16, 1941

No. 23 of 1940.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

INTERNATIONAL RAILWAY COMPANY (Plaintiff) *Appellant*

AND

THE NIAGARA PARKS COMMISSION (Defendant) *Respondent.*

Case for the Respondent.

RECORD.

10 1. This is an appeal from the judgment of the Court of Appeal for Ontario dated the 31st October, 1939, dismissing the Appellant's appeal from the judgment of the Honourable Mr. Justice Kelly which had dismissed the Appellant's claim for interest on the amount of compensation awarded to the Appellant for its electric railway which the Respondent took over from the Appellant under the terms of an agreement between their respective predecessors in title dated the 4th December, 1891. The amount claimed for interest to the date of the Writ, the 29th August, 1938, was $227,538.22, with interest thereon.

p. 58.
p. 46, l. 18.
p. 70, l. 36–p. 79.
p. 2, ll. 25–34.

2. The Respondent is a statutory corporation which controls as
20 trustee for the Government of the Province of Ontario the lands along the Canadian bank of the Niagara River which for its entire length forms part of the boundary between Canada and the United States of America. The lands on the Canadian bank adjacent to the rapids above Niagara Falls and adjacent to the gorge below the Falls and to and beyond the village of Queenston below the escarpment have been developed as a public park (the Queen Victoria Niagara Falls Park) by the Respondent and its predecessors in title under Acts now consolidated in the Niagara Parks Act, Chapter 93 of the Revised Statutes of Ontario, 1937. Practically every power given to the Respondent is subject to the control of the Lieutenant-
30 Governor in Council.

RESPONDENT'S CASE.

3. By section 9 of the Niagara Parks Act :—

> "All works or land whereon any expenditure is authorized in pursuance of this Act shall be deemed and are declared to be public works of Ontario notwithstanding that they are in the care or charge of the Commission."

Accordingly by section 7 of the Public Works Act of Ontario, Chapter 54 of the Revised Statutes of Ontario, 1937, the Respondent's works and land are vested in His Majesty and under the control of the Public Works Department of the Government of Ontario. Under Section 21 of the Niagara Parks Act all the Respondent's revenues not required for the purposes mentioned in the section are to be paid over to the Treasurer of Ontario and to become part of the Consolidated Revenue Fund of Ontario.

p. 70, l. 36–p. 79.

4. The action arises out of a contract made between the predecessors in title of the parties dated the 4th December, 1891 (which may be referred to as if made by the parties to the action) under which, when it came to an end on the 1st day of September, 1932, the Appellant became entitled to have fixed and to receive when fixed compensation for a railway which the Appellant had built on the Respondent's lands. Pursuant to the terms of the contract arbitration proceedings were had to determine the amount. On the 29th May, 1935, by a majority award, the arbitrators fixed the amount at $179,104. This amount was reduced by the Court of Appeal, but on appeal to His Majesty in Council by Order in Council dated the 23rd April, 1937, the amount was increased to $1,057,436. This last amount was paid on the 3rd June, 1937.

p. 105, ll. 19–21.

p. 111.
p. 112, ll. 24–27.

5. As an award may, by leave of the Supreme Court or a judge, be enforced in Ontario in the same manner as a judgment, the Respondent paid interest to the Appellant on—

p. 2, ll. 13–21 ;
p. 4, ll. 8–13.

> (A) $179,104 from the 29th May, 1935, the date of the arbitrators' award, to the 15th April, 1937, the date of the Privy Council judgment ; and
>
> (B) the amount awarded by the Privy Council from the 15th April, 1937, to the 3rd June, 1937, the date of payment.

The correctness of the amounts of interest paid on this footing is not in dispute.

6. A claim for interest was made in the proceedings before the arbitrators but was disallowed by the arbitrators, who were of opinion "that this is a matter beyond our jurisdiction." In the Privy Council the Appellant again put forward its claim for interest but the Board was of the opinion "that the Company must seek enforcement of their claim "to interest, if any, outside the present arbitration."

p. 105, l. 22.

Privy Council judgment, p. 12.

7. The Appellant claims interest on the amount awarded by the Privy Council from the 1st September, 1932—the date upon which the Respondent became entitled to take over the railway—with interest on this interest, less the amount of interest paid, basing its claim solely upon the principle or rule of equity which gives to the vendor of land interest on unpaid purchase money from the date when the purchaser takes, or may safely take, possession. The Appellant does not claim interest on the footing of damages or under the Ontario Judicature Act or under any statute or otherwise than under the equitable rule. p. 2, ll. 25–34.

8. The chief questions for decision in this appeal accordingly are—

(A) Whether the equitable rule (that if a purchaser is in possession of an estate receiving the rent, he is liable to pay purchase money; and the purchase money retained by him will carry interest to be paid by him to the vendor) applies to this case where the Appellant contracted to go upon the Respondent's lands, build a railway with appropriate buildings, grades and superstructures, operate that railway for a time and at a fixed date turn over the railway, buildings and equipment to the Respondent.

(B) Whether when by the contract the Respondent expressly contracted for the right of ownership and possession of the railway on a named date and the Appellant expressly deprived himself of the right to receive purchase money concurrently with parting with title and possession, the Appellant can invoke the equitable rule.

(C) Whether, when the contract expressly laid down the method whereby compensation to be paid to the Appellant was to be ascertained, the amount to be paid as compensation is " purchase money " or merely money payable under a contract.

(D) Whether, in such circumstances, interest is payable during the time necessary to fix the compensation.

(E) Whether the contract was in substance and fact for the purchase and sale of real estate.

(F) Whether the Respondent, which took over the railway as an agent or servant of the Crown pursuant to a contract made by it on behalf of the Crown, can be sued on that contract or must be proceeded against by petition of right.

(G) Whether an agreement to pay interest can be implied against the Crown or against a corporation which has entered into an agreement as agent for the Crown.

p. 70, l. 36–p. 79.
p. 71, ll. 4–30.

9. With the object of developing the Queen Victoria Niagara Falls Park, the predecessor of the Respondent entered into an agreement, dated the 4th December, 1891, with Edmund Boyd Osler and others, the predecessors of the Appellant, for the purpose of licensing them to construct an electric railway along the top of the Canadian bank of the Niagara River from the Village of Queenston as the northern terminal in and through the park and other lands belonging to the Respondent's predecessor to the Village of Chippawa as the southern terminal, and also a low level railway (never, in fact, constructed) in the gorge along the bottom of the cliff which forms the west bank.

p. 62, ll. 35–40.
pp. 62–79.
p. 63, ll. 3–7.
p. 63, ll. 7–19.
p. 63, l. 20 *et seq.*

10. The agreement was ratified and confirmed by the Ontario Legislature in 1892 by Chapter 96 of 55 Victoriæ. The same Statute incorporated the Niagara Falls Park and River Railway Company (predecessors of the Appellant) with power to take over the agreement from Edmund Boyd Osler and his associates and to construct and operate the railway in accordance with the agreement.

p. 72, l. 38–p. 73, l. 5.
p. 73, l. 47–p. 74, l. 2.
p. 78, ll. 31–47.

11. By the agreement the Respondent's predecessor licensed and permitted the company to construct and operate the railway on the lands belonging to the Commission (subject to some relatively unimportant deviations on land to be purchased by the Company) but the ownership by the constructing company of the railway was expressly made subject at all times to the rights of the Respondent's predecessor as owner in fee simple of the lands upon which the railway was constructed.

p. 72, l. 38–p. 73, l. 32.
p. 73, l. 33–p. 74, l. 5.
p. 107, l. 6; Privy Council Judgment, p. 13.
p. 74, ll. 22–36.
p. 74, ll. 43–47.

12. The railway was to be constructed on the Respondent's land, the Respondent's predecessor providing the necessary rights of way with liberty to the Company, under clause 8, to save expense by deviating on to other land which the Company might acquire. Certain land was acquired by the Company under this clause and under clause 2. Under the award and Privy Council judgment the Respondent duly paid to the Appellant $31,550 in respect of such land, $30,450 being for land acquired under clause 8 and $1,100 for land acquired under clause 2. By clause 11 the Company was given the right to construct or acquire incline railways and lifts and (by clause 12) " on the acquisition thereof, the Company shall hold the same under the Commission."

p. 75, ll. 29–36.
p. 77, l. 45–p. 78, l. 19; p. 78, ll. 31–47.
p. 78, ll. 11–19.

13. The agreement was to remain in force for forty years from the 1st day of September, 1892, with a right of renewal on the part of the company for a further twenty years. By clauses 26 and 29, if the Company did not renew at the end of the forty year period the Company was to be compensated for its railway, equipment, machinery and other works, but the railway and all property was to become the property of the Commission, subject to the payment of compensation. The railway in the hands of the

Commission was also to be subject to a lien, save as to possession, for such liens and charges as might exist in favour of bondholders and for the compensation.

14. The forty year period expired on the 1st September, 1932, and as the Company had notified the Commission that it was unwilling to renew and as it did not renew, the Commission went into possession of the railway, its equipment etc. on the 1st September, 1932, subject to an arrangement made without prejudice to either party's rights whereby the Company continued to operate for eleven days after the 1st September, 1932. Thereafter arbitration proceedings were had between the parties and the compensation fixed as hereinbefore outlined. p. 83, l. 25. p. 84, ll. 31–37; p. 85, ll. 23–27.

15. On the 29th May, 1935, the arbitrators awarded the Appellant $179,104 which award was increased by the Privy Council judgment on the 15th April, 1937, to $1,057,436. p. 105, ll. 19–21; p. 106. p. 112, ll. 22–27.

16. On the 3rd June, 1937, the Respondent paid the amount of the award made by the Privy Council together with interest from the 21st May, 1937 (the date the award made by the Privy Council was registered in the Supreme Court of Ontario) and costs. On the 12th August, 1937, the Respondent paid the interest on the award by the Privy Council from the 15th April (the date it was made) to the 21st May, 1937, and interest on $179,104, the amount of the original award, from the date of that award, the 29th May, 1935, to the 15th April, 1937; the result being that interest had then been paid on the respective awards to the date of payment. The payment was without prejudice to the Appellant's right to make the present claim. The letter from the Respondent's solicitors to the Appellant's solicitor, whereby payment was made, referred to "suit for any balance" if the Appellant adhered to the view that further interest was due, and stated that the Respondent's solicitors were obtaining instructions to accept service of the writ. p. 100, ll. 11–33. p. 101. p. 101, ll. 32–37.

17. The Appellant's writ was issued on the 29th August, 1938, and the Statement of Defence denied any liability to pay further interest and also alleged that the Respondent is an emanation or agent of the Crown entitled to indemnity from action. In reply the Appellant denied the Respondent's right to immunity as an emanation or agent of the Crown and, if the Respondent were otherwise entitled to such immunity, relied on the above-mentioned letter as a waiver of the immunity and an agreement that the Appellant's claim should be determined by action. p. 1, l. 10. p. 3. p. 4, ll. 24–32. p. 5, ll. 27–39.

18. The action was tried on the 12th, 13th and 14th June, 1939, before the Honourable Mr. Justice Kelly, who on the 24th July, 1939, dismissed the action with costs. In his reasons for judgment, the learned p. 46, ll. 18–30. p. 46, l. 36–p. 55, l. 33.

p. 47, l. 33–p. 48, l. 39. p. 48, l. 39–p. 49, l. 47. p. 49, ll. 29–31. p. 49, ll. 43–47. p. 50, ll. 14–30. p. 50, l. 31–p. 51, l. 41. p. 51, l. 41–p. 52, l. 5.

judge considered the application and limitations of the equitable rule on which the Appellant relies, and examined the contract to determine whether it was an agreement for the sale of land. All the Appellant's rights over the Respondent's land expired on the 1st September, 1932, and were not the subject of any transfer. The contract, if not *sui generis*, was essentially for the supply of work and material, and the compensation was not purchase money for land but simply money due under a contract. Lands acquired by the company which had not been the Commission's property were transferred, and if this transfer and the portion of the compensation therefor were severable from the remainder of the contract, which the learned judge doubted, the equitable doctrine might apply to the sum of $30,450 (the compensation for land acquired under clause 8 of the agreement, no reference being made to the $1,100 awarded for land acquired under clause 2). But in equity it could scarcely be argued that because this small amount of land was transferred, interest amounting to $250,000 should be paid on a general contract, and the Appellant had definitely disclaimed such a contention. The learned Judge then considered whether the decisions in cases between *Toronto City Corporation* and *Toronto Railway Corporation*, reported in [1925] Appeal Cases, page 177, and (1926) 59 Ontario Law Reports, page 73, bound him to award interest to the Appellants. Those cases were distinguishable, and he would not be justified in extending the rule still further to a case where there was not a transfer of land except as the merest incidental. The Ontario Judicature Act governs the payment of interest and nothing therein, apart from the equitable rule which the Appellant had unsuccessfully invoked, gives the Appellant any right to interest.

p. 52, l. 6 *et seq.* p. 52, l. 12–p. 54, l. 14. p. 54, l. 15–p. 55, l. 1. p. 55, ll. 2–32. p. 101.

19. The learned Judge then considered the second ground of defence, that the contract was made on behalf of the Crown by the Respondent as agent of the Crown, and that therefore proceedings can only be taken by petition of right. After reviewing the authorities, he held himself bound to hold, that the Respondent is an emanation from and the servant of the Crown, and, as an examination of the relevant statutes and the contract would lead to the same conclusion, the second ground of defence must prevail. The estoppel or waiver set up by the Appellant in reply was based on a letter which was written, in his view, with no other meaning than that any further claim would be resisted. No estoppel can be raised against the Crown and if the letter were to be regarded as an agreement there was an entire absence of consideration.

p. 58. p. 58, l. 29–p. 61, l. 2.

20. The Appellant appealed to the Court of Appeal (consisting of Justices Riddell, McTague and Gillanders) which unanimously dismissed the appeal. In his reasons for judgment, in which the other learned Judges concurred, Mr. Justice McTague said that he agreed generally speaking with Mr. Justice Kelly's analysis of the nature of the contract,

but preferred to view it as an agreement by which the Respondent granted the Appellant's predecessors, as private undertakers, a franchise for a limited period coupled with an obligation on the part of the Appellant at the end of the period to accept compensation to be ascertained by arbitration in the manner provided in the agreement for whatever investment they had made pursuant to the franchise. Viewed in this way, the Appellant had nothing to sell, but only a right to compensation. This view was substantiated by paragraph 26 of the agreement by which the Appellant became obliged to give up possession before compensation is ascertained or paid. In his opinion the agreement was not a vendor and purchaser transaction. Where there is a true vendor and purchaser relationship the right to receive interest takes the place of the right to retain possession. The Appellant being specifically disentitled to possession under the contract cannot have interest in lieu thereof. The contract specifically provided what the Appellant was entitled to at the end of the term as compensation for its investment and how it was to be ascertained.

p. 59, ll. 34–43.
p. 77, l. 45.
p. 59, l. 20.
p. 59, l. 43.
p. 60, ll. 42–45.

21. Mr. Justice McTague also agreed that the Respondent was an emanation of the Crown, who in the absence of statutory authority, must be proceeded against by petition of right. There was nothing in the statutes to take away the Respondent's immunity from other proceedings. He also took the learned trial Judge's view of the Respondent's letter of the 12th August, 1937.

p. 59, l. 47–p. 60, l. 41.
p. 101.

22. The Respondent therefore respectfully submits that this appeal should be dismissed for the following amongst other

REASONS.

(1) BECAUSE the contract does not expressly or by implication provide for the payment of interest.

(2) BECAUSE the Appellant has no right to interest under the Judicature Act or as damages.

(3) BECAUSE the contract was not one for the sale and purchase of lands and therefore the equitable rule allowing interest does not apply to it.

(4) BECAUSE no agreement to pay interest can be implied in law as the rights of the Appellant are specifically provided for in the contract; the rights of the parties in the property pending the fixing and payment of compensation are likewise provided for, and the word "compensation" in the contract includes everything to be paid to the Appellant.

(5) BECAUSE in any event no term can be implied against the Crown.

(6) BECAUSE the Respondent being an agent of the Crown and having entered into the contract as an agent of the Crown can only be proceeded against by petition of right.

(7) BECAUSE the Respondent's immunity from action has not been waived or bargained away and the Respondent is not and in law cannot be estopped from relying on such immunity. 10

(8) BECAUSE of the other reasons given by Mr. Justice Kelly and Mr. Justice McTague.

R. I. FERGUSON.

FRANK GAHAN.

No. 23 of 1940.

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AND

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Case for the Respondent.

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