

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

1894.  
 Feb. 5.

SUPLIANTS ;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

*Rideau canal—Gift of lands—Breach of condition—Discovery—Jurisdiction of court to enforce same against the Crown.*

The Crown held certain lands at Ottawa for the purposes of the Rideau Canal. To its title to a portion of the lands was attached a further condition that no buildings should be erected on such portion. The court was of opinion that the breach of the conditions referred to, did not work any forfeiture or let in the heirs. (3 Ex. C. R. 304).

On motion under leave reserved :

*Held*, That the heirs (the suppliants) were not entitled to discovery or to an inquiry as to the particular uses to which the Crown had put the lands in question, or as to what buildings had been erected thereon.

*Semble*, That such a declaration and inquiry might be made in a case in which the court had jurisdiction to grant relief.

**MOTION** under leave reserved in a judgment of the court disposing of the principal issues in this case (1).

The grounds upon which the motion was based are stated in the judgment.

November 13th, 1893.

*J. A. Christie*, in support of motion.

*Hogg*, Q.C. *contra*.

(1) See the main case as reported in 3 Ex. C.R. 304.

1894  
 ~~~~~  
 MAGRE  
 v.  
 THE  
 QUEEN.  
 ———  
**Reasons  
 for  
 Judgment.**  
 ———

BURBIDGE, J. now (February 5th, 1894) delivered judgment.

The questions that were reserved in this case, and which have since been argued, had reference to the relief to which, if any, the suppliants were, under the finding of the court, entitled, and to costs.

With respect to that portion of the land at the By-wash, as to which Mr. Wise, the Government Engineer in charge of the canal, had expressed the view that, under existing circumstances, it was useful for building purposes only, further evidence has been taken which shows clearly, what perhaps was not a matter of serious question before, that this portion of the lands in dispute has not been abandoned by the Crown. It stands, therefore, in the same position as "the tract of sixty feet round the Basin" and the remaining portion of the land at the By-wash.

The suppliants, by their petition, prayed for a declaration:—

(1) That Her Majesty the Queen is a trustee of all the lands embraced in the gift of Nicholas Sparks that were not and are not now actually used for the purposes of the Rideau Canal, and of the rents and profits arising from the same.

(2) That the agreement expressed in the Act of the Provincial Legislature of Canada, 9th Victoria chapter 42, whereby the said Nicholas Sparks freely granted the two parcels of land therein mentioned, was made upon the condition that the said two parcels of land should be used for the purposes of the Rideau Canal, and upon the further condition that no buildings should be erected thereon.

(3) That the suppliants are entitled to discovery of all portions of said lands which are not now used for the purposes of the Rideau Canal; or on which buildings are erected, or which have been sold or leased.

(4) That the suppliants are entitled to be paid all the rents and moneys received by Her Majesty for any portion of the said lands.

(5) That the suppliants are entitled to those portions of the said lands whereon buildings are erected, and of those portions not now used for the purposes of the Rideau Canal, and to a conveyance thereof from Her Majesty.

1894  
 ~~~~~  
 MAGEE  
 v.  
 THE  
 QUEEN.  
 ~~~~~  
 Reasons  
 for  
 Judgment.  
 ~~~~~

No specific objection was taken by the Crown to the form of the petition, or to the relief sought, or to the jurisdiction of the court; and so far as the petition presented a claim for lands or money in the possession of the Crown, there could, I apprehend, be no objection. In such a case the court has, without doubt, jurisdiction (50-51 Vict. c. 16 s. 15), and where it has jurisdiction, there can, I think, be no objection to the suppliants seeking, or the court making a declaration of the relief to which they are entitled. By the 12th section of *The Petition of Right Act* (R.S.C. c. 136) it is provided that the judgment on every petition of right shall be that the suppliant is not entitled to any portion, or that he is entitled to the whole or some specified portion of the relief sought by his petition, or to such other relief, and upon such terms and conditions, if any, as are just; and by the 13th section, that in all cases in which judgment, commonly called a judgment of *amoveas manus*, was formerly given in England upon a petition of right, a judgment that the suppliant is entitled to relief, shall be of the same effect as such judgment of *amoveas manus*.

On the merits of the controversy, I came to the conclusion:—

1. That the Crown is not a trustee for the suppliants of any portion of the lands in question; and

2. That although such lands are held by the Crown for the purposes of the Rideau Canal, and to the gift

1894  
 MAGEE  
 v.  
 THE  
 QUEEN.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

or grant of "the tract of sixty feet round the Basin and By-wash" is attached the further condition that no buildings should be erected thereon, the conditions so attached to the gift or grant of such lands are not such as would in the case of a breach thereof work a forfeiture and let in the heirs.

That, if I am right, disposes of the case, so far as this court can deal with it, unless there is some relief to which the suplicants are entitled in respect of the breach of the conditions to which I have referred. The Crown believed, and the case it set up was, that it held the lands in question free from any condition, and as was to be expected, under such circumstances, and as the evidence shows, portions of such lands have been used for purposes other than "the purposes of the canal." But as to that there is no question that the court cannot restrain the Crown from using such lands for any purpose for which it sees fit to use them, or compel it to remove any buildings that may have been erected thereon contrary to the condition to which I have referred. No doubt if the Crown accepts the view that I have expressed, or if it is ultimately determined that it holds these lands subject to any condition, the condition will be observed. I do not for a moment suggest anything to the contrary. I am speaking only of the authority of the court, and the well settled rule of law that it has no power to compel, on the part of the Crown, the observance of any such condition.

The suplicants contend, however, that the court may and should declare that they are entitled to discovery, and should direct an inquiry to be had as to the particular uses or purposes to which such lands have been put, and as to whether or not such purposes are "purposes of the canal" and also as to what buildings have been erected on such lands contrary to the condition attached to the gift thereof. But to what end and for

what purpose would the court make such a declaration, and enter upon the inquiry mentioned? Not, as incident to any jurisdiction that it has to afford the suppliants any remedy, for as we have seen, it has no such jurisdiction. Not, it is equally clear, in aid of the jurisdiction of any other court, for there is no court which, in such a case, would have jurisdiction. The only purpose that such an inquiry could serve would be to elicit facts and collect materials upon which an appeal could be addressed to the Crown itself or to Parliament. But it is no part of the jurisdiction or duty of the court to adventure upon any such inquiry for any such purpose.

I am of opinion that I ought not to make the declaration or direct the inquiry prayed for.

As to costs, while the suppliants have not on the whole succeeded, they have not altogether failed. On the issues as to the conditions attached to the Crown's title they have substantially maintained their contention, although the court can in respect thereof afford them no relief. The case is one, I think, in which the costs might be apportioned, or in which, perhaps, the more convenient rule of leaving each party to bear his own costs, might be followed. I shall, I think, do what on the whole is fair between the parties, if I adopt the latter course. There will be no costs to either party, and either may within thirty days appeal as well from the principal judgment herein, as from the judgment now rendered on the questions reserved.

*Judgment accordingly.*

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

Solicitors for respondent : *O'Connor & Hogg.*

1894  
 MAGEE  
 v.  
 THE  
 QUEEN.  
 Reasons  
 for  
 Judgment.