exclusive of the value of the tolls, such value to be ascertained by three arbitrators, one of which to be named by the Governor of the Province for the time being, another by the said Y. his heirs, etc., and the third by the said two arbitrators.

The bridge and its appurtenances were built and erected in 1845, and Y. and his heirs, maintained the same and collected tolls for the

1898

YULE
v.
THE QUEEN.

Statement of Facts.

use of the said bridge until the year 1895, when the said property became vested in the Crown under the provisions of the said Act.

Held, that upon the vesting of the bridge and its appurtenances in the Crown the obligation created by the said statute to compensate Y. and his heirs, etc., for the value thereof was within the meaning of the 111th section of *The British North America Act*, 1867, a liability of the late Province of Canada, existing at the Union, and in respect of which the Crown, as represented by the Government of Canada, is liable.

2. That the Exchequer Court had jurisdiction under clause (d) of the 16th section of *The Exchequer Court Act* in respect of a claim based upon the said obligation, it having arisen under the said provisions of *The British North America Act*, 1867, which, for the purposes of construction of the said 16th section of *The Exchequer Court Act*, was to be considered a law of Canada.

3. That under the wording of the said Act 8th Vict. (P.C.) c. 90 no lien or charge in respect of the value of the said property existed against the same in the hands of the Crown.

4. Where both the Governments of Ontario and Quebec, on one or both of which the burden of the claim would ultimately fall, had expressed a desire that the matter should be determined by petition of right and not by arbitration, and where the suppliants, with knowledge thereof, had presented their petition of right praying that a fiat thereon be granted or, in the alternative, that an arbitrator be appointed by the Crown, and naming their arbitrator in case that course were adopted, and the Crown on that petition had granted a fiat that "right be done," even if the appointment of arbitrators for the purpose of ascertaining the value of the said bridge and its appurtenances, as provided in 8th Vict. (P.C.) c. 90, constituted a condition precedent to a right of action accruing for the recovery of the same, such a defence must, under the above circumstances, be held to have been waived by the Crown.

PETITION OF RIGHT for the recovery of compensation for property passing into the hands of the Crown by operation of law.

The facts of the case are stated in the reasons for judgment.

February 14th and 15th, 1898.

The case was heard at Ottawa.

1898

YULE
v.
THE QUEEN.

Argument of Counsel.

E. Barnard, Q.C., *W. D. Hogg*, Q.C., *E. Lafleur* and *R. V. Sinclair* for the suppliants;

The *Solicitor-General* for Canada and *E. L. Newcombe* Q.C. (D.M.J.) for the respondent.

E. Barnard Q.C., for the suppliants:

There are only two salient questions of law arising in this case, 1st: Whether the suppliants have a claim at all against the Dominion Government under section 111 of *The British North America Act*, 1867; and 2ndly: If they have, is there any unfulfilled condition precedent to the right of action arising by reason of a failure to proceed to ascertain the value of the bridge by arbitration as pointed out in the Act 8 Vict. (P.C.) c. 90?

In answer to the first question we say there was a claim in respect of this bridge existing at the time of the Union against the Government of the old Province of Canada. That claim subsisted in the right of the heirs of John Yule, the younger, to be compensated for the value of the bridge and its dependencies which were to surely and certainly vest in the Crown in the year 1895. (He cites the Indian Treaties case *sub nom. Attorney-General for Canada* v. *Attorney-General for Ontario*, [1897] A. C. 199.) The bridge did not belong to Quebec at the time of Confederation, as the property was then vested in the suppliants. It is, therefore, not a question of the operation of section 109 of *The British North America Act*; for that section undoubtedly only refers to property belonging to Canada at the time of Confederation. Of course, if it had been property belonging to Canada at that time, it would have become the property of Quebec under sec. 109. We have produced our charter—the Act of 1845. We have proved that we have built the bridge in 1845 and that we have maintained it all along up to 1895,

1898

YULE v. THE QUEEN.

Argument of Counsel.

when the condition precedent to our right to compensation was fulfilled. As to the character of the property in John Yule and his heirs, I do not know of any stronger term in English law than "vest" to convey the fee. It is true it was limited as to time, but during the currency of the fifty years the Yules' title was paramount; and under the provisions of French law and section 407 of the Civil Code of Quebec the owner cannot be divested until he is paid. It is against the policy of our law that the owner be deprived of his property until paid. This case has to be decided under the law of the Province of Quebec. Yule became the proprietor of the bed of the river for fifty years at the point where the bridge was erected, by virtue of his charter. The local legislature of Quebec, of late years has not attempted to deal with the bed of this river as if the fee were in the Crown; dams have been erected on it from time immemorial, and when conferring any powers with respect to the waters of the river on new manufacturing companies, the legislature requires them to expropriate in the usual way. (He cites *The Queen* v. *Moss* (1).

As to the question of arbitration to settle the value of the bridge, we say that if it were a condition precedent to our right to recover, the condition has become impossible of performance by law, and not through our fault. The constitution of the country has been changed, and there is now no Governor of the Province of Canada, and no person representing him who could appoint an arbitrator. Again, the provision for reference to arbitration does not oust the court of jurisdiction. That is the rule of Quebec law. Even if it were otherwise the Crown has waived its right to insist on the arbitration by granting a fiat on the petition of right. If the Crown intended to insist

(1) 26 Can. S. C. R. 322.

on the arbitration, it should not have granted the fiat for the case to proceed in this court.

W. D. Hogg Q.C. followed for the suppliants:

If there is no express contract to pay the suppliants the value of the bridge, there is clearly an implied contract to do so. (He refers to section 3 of 8 Vict. (P.C.) c. 90).

There can be no question about the competence of this court to entertain the petition. Under the 111th section of *The British North America Act*, 1867, the Crown in respect of the Dominion of Canada is primarily liable for a debt or liability of the old Province of Canada existing at the Union. That this was an outstanding liability of old Canada cannot be disputed. It is true the amount of liability was not then ascertained, but it was ascertainable on the happening of an event that was inevitable—namely the expiry of the term of fifty years, and *certum est quod certum reddi potest.* This court has not to worry itself over the consideration as to upon which of the two Provinces of Ontario and Quebec the burden of the claim will ultimately fall; the Dominion is primarily liable in any event and the jurisdiction of this court over the claim is undoubted.

It is also clear that the legislature did not intend to make the reference to arbitration to ascertain the value, a condition precedent to the right of action. The undertaking to pay is severable from the provision to refer to arbitration. (He cites *Ulrich* v. *National Insurance Co.* (1); *Collins* v. *Locke* (2); *Dawson* v. *Fitzgerald* (3). If the arbitration is insisted upon as a condition precedent to action, the liability to pay must be taken to be admitted and all other defences abandoned.

(1) 42 U. C. Q. B. 141 and 4 Ont. A. R. 84.
(2) 4 App. Cas. 674.
(3) 1 Ex. D. 257.

1898

YULE v. THE QUEEN.

Argument of Counsel.

Hughes v. *Hand-in-Hand Insurance Co.* (1); *Goldstone* v. *Osborn* (2). There is no doubt upon the facts and evidence that whatever right the Crown might have had to set up the failure of arbitration as a bar to the action, it waived it before action brought by refusing our request for the appointment of an arbitration as provided by the statute, and the granting of a fiat to proceed by petition of right. The Governor-General of the Dominion represents the Governor-General of the late Province, and waiver by the former may properly be taken advantage of by the suppliant where the Crown relies upon a purely technical defence. (Cites sections 12 and 55 of *The British North America Act*, 1867). It is absurd to contend that where the Crown has taken possession of our property we are not entitled to be paid for it. Under the statute 8 Vict. c. 90 we were entitled to be paid for the property the moment it vested in the Crown.

E. L. Newcombe Q.C., for the Crown:

Upon the evidence, the suppliants have not made out a claim against the Crown in right of the Dominion of Canada. This bridge has been shown to be "land," and it has been claimed by Counsel for the suppliants that the approaches and the bed of the stream were vested in the Yule estate for fifty years, subject to be divested and become the property of the Crown at the expiry of that period. Now this is "land" situate in the Province of Quebec, and when it reverts under the provisions of the Act to the Crown, it reverts to the Crown in right of the Province of Quebec. It was not a liability existing at the Union within the meaning of the 111th section of *The British North America Act*, 1867. It was land which was intended by the statute to become the property of Can-

(1) 7 Ont. R. 615. (2) 2 C. & P. 552.

1898

YULE
v.
THE
QUEEN.

Argument of Counsel.

ada at the expiry of a certain period, and as such it passed to the province of Quebec. Clearly that is the state of affairs which is brought about by the wording of the 109th section of *The British North America Act*, 1867. The words "belonging to" as used in the 109th section are not to be construed in any technical sense. They cannot be narrowed to refer only to lands then in the possession of the Provinces, but should properly be held to include lands in respect of which the Crown would come into possession in right of the Province at the expiry of any given time. You have to read sections 109 and 117 together. *Mercer* v. *The Attorney-General* (1) establishes the principle that an escheat which takes place after the Union in respect of lands within a particular Province enures to that Province. Then again under the decisions of their lordships of the Privy Council in the case of *Attorney-General for the Dominion of Canada* v. *Attorney-General for Ontario* (2), it was held that the beneficial interest in the Indian Reserves passed to the provincial governments, subject to a liability to pay certain annuities, and this view is arrived at upon a construction of section 109. To put it shortly, their lordships hold that the lands passed to the provinces, subject to a charge or trust. Lord Watson at p. 205 says: "The effect of "these treaties was that whilst the title to the lands "ceded continued to be vested in the Crown all bene- "ficial interest in them, together with the right to dis- "pose of them, and to appropriate their proceeds, "passed to the Government of the Province, which "also became liable to fulfil their promises and agree- "ments made on its behalf, by making due payment "to the Indians of the stipulated annuities, whether "original or increased." I submit that the construction of the 109th section enunciated by their lordships

(1) 8 App. Cas. 767. (2) [1897] A. C. 199.

1898

YULE v. THE QUEEN.

Argument of Counsel.

in the case just referred to applies to the case of the suppliants here. The claim of the suppliants is against the Province of Quebec primarily and not against the Dominion Government. The lands —that is, the bridge and its approaches—passed to the provincial government on the expiration of the term of fifty years, subject to a lien or charge for the payment of the compensation money to be ascertained in the manner provided by the statute. There is no alternative right against the Dominion Government. I submit that it is not a tenable argument under *The British North America Act* that a party has the right to sue both Governments—the Dominion and the Provincial—at the same time.

[BY THE COURT: But you must admit that if it were a liability or debt it could be recovered against the Dominion?]

Of course if you get within the wording of section 111, then the Dominion is liable; but I contend that the facts of this case exclude any possible application of section 111. We say that this liability to make compensation for the bridge logically falls within the provisions of the 109th section in the way of a trust or charge. We say that it is the fair interpretation of section 109—that it is the interpretation placed upon it by the Privy Council that these lands vested in the Province subject to a legal or contractual duty on the part of the Province to pay for the same. If the moneys constituting the subject of the trust are to come out of the lands, then I say that under the case above referred to in the Privy Council, the Province is responsible for the claim in the first instance. The Province of Quebec stands in the place of the old Province of Canada in respect of this case, and is subject to the same rights and the same liabilities.

1898

YULE
v.
THE QUEEN.

Argument of Counsel.

We submit as a reasonable conclusion that when the Province is chargeable under section 109 the Dominion is not chargeable under section 111. In construing the statute you have to seek for a leading principle of construction, and when you find that principle you give effect to it. If you find a specific provision which applies to a particular case then that excludes all general provisions. We say that section 109 properly controls this case.

Furthermore, I submit that the power of appointment of an arbitrator in this case is not a power that can be exercised by the Governor-General in Council under the provisions of section 12 of *The British North America Act*, 1867. It is rather a power that would devolve upon the Lieutenant-Governor of Quebec under the provisions of section 65. The force of this contention subsists in the fact that the subject is entirely a provincial one. It is a matter of civil rights, and of local and provincial concern. The matter is one that is properly a subject of provincial legislation. It is not within the legislative authority of Canada in any way. The statute 9 Vict. (P.C.) could not have been enacted by the Dominion Parliament since the Union. The river which the bridge crosses is not navigable at that point; and even if it were it would be possible for the Province to authorize the construction of the bridge subject to the exercise of the Dominion's power to regulate navigation. The Act of the old Province of Canada vests the property in the Province at the end of fifty years and it enacts that the property should be paid for in a certain way, and provides the means of obtaining payment. On these grounds I submit that the power of appointing an arbitrator in this matter is not in any way vested in the Governor-General of Canada.

It cannot be said that this was a debt or liability "existing at the time of the Union" so as to fall within

1898

YULE v. THE QUEEN.

Argument of Counsel.

the operation of section 111 of *The British North America Act*, because there was no debt until the bridge vested in the Crown.

[BY THE COURT: It might not have been a debt, but it was a liability existing at the time of the Union.]

I submit that there was no liability existing until the fifty years had elapsed. There was no obligation of any kind that could be enforced at the time of the Union. There was a liability which would enure at a given time in the future; but it was a liability *in posse* but not *in esse*—not "existing." A man cannot be said to be liable in respect of any matter until he is bound to discharge some legal duty concerning it. Therefore, section 111 of *The British North America Act* does not apply to this case.

With reference to the point that the appointment of an arbitrator is a condition precedent to the right to recover, I rely upon the following cases:—*Murray* v. *Dawson* (1); *Hepburn* v. *Township of Orford* (2); *Vestry of St. Pancras* v. *Batterbury* (3); *Berkeley* v. *Elderkin* (4); *Dundalk Western Railway Company* v. *Tapster* (5); *Stevens* v. *Evans* (6); *Bishop of Rochester* v. *Bridges* (7); *Colley* v. *London and North Western Railway Company* (8); *Handley* v. *Moffatt* (9); *Babbage* v. *Colburn* (10); *Elliott* v. *Royal Exchange* (11); *Scott* v. *Liverpool* (12); *Scott* v. *Avery* (13).

The law of the Province of Quebec on this point is the same as that of England. *Mayor of Montreal* v. *Drummond* (14).

(1) 17 U. C. C. P. 588.
(2) 19 Ont. R. 585.
(3) 2 C. B. N. S. 477.
(4) 1 El. & B. 805.
(5) 1 Q. B. 667.
(6) 2 Bur. 1157.
(7) 1 B. & Ad. 859.
(8) L. R. 5 Ex. D. 277.
(9) 21 W. R. 231.
(10) 9 Q. B. D. 235.
(11) L. R. 2 Ex. 242.
(12) 3 DeG. & J. 361.
(13) 5 H. L. Cas. 823.
(14) 1 App. Cas. 384.

Equity will not enforce an agreement to refer to arbitration. *Street* v. *Rigby* (1); *Milnes* v. *Gery* (2); *Wilks* v. *Davis* (3); *Vickers* v. *Vickers* (4).

With reference to the suppliants' claim for interest, they are clearly not entitled to it here. Interest is not payable by the Crown except by statute or contract. *In re Gosman* (5). Even between subject and subject interest would not be payable in such a case. *London, Chatham and Dover Railway Company* v. *South Eastern Railway Company* (6). It is submitted that the judgment of the Supreme Court in *St. Louis* v. *The Queen* (7), in so far as it allows interest to the suppliant, is in contravention of the Statute 50-51 Vict., c. 16, sec. 33, and is bad law. We rely upon this provision as against the claim for interest put forward here.

Mr. Lafleur for the suppliants in reply:

I submit that under the law of the Province of Quebec there can be no doubt whatever as to the liability for interest, the moment the party has been put in default. Arts. 1067 and 1077 C. C. L. C.—The Crown was put in default by the commencement of this suit beyond a doubt, and it is arguable that the Crown was in default from the time of the demand made by the suppliants to appoint an arbitrator.

As to the unfulfilled condition that arbitrators should be appointed to fix the value being a bar to suit, I submit the jurisprudence of the Quebec courts is unanimously against it. You cannot by private agreement oust the courts of Quebec of their jurisdiction. *Anchor Marine Insurance Company* v. *Allen* (8). The law of Scotland impresses one as being very similar to our Quebec law. *Hamlyn* v. *Talisker Distillery*

(1) 6 Ves. 817.
(2) 14 Ves. 400.
(3) 3 Mer. 507.
(4) L. R. 4 Eq. 529.
(5) 17 Ch. D. 771.
(6) [1893] A. C. at p. 434.
(7) 25 Can. S. C. R. at p. 665.
(8) 13 Q.L.R. 4; Art. 177 C.C.P.

1898

YULE v. THE QUEEN.

Argument of Counsel.

Company (1). That was a case similar to this, and Lord Watson there shows that such an agreement would not oust the Scotch courts of their jurisdiction. It is a mere matter of procedure, and not one of substantive right.

As to the proper authority to appoint an arbitrator since there is now no Governor-General of the Province of Canada, I do not think it could be claimed that this was one of the powers which were transferred to the Lieutenant-Governor of the Province of Quebec under *The British North America Act.* The Governor-General of the Province of Canada as referred to in the Act was only *persona designata* for a particular purpose, and such a statutory power or privilege or duty is not transferable. Then if this be admitted, the condition has lapsed, and there can be no possible reason in such a case for the court to decline to exercise its jurisdiction. But I submit it would be quite possible for a case to arise in which the Lieutenant-Governor of Quebec might have the power to appoint an arbitrator to fix a liability of the Dominion of Canada. I submit that that is possible under our constitutional Act. The power of appointment having lapsed, the courts will treat the matter as *casus omissus* and supply the remedy. There can be no denial of a remedy under Quebec law—*ubi jus, ibi remedium* is a maxim that never fails the person who is injured by any act or omission or failure to perform a promise, in the Province of Quebec.

There is no doubt that if the appointment of an arbitrator were a condition precedent to the right of action, such a condition has been waived by the acts of the Crown. Not only did the Dominion Government grant a fiat on the petition of right, but it entered into negotiations with the provincial Governments with a

(1) [1894] A. C. 202.

1898

YULE
v.
THE QUEEN.

Argument of Counsel.

view to having all the issues in the case disposed of by a court of law. Under the circumstances the court ought not to give effect to this ground of defence.

There is another constitutional aspect of the case, and that is that the lands referred to in the provisions of section 109 of *The British North America Act* are to be taken to mean ungranted lands. The *Fisheries* Case (1). It was only the ungranted lands that became vested in the provinces of the Union.

[BY THE COURT: Would the charter be a grant of lands?]

ANSWER: It would be under our code; it would be a grant of whatever lands our piers rested on. The Yules could have hypothecated the property, and for fifty years they were the absolute owners of it. It was a resolutive condition that at the end of fifty years the property was to go to the Crown. They have been regarded by our courts as owners of the fee. *Corporation of Chambly* v. *Yule* (2) The Yules had the fee, a reversion subsisting in favour of the Crown.

[BY THE COURT: The charter makes a destination of the bridge to the public?]

That is no concern of the suppliants. I wish to emphasize my view that section 109 of *The British North America Act*, 1867, simply regulates the ultimate incidents of a liability between provinces. There is no trust or charge attaching to the present transaction within the meaning of section 109. The observations of Lord Watson in the *Indian Treaties* case (3) with reference to the character of the charge or trust in that case are *obiter dicta*. There is no authorative pronouncement of the Privy Council positively defining the word "trust" as used in the 109th section; and there was no decision as to the primary liability

(1) 26 Can. S. C. R. pp. 514, 515. (2) 2 Steph. Dig. 122.
(3) 1897 A. C. 199.

1898

YULE v. THE QUEEN.

Argument of Counsel.

of the provinces, but it was decided only with reference to the ultimate liability between the provinces. I know of no reason why the creditor is bound to pursue his remedy against the province primarily. It would seem to me that the creditor may go against the one or the other as he may elect. He may proceed against the Dominion as guarantor of the province.

Then again there is no "trust" in respect of the lands. It is in no sense a payment to be made out of the lands. The lands become vested in the Crown before the liability arises. Suppliants have only a bare claim against the Dominion Government for compensation. There is nothing but a personal liability created by the statute. In no sense can it be said that the vendors in this case have a lien for the purchase or compensation money.

Mr. Newcombe in reply:

In Caledonian Insurance Co. v. *Gilmour* (1) Lord Herschell says there is no difference between the English law and Scots law where ascertainment is made a condition precedent of the obligation to pay. This renders *Hamlyn* v. *Talisker Distilling Company* unimportant in the consideration of this case. See also *Caledonian Railway Company* v. *Greenock &c. Railway Company* (2).

The case of *Yule* v. *The Corporation of Chambly* (3) decides that the bridge is "real estate." This being so a vendor's lien arises for the unpaid purchase money. See articles of the Civil Code of Lower Canada, Nos. 2014, 1983 and 2009. *Evans* v. *Missouri, Iowa and Nebraska Railway Company* (4). *Walker* v. *Ware, Hadham and Buntingford Railway Company* (5).

(1) [1893] A.C. at p. 90.
(2) H.L. 2 Sc. App. 350.
(3) 2 Steph. Dig. p. 122.
(4) 64 Mo. 453; Lewis on Eminent Domain, sec. 620.
(5) 35 L.J., N.S., Ch. at p. 96

1898

YULE v. THE QUEEN.

Reasons for Judgment.

Cosens v. *Bognor Railway Company* (1). *Bishop of Winchester* v. *Mid-Hants Railway Company* (2).

The jurisdiction of the court in this case depends upon section 101 of *The British North America Act*, and section 16, paragraph 4 of *The Exchequer Court Act*. This is not a claim arising under any law of Canada.

THE JUDGE OF THE EXCHEQUER COURT (April 4th, 1898) delivered judgment.

The claim presented by the petition of right filed in this case has its origin in the Act of the Legislature of the late Province of Canada, 8 Victoria, Chapter 90, whereby one John Yule, the Younger, was authorized and empowered at his own cost and charges to erect and build a good and substantial toll-bridge over the River Richelieu, in the Parish of St. Joseph de Chambly, in the Province of Quebec, and to erect and build a toll-house and turnpike with other dependencies on or near the said bridge. By the 3rd section of the Act it was provided, amongst other things, that the said bridge, toll-house, turnpike and dependencies to be erected thereon or near thereto, and also the ascents or approaches to the bridge, and all materials which should be from time to time provided for erecting, building, maintaining or repairing the same, should be vested in the said John Yule, the Younger, his heirs and assigns, for the term of fifty years from the passing of the Act, that is, from the 29th of March, 1845; and that at the end of such term of fifty years the said bridge, toll-house, turnpike and dependencies and the ascents and approaches thereto, should be vested in Her Majesty, Her heirs and successors, and be free for public use, and that it should then be lawful for the said John Yule, the Younger, his heirs, executors, curators or

(1) L.R. 1 Ch. 594. (2) L.R. 5 Eq. 17.

1898

YULE v. THE QUEEN.

Reasons for Judgment.

assigns to claim and obtain from Her Majesty, Her heirs and successors, the full and entire value which the same should at the end of the said fifty years bear and be worth exclusive of the value of any toll or privilege; such value to be ascertained by three arbitrators, one to be named by the Governor of the Province for the time being, another by the said John Yule, the Younger, his heirs, successors, curators or assigns, and the third by the said two arbitrators.

The bridge was built within the time prescribed by the Act to which reference has been made, and has since been maintained by the said John Yule, the Younger, or his representatives. In the year 1891 its superstructure was destroyed by fire, leaving only the piers upon which the superstructure had rested, and the persons then interested in the property brought the matter to the attention of the Government of Canada, stating that they were then willing instead of re-building the bridge, to accept from Her Majesty's Government the value of the piers, to be determined by arbitration, and a fair allowance for their privileges under the said Act. This proposition was communicated by the Government of Canada to the Lieutenant-Governor of the Province of Quebec, but nothing came of the proposal, and the owners of the bridge rebuilt it, as they had a right, and were required by the Act 8 Victoria, Chapter 90 to do. The fifty years mentioned in the Act expired on the 29th of March, 1895, and the suppliants presented to His Excellency the Governor-General in Council a petition to have the amount of the compensation to which they were entitled determined, expressing their willingness to proceed either by way of arbitration as specified in the Act, or by petition of right; or to take any steps whatever which the Government of Canada might suggest as advisable for a fair and equitable adjust-

1898

YULE
v.
THE
QUEEN.

Reasons for Judgment.

ment of their claim. The matter having been brought to the attention of the Governments of the Provinces of Ontario and Quebec, the Government of the Province of Ontario, while denying any liability, expressed a desire that if there was supposed to be any ground for holding that province liable, or to be possibly liable conjointly with the Province of Quebec, the matter should be settled by petition of right; and not by the Dominion Government or by arbitration. The Government of the Province of Quebec also expressed a preference for the submission of the questions at issue to the courts. The views of the two Provincial Governments having been communicated to the suppliants, they filed their petition of right in which they stated that they were ready and willing to proceed with the prosecution of their claim by petition of right, or by way of arbitration, if Her Majesty should desire to refer the claim to arbitration under the Act, and they prayed that Her Majesty might be pleased to grant Her fiat for the petition or that Her Majesty might be pleased to name an arbitrator in the event of it being desired to proceed by arbitration, and they named an arbitrator to act if the latter course were adopted. On that petition of right a fiat was granted by His Excellency the Governor-General.

The questions to be determined on the facts stated and the defences set up by the Crown are, first, whether this court has jurisdiction of the matter; and secondly, if it has jurisdiction, whether the amount of compensation not having as yet been determined by arbitration the petition may be maintained.

And first, it is to be observed that in 1845 when the Act 8 Victoria, chapter 90, was passed there was no court having by petition of right or otherwise jurisdiction to hear and determine claims against the Crown; and the proceeding prescribed by the statute

1898

YULE v. THE QUEEN.

Reasons for Judgment.

for determining the value of the bridge and its dependencies was one that could not have been invoked without the Crown's consent. If the Crown failed to appoint an arbitrator there was no way of compelling it to do so, and no forum in which the claim could be enforced. The question is not therefore whether the special proceeding or remedy given by the statute excluded some other proceeding or remedy that would otherwise have been available, but whether by the Acts relating to this court it has been given jurisdiction in respect of the claim created by the statute in question. That depends, it seems to me, upon the construction to be put upon clause (d) of the 16th section of *The Exchequer Court Act* whereby it is provided that the court shall have original exclusive jurisdiction to hear and determine every claim against the Crown arising under any law of Canada; that is to say, taking the Act as a whole, every claim against the Crown as represented by the Government of Canada arising under any law of Canada.

Now that this is a claim against the Crown does not, it seems to me, admit of any question. That is exactly what the statute gives to John Yule, the Younger, and to his legal representatives, for it states in terms that at the end of the fifty years mentioned therein he or they may claim and obtain from Her Majesty, Her heirs and successors, the full and entire value of the said bridge, toll-house, turnpike and dependencies, exclusive of the value of any toll or privilege.

The second question arising upon the construction of the clause of *The Exchequer Cour Act* to which reference has been made, is as to whether or not it is a claim against the Crown as represented by the Government of Canada; and that depends upon the construction of the 109th and 111th sections of *The British North America Act*, 1867. By the 111th

1898

YULE
v.
THE
QUEEN.

Reasons for Judgment.

section thereof it is provided that Canada shall be liable for the debts and liabilities of each province existing at the Union. Was the obligation created by the statute 8 Victoria, chapter 90, to compensate, in the event that has happened, John Yule, the Younger or his representatives for the value of this bridge and its dependencies a liabilitiy of the late Province of Canada existing at the Union? That question must, it seems to me, be answered in the affirmative. But it is argued that under the 109th section of *The British North America Act*, 1867, the bridge and its dependencies passed to the Province of Quebec subject to some interest or lien of the suppliants therein or subject to some trust on the part of the Government of Quebec to compensate the suppliants for the same; and that therefore the Government of the Province of Quebec is, and the Government of Canada is not, liable for this claim. With that conclusion I do not agree. The statute in terms says that on the expiry of the term of fifty years, the bridge, toll-house, turnpike and dependencies and the ascents and approaches thereto shall be vested in Her Majesty, Her heirs and successors and be free for public use. No lien or interest of any kind is by the Act reserved to the said John Yule, the Younger, or his representatives. All that he is given is a right to claim and obtain from Her Majesty the value of the bridge and its dependencies exclusive of the value of any toll or privilege. It is not necessary in this case, to decide whether or not the bridge and its dependencies passed to the Province of Quebec under the 109th section of *The British North America Act*, 1867, or to determine whether or not under some provision of that Act the Province of Quebec is, or the Provinces of Ontario and Quebec conjointly are, liable to make good to the Government of Canada any sum which it may pay in

1898

YULE v. THE QUEEN.

Reasons for Judgment.

discharge of the claim created by the statute. What seems clear is that the suppliants have by virtue of the statute of the late Province of Canada 8 Victoria, chapter 90, and section 111 of *The British North America Act*, 1867, a claim against the Crown as represented by the Government of Canada. But to come within that part of clause (d) of the 16th section of *The Exchequer Court Act* now under discussion, the claim must not only be against the Crown as represented by the Government of Canada, but it must arise under a law of Canada. Does this claim arise under a law of Canada? Now I am inclined to the opinion that the Act 8 Victoria, chapter 90 is not as a whole one that could be called a law of Canada. The River Richelieu at the point where the bridge is constructed is not navigable, and even if it were, it is possible that the local legislature might give authority to construct such a bridge as that in question subject to any interference with navigation being sanctioned and made lawful by the Parliament of Canada or by His Excellency the Governor in Council acting under an Act of Parliament making provision therefor. There is, however, as I have stated, no question of navigation here, and the work is local and provincial; one that would now be within the legislative authority of the Legislature of Quebec. In that sense the statute is, as a whole, provincial, and cannot, it seems to me, be said to be a law of Canada. But if I am right that the obligation created by the statute to compensate in the event that has happened, John Yule, the Younger, or his representatives for the value of the bridge and its dependencies was within the meaning of the 111th section of *The British North America Act*, 1867, a liability of the late Province of Canada, existing at the Union, then it is by virtue of the latter Act that the claim arises, and the Crown, as

represented by the Government of Canada, becomes liable, and that section is, I think, in that respect, a law of Canada.

I am, therefore, of opinion that on the true construction of clause (d) of the 16th section of *The Exchequer Court Act* this is a claim against the Crown as represented by the Government of Canada, arising under a law of Canada.

That brings us to the question raised by the third paragraph of the statement of defence as to whether or not the ascertainment by arbitration of the value of the bridge and its dependencies is an unfulfilled condition precedent to the suppliants' right to claim or obtain any compensation from Her Majesty, or to maintain this action. It is of course the duty of the court to say whether a defence pleaded is good or bad in law, and not to say whether it is one that ought in fairness or good conscience to be pleaded. But I may perhaps be permitted to add that in a case such as this, where the Crown's faith has been solemnly pledged by an Act of the legislature, and where the suppliants have at all times been ready to proceed either in the manner prescribed by the Act, or by petition of right, and where the governments of the provinces on one or both of which the burden of the claim may ultimately fall have expressed a desire that the matter may be determined by petition of right, and not by arbitration, and where the suppliants with knowledge thereof, have presented their petition of right and have prayed that a fiat be granted, or in the alternative that an arbitrator be appointed by the Crown, and have named their arbitrator in case that course should be adopted, and the Crown on that petition has granted its fiat that "right be done," I should deem it an unhappy state of the law, if, under such a state of facts, the court were compelled to de-

1898

YULE
v.
THE
QUEEN.

Reasons for Judgment.

clare that the Crown could now successfully invoke against the suppliants' petition the fact that the amount of the claim had not been determined by arbitration. Whether but for what has taken place between the parties that defence could have been successfully set up need not now be considered. That is a question as to which there might be room for some difference of opinion. But it does not now arise. While the parties could not by consent give the court jurisdiction of the matter, if otherwise it had not jurisdiction, yet it was open to them in respect of a claim over which the court has jurisdiction, to waive a proceeding prescribed by the statute for determining the value of the bridge and its dependencies, and this, it seems to me, has been done; and it is now too late for the Crown to object that the petition may not be maintained because there has been no reference to arbitration. It will, however, be proper, I think, to take such steps as will practically give the same proceeding as that prescribed by the statute. There will be judgment for the suppliants with costs; but the question of the value on the 29th of March, 1895, of the bridge, toll-house, turnpike and dependencies, and the ascents and approaches thereto, exclusive of the value of any toll or privilege will be referred for enquiry and report to three special referees, whose names I will give to the parties before the minutes of judgment are settled.

I have not considered the question of title, because subject to the production of certain original documents, the Crown seems to be satisfied that the suppliants have title; but if any question arises as to that, or as to the share of any one of the suppliants in the amount of the compensation to be ascertained, there will be a reference to the Registrar of the court for enquiry and report as to that.

1898

YULE
v.
THE
QUEEN.

Reasons for Judgment.

There is also a question of interest, but I shall reserve it until the case comes again before the court on a motion for judgment upon the report of the special referees, and I shall extend the time for appealing from this judgment until thirty days after the entry of final judgment upon their report.

Judgment accordingly.

Solicitor for suppliants: *R. V. Sinclair.*

Solicitor for respondent: *E. L. Newcombe.*