

IN THE MATTER OF THE PETITION OF
 RIGHT OF THE HALIFAX GRAV-
 ING DOCK COMPANY, LTD., } SUPPLIANTS;
 (A BODY CORPORATE)..... }

1920

July 6th

AND

HIS MAJESTY THE KING..... RESPONDENT.

Petition of Right—War Measures Act—Contracts, essentials of—Effect of expropriation.

On the 15th January, 1918, an Order in Council was passed stating, *inter alia*, that owing to the importance of Halifax as a naval base, authority should be given under the War Measures Act, to proceed with the repairing and reconstruction of the suppliants' dock which had been seriously damaged by the explosion of a munition ship, on condition, 1st, that the company contribute the sum of \$111,000.00 towards the cost thereof; 2nd, that the balance be defrayed from the war appropriation; 3rd, the final decision as to the exact nature and extent of repair, reconstruction, etc., be under the inspection, supervision, and control of the representative of the Minister of Public Works.

On the 20th of May another Order in Council was passed rescinding the above and suspending the work on the dock, the preamble thereof showing, *inter alia*, that arrangements with the company in regard to sub-letting contracts, did not prove satisfactory to the Minister and the work was taken over by the Department, and had proceeded to the extent that vessels were capable of being received and repaired. A further Order in Council was passed on the 27th May authorizing the expropriation of the said dock, in which the former Orders in Council were referred to, and it is stated, *inter alia*, that the progress made in reconstruction by the Company had not been satisfactory, and owing to the urgency of this work being completed, it was necessary that the Crown should expropriate.

The correspondence shows that the suppliants wished the Crown to accept the proceeds of the insurance as their contribution to the reconstruction, when collected and whatever was collected, whereas the Crown, adhering to the terms of Orders in Council, insisted on the amount being paid, regardless of whether policies were collected or not.

Held, On the facts, that the parties were never in accord as to the suppliants suggestion regarding the insurance moneys and that

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therefore there never existed any contract under which the suppliants could recover.

2. That when the Crown came to the help of suppliants in the present instance, it was under no legal obligation to do so, and what it has done is referable to its grace and bounty and does not constitute an acknowledgment of any right of action or does not amount to an act that might imply any contract upon which an action would lie.

PETITION OF RIGHT to recover the sum of \$195,638.18 estimated cost of the works of reconstruction of suppliants' dock at Halifax at the date of expropriation of the same by the Crown.

Mr. L. A. Lovett, K.C., Mr. J. S. Roper, counsel for suppliants.

Mr. W. N. Tilley, K.C., for respondent.

The case was tried before the Honourable Mr. Justice Audette, at Halifax, on the 24th and 25th days of June, 1920.

Mr. Lovett, K.C.—As regards the insurance money two points are to be considered:—(a) whether under the Order in Council it was intended that the insurance money should be paid only on complete reinstatement, that is, whether the intention was that the work was to be done, that we were to pay \$111,000 on account of that whole work, and that the government was to pay the balance—or whether by reason of only one half of the reinstatement having been made, it can be found that only one half of the insurance money should be contributed, that is one half of the \$111,000. (b) whether it was the sum of \$111,000 or whatever sum might be realized from the insurance.

As to the question of liability I understand that the contention is that because there was no agreement drawn up and signed and sealed as provided

This case has been appealed to the Supreme Court.

by section 31 of the Public Works Act that we cannot recover.

The Public Works Act has no application. This was done under the War Measures Act, and it supercedes all others, and any Order in Council could be made under the War Measures Act. As to there being no agreement, the Crown is precluded from raising this point by its own Order in Council of May 27, 1918. (See O. in C. and also O. in C. P.C. 56.)

The work has been done admittedly. It was done under an Order in Council passed under the War Measures Act, which is just as good as under the hand and seal of the Minister. The War Measures Act was passed to permit such things being done without being hampered by the necessity of statutes. It was a thing that was agreed upon and done to this extent. It is not a matter of gratuity, because there was a consideration expressed in the Order in Council itself. We relieve the government of the alleged liability.

Under Order in Council P.C. 56 passed on the 15th day of January 1918, the Crown undertook to reinstate suppliants to the extent stated in Order in Council. The work was begun and carried on, and when the Crown took possession and expropriated, certain amount had been expended, and the suppliants are entitled to recover this amount so spent, less a proportion of the money recovered from the insurance company.

The company does not claim for unexecuted reconstruction; but only for what was actually put on the property by it, under the Order in Council.

HIS LORDSHIP:—Would not the Crown by paying you the value of your property at the date of expropriation, be paying you for everything?

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MR. LOVETT:—That would not be giving us reinstatement at all.

At the date of expropriation, the Crown owed us a debt, for moneys advanced by us for the reinstatement. Let us assume that the Crown had placed the work in the hands of a contractor instead of our doing it ourselves, it would have been bound to pay the contractor; and the property would have remained ours, and on subsequent expropriating, the Crown would have had to pay us for the property as it then stood including the reinstatement.

Mr. Tilley, K.C.—The claimant now says, you agreed to reinstate this property, and you must pay for the reinstatement work done; and if you had paid for the reinstatement work, the buildings would have been paid for. But then, you chose to expropriate my property, you pay me again for the property expropriated. So that, his claim is, that the Crown must first pay all the cost of the reinstatement work actually done by the company, and then the property thus created becomes the company's property—and when the Crown expropriates the company's property, it pays on the basis of the value of the property treating that property as the company's property. We are paying the full value of the property, but now he says, the Crown must not only pay for the full value under the expropriation, but it must pay the cost in addition of doing that reinstatement work, and doing it the second time.

My submission is that no liability to a third party can be created merely by the terms of an Order in Council. An Order in Council may authorize agreements to be entered into or be made. They can authorize something to be done, but we must find it done.

Contractual relationship cannot be made by Order in Council.

Secondly, even if it could be, there must be some evidence outside of the Order in Council showing the agreement. That is, there must be something to show Mr. Brookfield's concurrence with the terms of the intended contract.

It takes two to make a contract, and far from there being any contract here, or any concurrence by Mr. Brookfield, the evidence shows that Mr. Brookfield never agreed to what the Crown agreed to, assuming there was a contractual bargain. (Reference is made to correspondence.)

On the question of insurance money they were never agreed down to the time of the Petition of Right. They were never *ad idem*. (Love *v.* Instone (1) referred to.)

Mr. Brookfield *now* says, I will let the court say whether it is \$111,000 or something different, but he cannot make his contracts in court. He must make his contracts outside of the court and then come in and show what the terms were.

In this case there never was a contract at all between these parties, because the moment the Order in Council was sent stating they were to contribute \$111,000, Mr. Brookfield wrote back, I am to give over my insurance—I am to assign my insurance to the government.

He in effect says, I have your order in council, but it does not show the true arrangement with you. The moment he said that he disclaimed the agreement.

I submit he is left to the benevolence of the Crown. He has no agreement which has been agreed to by the Crown. It is not as if the Crown had taken his pro-

(1) [1917] 33 T.L.R. 475.

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perty and kept it. It is not a matter in which the Crown is taking or keeping anything.

As a result of this proceeding the Crown is remunerating him for it, but it is not in the position of taking his property and refusing to return it. It is an expenditure by him on his own property, and the Crown is compensating him for it in the expropriation proceedings, and there is no question of having deprived him of anything that he had under any contract that is partly executed.

Mr. Lovett, K.C.—As to the estoppel against the Crown, see *Attorney-General v. Collom*. (1).

The case cited by Mr. Tilley does not apply. In that case the contract had not been executed, in this case the work was done and in presence of the agent of the Crown. It is only a matter of interpretation of the Order in Council.

The facts are stated in the reasons for judgment.

AUDETTE, J., now (this 6th July, 1920) delivered judgment.

The Suppliants, by their Petition of Right, seek to recover the sum of \$195,638.20, that is \$217,850.40 less the \$22,222.20 hereinafter mentioned, being the amount claimed as representing what they are entitled to, under the provisions of the Order in Council dated the 15th January, 1918, for the expenditure upon the works of repair and reconstruction of the dock and shops, etc., at Halifax.

As the result of a disastrous explosion which occurred at Halifax, on the 6th December, 1917, creating a great upheaval inflicting considerable damages upon the property in the city, the Dominion Government,

(1) 1916, 2 Q.B.D. 193 et p. 204.

of its grace and bounty, came to the rescue of the sufferers.

The 'suppliants' dry dock, with its usual repair shops and plant, were considerably damaged thereby and the Crown, wishing to extend a helping hand, dealt with them in the manner that will clearly appear from the following Orders in Council. The Order in Council of the 15th January, 1918, reads as follows:—

"The Committee of the Privy Council have had before them a report, dated 5th January, 1918, from the Minister of Public Works, submitting as follows:—

"That a Dry Dock, with necessary repair shops and plant, was constructed in the Harbour of Halifax, N.S., by the Halifax Graving Dock Company, Limited, of England, and completed in 1889, the dock in question being 570 feet long, 88 feet wide at entrance and 30 feet deep over sill at high water, spring tides. This dock was subsidized by the Dominion Government under Act 45, Victoria, Chapter 17, and also by the Imperial Government and the city of Halifax. The subsidies were each for \$10,000 per annum for a period of twenty years. Payment of the Dominion Government subsidy was completed in the fiscal year ending 31st March, 1910, and it is assumed that full payment has also been made of the two other subsidies;

"That, in the recent disastrous explosion of a munition ship in the harbour of Halifax, the dock was badly damaged and the repair shops and plant connected therewith were practically destroyed;

"That the port of Halifax is a naval base and is very largely used by warships and warcraft of all kinds of His Majesty and of his allies. It is also used as a rendezvous for ships needing convoy. For

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these reasons it is urgently necessary for the purposes of the war that all facilities for the repairing of ships of war and other ships should be effectively available with the least possible delay. That the owners of the dock are not, at present, in a position, financially, to enable them to undertake the necessary repairs to same and the reconstruction of the shops and plant, as this work will cost considerably more under present winter conditions and the scarcity of labour than would ordinarily be the case;

“That the owners originally proposed that the Government expropriate the property and they offered to sell their interest in same for a sum not to exceed \$1,250,000 to which would have to be added the full cost of rebuilding the dock, etc. The acceptance of this proposition would, moreover, necessitate the operation of the dock by the Government;

“That an alternative proposal has, however, been made by the owners in which they offer to proceed with the reconstruction of the dock and to furnish the sum of \$111,000, which is the amount of the insurance, towards the cost, provided the Government supply the balance of the cost of reconstruction by way of a subsidy relieving the Government of any further liability, as well as responsibility for the operation and maintenance of the dock. It is understood that the work of repair and reconstruction shall not consist of anything beyond the replacement of the dock and shops, etc., in the same condition in which they existed at the time of the disaster. The final decision as to the exact nature and extent of such repair, reconstruction and equipment, of the dock and plant to rest entirely with the Minister of Public Works or his delegated representative on the work; the actual

work of reconstruction and purchase of material therefore to be under the inspection, supervision and control of the representative of the Department of Public Works.

“The Minister, in view of the foregoing and of the imperative necessity that docking and repairing facilities at Halifax be forthwith re-established and made available at once for ships awaiting repairs in that port, recommends that authority be given, under the War Measures Act, to proceed with the repairing, reconstruction and re-equipment of the dock and plant at that place under the following conditions:—

“1. The Halifax Graving Dock Company, Limited, the owners of the dock damaged, do contribute towards the cost thereof the sum of \$111,000;:

“2. The balance of the outlay required to be defrayed by the Government from the War Appropriation;

“3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant as well as the actual work of reconstruction and purchase of material therefor, to be under the inspection, supervision and control of the representative of the Minister of Public Works.”

The Order in Council of the 20th May, 1918, which rescinded the Order in Council of the 15th of January, 1918, reads as follows:—

“The Committee of the Privy Council have had before them a Report, dated 14th May, 1918, from the Minister of Public Works, submitting as follows:—

“That under the authority of an Order in Council, dated 15th January, 1918, the work of repair and reconstruction of the Halifax Graving Dock and Plant, which were badly wrecked in the disastrous explosion of a munition ship in the Halifax harbour

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last fall, was entrusted to the Halifax Graving Dock Company, Limited, on the following conditions:—

“1. The Halifax Graving Dock Company, Limited, the owners of the dock damaged, to contribute towards the cost thereof, the sum of \$111,000 (which is the amount of insurance).

“2. The balance of the outlay required to be defrayed by the Government from the War Appropriation.

“3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant, as well as the actual work of reconstruction and purchase of material therefor, to be under the inspection, supervision and control of the representative of the Minister of Public Works.”

“That the work was commenced in due course, but the arrangements made with the company in regard to sub-letting contracts having proved unsatisfactory to the Minister of Public Works, actual building operations were taken over by the Department direct and work has proceeded to an extent that vessels are capable of being received and repaired in the dock;

“That it is considered advisable, therefore, that further operations be suspended for the present, and the Minister, therefore, recommends that authority be given to rescind the Order in Council of January 15th, 1918, accordingly.

“The committee concur in the foregoing recommendation, and submit the same for approval.”

The Order in Council of the 27th of May, 1918, which provides for the expropriation of the dock, reads as follows, viz.:—

“The committee of the Privy Council have had before them a report, dated 24th May, 1918, from the

Minister of Public Works, stating that in the disastrous explosion of a munition ship in the harbour of Halifax on the 6th of December last, the dry dock, with necessary repair shops and plant, which was constructed in the harbour of Halifax, Nova Scotia, by the Halifax Graving Dock Company, Limited, and completed in 1889, was badly damaged and the repair shops and plant connected therewith were practically destroyed.

“That in view of the great importance of the port of Halifax as a naval base and of the fact that it is very largely used by war ships and war craft of all kinds and by transports of His Majesty and His allies and also as a rendezvous for ships needing convoy, it was urgently necessary for the purposes of the war that all facilities for the repairing of ships of war and other ships should be effectively available with the least possible delay.

“In order to attain this object an agreement was entered into with the owners of the dock in which they agreed to proceed with the reconstruction of the dock and to furnish the sum of \$111,000, which was the amount of the insurance, towards the cost, provided the Government would supply the balance of the cost of reconstruction by way of a subsidy, relieving the Government of any alleged liability, as well as responsibility for the operation and maintenance of the dock.

“That the progress made by the company in the reconstruction of the dock has not been satisfactory, and in view of the urgency of restoring the port of Halifax to its former status as a naval base and rendezvous during the war and of preparing it to meet the greatly increased needs of shipping after the war, it is necessary that the Government take immediate mea-

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tures to enter into possession of the said dock at once and to proceed with the reconstruction of the same.

“That from reliable information received it would seem that the sum of one million, one hundred thousand dollars is a fair estimate of the value of the dock as it stands at the present time, and the Minister recommends that authority be given to offer this sum to the Halifax Graving Dock Company, Limited, for the property as it stands at present, and that if this offer is refused authority be granted pursuant to the powers conferred by the War Measures Act, 1914, and all other powers vested in Your Excellency in Council, for reasons declared to arise out of the present war, of the business, property and rights of, or connected with the operations of the dry dock which was constructed in the harbour of Halifax by the Halifax Graving Dock, Limited, aforesaid, and that the question of compensation for the property, etc., as aforesaid, be submitted to the Exchequer Court for adjudication.

“The Committee concur in the foregoing recommendation and submit the same for approval.”

The Crown therefore expropriated the said dry dock, as will more fully appear from the case of No. 3239, *The King v. The Halifax Graving Dock Company, Limited*, in which I this day delivered judgment and wherein I have allowed the present suppliants compensation to cover the value of the dock, as it stood on the 24th June, 1918, inclusive of all works, buildings, erections, etc., executed by the Crown and the suppliants from the date of the explosion to the date of the expropriation.

Now the suppliants' contention, as set forth in paragraph 7 of the Petition of Right is founded on the following method of reasoning, to wit:

"The estimated cost of said reconstruction was \$450,000. The amount still to be done when Order in Council P.C. 1291 was passed to put the said dock in the same condition as before the explosion would amount to about \$250,000, or about five-ninths of the work. Your suppliant in accordance with said letter more fully set out in paragraph 3 of this petition, collected \$50,000, the cash results of the insurance monies on the said dry dock. As the respondent rendered it impossible for your suppliant to do any more than four-ninths of the work of reconstruction under said Order in Council, said respondent is only entitled to four-ninths of the insurance monies, or \$22,222.22."

They contend that the above Order in Council constituted a contract and that as the total work of repairs and reconstruction, estimated at \$450,000.00, were not entirely done, but only four-ninths thereof, that the Crown is only entitled to four-ninths of their insurance monies of \$111,000, namely \$22,222.22.

The question which *in limine* presents itself for decision, as I understand it, is whether or not it can be found that from the evidence a legal contract was ever entered into between the said parties for the reconstruction of the dock, or whether what was done by the Crown was not solely referable to its grace, bounty and benevolence shown to the suppliants by reason of their loss through the explosion at Halifax in 1917, and therefore cannot be treated as giving rise to a contract with all its attendant consequences in case of breach.

In respect of the English law of contract the Crown is at least in no worse position than the subject.

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Tested by this parallel, how will the situation between the Crown and the suppliants eventuate under the authorities? It is an elementary question, but certitude is sometimes only attained by going back to first principles.

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What is necessary to constitute a contract? "In its legal sense, it is the union of two or more persons, in a common expression of will affecting their legal relations.

"An agreement implies the assent of two minds. This idea is often expressed by the phrase 'It takes two to make a bargain.' Or, to state it in other words, it must be understood between the parties that one party has made an offer and the other has accepted it. . . .

"In construing an agreement 'the question is, what by a fair and reasonable construction of the words and *acts of the parties*, was the bargain between them, and not what was the secret interest and understanding of either of them.'" Benjamin, on Contract, pp. 7 and 8.

Among the essential elements to the validity and enforcement of a contract are: "1. A communication whereby the parties unite in a common *expression of will* as to their legal relation, in other words, offer and acceptance.

"2nd. A consideration.

"3rd. A writing, wherever it is required by the Statute of Frauds.

"4th. Capacity of the parties to make a contract.

5th. Reality of the consent expressed in offer and acceptance.—*Idem*, p. 9.

In the case of offer and acceptance, "the latter must be absolute and identical with the terms of the offer." Benjamin, p. 12; Anson, on Contracts, p. 61.

"The intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of acceptance or as to the correspondence of the terms of the acceptance with those of the offer." Anson, on Contracts, p. 61.

"The acceptance of an offer may introduce terms not comprised in the offer, and in such cases no contract is made, for the offeree in effect refuses the offer, and makes a counter-offer of his own." *Idem*, p. 62.

The first Order in Council, of the 15th of January, 1918, clearly stated that:—

"1. The Halifax Graving Dock Company, Limited, the owners of the dock damaged, to contribute towards the cost thereof the sum of \$111,000."

It did not attach to the clause any stipulation that this amount must first be recovered from the insurance companies, before it became payable.

Now the suppliants never complied with this requirement,—they never did, up to the present day, pay the sum of \$111,000 or any part of it to the Crown or on its account. Upon this question a long and protracted correspondence was carried on, which establishes beyond controversy that the parties have always failed to come to final terms or arrangement upon the question. They were never *ad idem* upon this point.

From the correspondence filed of record as Exhibits 1 and 2, it clearly appears that both parties always agreed to disagree from the very date of the first Order in Council.

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However, the intention of the parties was clearly set out by the suppliants before the date of the first Order in Council. Indeed as far back as the 1st January, 1918, (p. 2 of No. 1) we find a telegram of the president of the company addressed to Mr. Carvell, stating as follows: "As the dock is of such paramount importance, will accept, on behalf of the company, your proposal that we hand you the insurance, one hundred and eleven thousand, and you do the rest."

On the 15th June, 1918, (p. 19, Ex. No. 2) the president, on behalf of the suppliants, was writing to the Minister of Public Works, saying: "The proceeds of our insurance was to be handed to you and no doubt this will be paid, but I cannot say when unless the Government does something to force them. However, we will endorse our policies over to you so you are perfectly secure."

On the 18th June, 1918, (p. 26, Exhibit No. 2) Mr. Carvell writing to the president, says: "I am sorry, however, that I cannot agree with your contention that we were to take the proceeds of the insurance policy. While I think you may have opposed that, yet it was *distinctly understood* that you were to collect the policies and pay us \$111,000 as your contribution to reconstruction, *regardless of whether the policies were collected or not*. We therefore cannot have anything to do with the policies." And again, at page 35 of the same exhibit, we find another letter of Mr. Carvell to the president saying: "In reply to your letter of the 15th inst., I realize just as much as you do the necessity of having our matters closed up at the earliest possible moment, but I think I should say to you frankly that before anything can be paid on the re-instatement account, we must have a settlement

with you as to the insurance. You know the terms of the Order in Council and my views as to the agreement made between us. The moment you are ready to pay the \$111,000, or to recognize it as your contribution, we are prepared to make a settlement of this whole transaction."

Then in Mr. Hunter's letter, recited at paragraph 3 of the Petition of Right, it is stated "you are to collect your own insurance policies, and hand over the cash results to the Government"—refusing the assignment of the policies. To which letter the president answers on the 2nd February, 1918, (p. 27, Exhibit No. 1), saying: "Both clauses in your letter are quite satisfactory." At pp. 65 and 66 of the same exhibit, on the 5th and 8th April, 1918, the president again asks Mr. Hunter what he is to do with the insurance, and Mr. Hunter answers: "Collect and hand over cash to the Government."

At pp. 97 (2nd May, 1918) and 110 (13th May, 1918) Mr. Hunter again refuses to pay out any moneys until the sum of \$111,000 reaches the Government.

Then after the expropriation on the 23rd August, 1918, (p. 126 of the Exhibit) the president joins issue with Mr. Carvell on the insurance moneys and says, (as alleged in the pleadings), "I think you would not be entitled to the whole of the insurance, but only part of it, because you did not finish the re-instatement of the dock, but took it out of our hands. . . . If the full insurance were collected, viz., \$111,000, the proportion payable to the Government would be as \$400,000 is to \$185,000."

This last proposition enunciated both in the letter and on the pleadings is not to be found either in the Order in Council or in the correspondence on behalf of

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the Crown. It is outside of the alleged proposed agreement—*de hors* the alleged contract.

From the above cited correspondence, and from numerous other letters, and from the obvious fact that the \$111,000 were never paid by the suppliants,—it conclusively appears that the parties were never *ad idem*, after the passing of the Order in Council of the 15th January, 1918, with respect to this sum of \$111,000,—which the suppliants were to pay but never did pay. On the other hand it appears clearly that the Crown always adhered to the Order in Council, never waivering and never ceasing to ask for the \$111,000. Therefore, it must be found,—as the parties were never *ad idem*, that there could never have existed any legal contractual obligation under which the suppliants could recover in an action like the present one.

It is perhaps noteworthy that on the 17th January, 1918, (p. 14 of Exhibit No. 1) the secretary of the Department of Public Works wrote to the company, “an agreement is being prepared in the matter, and it will be submitted to you for signature.” Now, what can be deduced from this statement, except the Crown was then willing to enter into a contract with the suppliant, could the parties come to terms? This they wholly failed to do—no such contract or agreement has ever been entered into or executed by the parties. See *Love & Stewart v. Instone Co.; Ltd.*¹ The Crown has borne the expense of the considerable work it has performed at the dock, and in addition thereto the Crown has paid for it over again as part of the compensation in the expropriation of the dock.

Assuming for the sake of argument that a contract

¹ 33 T. L. R. 475.

had been entered into, could the suppliants recover for any work of reconstruction done, or to be done, outside the period between the 20th May, 1918,—(when the Order in Council of the 15th January, 1918, was rescinded) and the 21st June, 1918, the date of the expropriation? Indeed, on the 21st June, 1918, would not such contract be put at an end by the expropriation? That was the doctrine laid down by this court in the case of *Samson v. The Queen*.² See also Nichols, *On Eminent Domain*, p. 700 *et seq.* And for all such work executed up to the time of the expropriation, they have received full compensation in the expropriation case No. 3239.

Under all the circumstances of the case, I have come to the conclusion that there existed no legal contract between the parties, and when the Crown came to the help of the suppliants in this great upheaval and calamity, it did so of its own benevolence, and what it has done is referable to its grace, bounty and benevolence, and does not constitute an acknowledgment of a right of action or does not amount to any act that might imply any contract upon which an action would lie.

Therefore, my judgment is, that the suppliants are not entitled to any portion of the relief sought by their Petition of Right.

Judgment accordingly.

Solicitor for suppliants: *J. S. Roper.*

Solicitor for respondent: *W. L. Hall.*

² 2 Can. Ex. C. R. 30.—*See* 94.