

42, 1933

In the Privy Council.

No. 50 of 1932.

CANADIAN  
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APPELLANTS' CASE.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

DOMINION BUILDING CORPORATION LIMITED  
(*Claimants*) and JAMES L. FORGIE (added as  
a Party Claimant by Order made by the President  
of the Exchequer Court of Canada, on the 4th  
day of March, 1931) - - - - - *Appellants*

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AND

HIS MAJESTY THE KING (*Respondent*) - - - *Respondent.*

CASE FOR THE APPELLANTS.

Record.

1. This is an appeal brought pursuant to leave granted by His Majesty in Council on the 10th June, 1932, from a Judgment of the Supreme Court of Canada dated 15th March, 1932, allowing the Respondent's appeal from a Judgment of the Exchequer Court of Canada dated 4th March, 1931. p. 142. p. 133. p. 125.

2. The question in dispute is as to the right of the Appellants or one of them to claim damages from the Respondent by reason of a repudiation (as the Appellants allege) by the Minister of Railways and Canals of a contract entered into by the Crown to sell to the Appellant Forgie valuable freehold lands belonging to the Crown in Toronto at the price of \$1,250,000. 20

3. The dispute was on the 16th September, 1926, referred by the Acting Minister of Railways and Canals to the Exchequer Court of Canada for adjudication in pursuance of the powers conferred by Section 38 of the Exchequer Court Act, Revised Statutes of Canada (1906) c. 140. The validity of the reference was subsequently challenged by the Respondent. It was upheld by the Exchequer Court on 2nd March, 1927; this decision was reversed by the Supreme Court on 16th December, 1927, but was 30

Record. finally restored in favour of the Appellants by His Majesty in Council in pursuance of the advice of the Judicial Committee of the Privy Council contained in their judgment dated 15th October, 1929 (L.R. 1930 A.C. 90).

p. 7, l. 26. **4.** The main issue in the dispute is whether, having regard to the form of the transaction which took place between the Appellant Forgie and the Minister of Railways and Canals, any valid contract of sale was ever entered into at all. As to this the Respondent contends that no binding contract was ever made and relies in particular upon the provisions of Section 15 of the Department of Railways and Canals Act R.S.C. (1906) c. 35.

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**5.** The provisions of that section are as follows :—

“15. No deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding upon His Majesty, unless it is signed by the Minister, or unless it is signed by the Deputy Minister, and countersigned by the Secretary of the Department, or unless it is signed by some person specially authorised by the Minister, in writing, for that purpose: Provided that such authority from the Minister, to any person professing to act for him, shall not be called in question except by the Minister, or by some person acting for him or for His Majesty.” 20

**6.** In answer to this the Appellants contend :—

(A) That the provisions of Section 15 of the Railways and Canals Act do not apply to a sale of Crown lands, which sale must be effected under the authority of Section 4 of the Public Lands Grants Act R.S.C. (1906) c. 57. This section runs as follows :—

“The Governor in Council may authorise the sale or lease of any public lands which are not required for public purposes, and for the sale or lease of which there is no other provision in the law, and may make regulations with respect to the price or rental for the sale or lease of any such lands ;” 30

(B) That the contract in question was an oral contract to which the provisions of the Department of Railways and Canals Act Section 15 do not in any event have any application.

(C) That if the contract was not an oral but a written contract, the requirements of Section 15 were in fact complied with.

(D) That by reason of certain acts of part performance on the part of the Appellants the Respondent is debarred in any event from taking advantage of the Department of Railways and Canals Act.

**7.** There is a second issue in dispute, whether, assuming the contract of sale was validly made, the Minister of Railways and Canals (hereinafter referred to as "the Minister") was entitled to repudiate it at the date when he purported so to do on the ground that the Appellants had broken it by delay in completion.

Record.

**8.** The contract on which the Appellants rely arose in the following manner. In May, 1925, the Appellant Forgie proposed to acquire (A) certain property at the North West corner of King and Yonge Streets in the City of Toronto which belonged to the Crown and was used for the purposes of the Canadian National Railways, and (B) certain property, known as the Home Bank property, adjoining the Crown property, with a view to erecting on the combined site a large new office building, the first four floors of which would be leased by the Canadian National Railways.

p. 145.

**9.** In May, 1925, a written offer by him to this effect was submitted to and approved by the Board of the Canadian National Railways. On the 27th July, 1925, having already acquired an option on the Home Bank property, he submitted through the Minister a written offer to purchase the Crown property, his offer being directed to "His Majesty the King, represented by the Minister of Railways and Canals."

pp. 148-150.  
p. 150, l. 15.pp. 159-161.  
p. 146.

p. 22, l. 23.

**10.** This offer took the form of an offer to purchase the Crown property for a sum of \$1,250,000, accompanied by a deposit of \$25,000. It was part of the terms of the offer that the deposit was to be returned if the offer was not accepted, and it was also provided (A) that upon obtaining possession of the Crown lands on or before 15th September, 1925, the Appellant Forgie would immediately proceed with the erection of a 26 storey modern office building on the combined site, and (B) that the Respondent should take a 30 years' lease of the ground floor and first three floors of the proposed building at a rental and on the terms therein specified.

p. 159, l. 8.

p. 159, l. 23.

p. 160, l. 16.

p. 160, l. 37.

**11.** The only provisions of this offer which it is necessary to set out in full are as follows :—

(1) "The undersigned herewith deposits with His Majesty, represented as aforesaid, on account of the above purchase price, the sum of Twenty-five thousand (\$25,000) dollars, to be applied by His Majesty on account of said purchase price, in case of and upon the acceptance of this offer, otherwise to be returned, without interest, to the undersigned.

p. 159, l. 23.

(2) "The undersigned undertakes and agrees, upon the acceptance of this offer to pay to His Majesty the balance (One million two

p. 159, l. 23.

Record. hundred and twenty-five thousand dollars) of the said purchase price at such time as possession of the said premises be given to the undersigned not later than the fifteenth day of September 1925.

\* \* \* \* \*

p. 161, l. 23. (3) "This offer of purchase, if accepted by Order of His Excellency the Governor-General in Council, shall constitute a binding contract of purchase and sale, subject to all the terms and provisions thereof and which contract shall enure to the benefit of the undersigned, his heirs, executors, administrators and assigns and to the benefit of His Majesty, His Successors and Assigns."

p. 156-158. **12.** On 29th July, 1925, an Order in Council was made accepting the offer of the Appellant Forgie. The Order took the form (which is usual in Canada) of a Minute of the Committee of the Privy Council approved by the Deputy Governor-General of Canada and bearing the Seal affixed by the Clerk of the Privy Council, Canada. 10

**13.** The Order in Council begins with the statement that :—

p. 156, l. 7. The Committee of the Privy Council have had before them a Report dated the 27th day of July, 1925, from the Minister of Railways and Canals representing as follows :

\* \* \* \* \*

Then it sets out by description the property in question and that the fee is in His Majesty, and the offer to purchase by Forgie, and proceeds further to state that :— 20

p. 156, l. 25. "The Minister accepted said offer of purchase, subject to the approval and authority of Your Excellency in Council given on or before the 29th day of July, A.D. 1925."

"That in the main the said offer of purchase, accepted as aforesaid, sets out in effect as follows :—"

\* \* \* \* \*

There is, further, a reference to the draft of the lease proposed to be granted by the Respondent, which draft was attached to the Order in Council, and the Order concludes with the following words :—

p. 158, l. 31. "The Minister submits the above and, upon the advice of the Deputy Minister of Railways and Canals, recommends that authority be given for the acceptance of the said offer of purchase hereto attached marked "A," and that authority be given for the sale and transfer of the premises by His Majesty to the Purchaser, the 30

transfer by its own terms only to vest title of the premises in the Purchaser upon the execution and delivery of the lease hereinbefore referred to, and such transfer to be in form to be approved by the Department of Justice. Record.

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

**14.** A certified copy of the Order in Council reached the Appellant Forgie within a few days of its having been made, but it was not clearly established in evidence by what means it came to his hand. It was never suggested to him, however, in cross-examination at the trial that the certified copy was not delivered to him on behalf of the Respondent, the only suggestion being that it was not sent with any covering letter, which letter in the Appellants' submission was quite unnecessary. It is at any rate certain that on 15th August, 1925, one J. W. Pugsley, Secretary to the Department of Railways and Canals addressed a letter to the Appellant Forgie which stated :—

p. 27, l. 3.  
p. 50, l. 1.  
p. 191, l. 13.

“Pursuant to the requirements of your offer of purchase dated July 27th, 1925, . . . which said offer of purchase was accepted by Order in Council (P.C. 973) dated the 29th day of July, 1925, His Majesty the King is taking steps to vacate the said premises by the 15th day of September next (1925) and you are hereby required to be ready to finally close the transaction on or before that date.”

p. 192, l. 1.

**15.** While the Report of the Minister, referred to in the Order in Council as mentioned in paragraph 13 hereof, was not produced at the trial, it ought to be inferred that there is in existence a written document or report, signed by the Minister, stating that he had accepted the offer of the Appellant Forgie and submitting it for approval and acceptance by the Committee of the Privy Council, and, it is submitted, this would be a compliance with Section 15 of the Department of Railways and Canals Act. The Appellants do not contend, however, that the existence of such a document is in any way essential to the question of the validity of the contract.

p. 174, l. 1.

**16.** On 5th August, 1925, the Appellant Forgie assigned to the Appellants the Dominion Building Corporation Limited the full benefit of the contract of purchase concluded by the Order in Council.

**17.** The balance of the purchase money due under the Contract was not paid on 15th September, 1925. The delay in completion was due to the fact that about May, 1925, the Appellant Forgie had commenced negotiations

Record. with the Respondent, represented by the Minister of Public Works, with a  
 p. 38, l. 29. view to the Respondent taking a lease of five other floors in the proposed  
 new building for the use of the Department of Customs and Excise. The  
 Minister of Public Works had informed the Appellant Forgie that he  
 p. 215, l. 15. proposed to recommend the taking of such a lease, but the intervention of  
 a general Election prevented the necessary Order in Council being made  
 until the 1st February, 1926. The proposal to arrange a lease of the five  
 p. 99, l. 12. floors for the use of the Department of Customs and Excise was at all  
 material times known to the Minister and Deputy Minister of Railways.

**18.** In view of the delay in his plans the Appellant Forgie accordingly 10  
 proceeded to apply to the Minister or his Deputy from time to time during  
 the remainder of the year 1925 for an extension of the contract date for  
 payment of the balance of the purchase money—these extensions were  
 apparently obtained without difficulty and were contained in letters  
 signed by the Deputy Minister, except the last extension which was granted  
 by a letter under the hand of the Minister himself. They may be  
 summarised as follows :—

p. 198, l. 28.	16th September 1925.	Extension till	28th September.	
p. 201, l. 20.	28th September 1925	” ”	12th October.	
p. 209, l. 19.	10th October 1925	” ”	19th October.	20
p. 210, l. 18.	19th October 1925	” ”	26th October.	
p. 211, l. 19.	26th October 1925	” ”	3rd November.	
p. 212, l. 22.	3rd November 1925	” ”	17th November.	
p. 214.	17th November 1925	” ”	30th December.	

p. 214. **19.** The letter dated 17th November, 1925, signed by the Minister,  
 was to the following effect :—

“Dear Sir,

Re Purchase of Crown property (Imperial Bank Property, so called),  
 Corner of Yonge and King Streets, Toronto, Ont.

I have your letter of the 16th instant, addressed to the Deputy 30  
 Minister, applying for a further extension of time within which to  
 receive possession of the property in question and to make payment  
 of the balance of purchase price therefor and to perform and carry  
 out on your part other details of the contract of purchase under your  
 offer of purchase, dated July 27th, 1925, and the acceptance thereof.

In reply, I am to advise you that a further extension of time,  
 namely, from November 17th, 1925, to December 30th, 1925, is  
 hereby given, but without prejudice on the part of His Majesty as  
 to, and without waiver on the part of His Majesty of, any of His

rights, reservations or remedies under and as provided for by the said contract should you fail to perform and carry out, within the hereby extended period, all the covenants and conditions, which on your part, under and as provided by the said contract, were to be performed and carried out within the original period thereunder provided.

Record.

Yours faithfully,

GEO. P. GRAHAM.

James Forgie, Esq.,  
Barrister, etc.,  
Toronto, Ont.”

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**20.** The Appellants respectfully point out that at any rate at this date the Minister evidently treated the matter as if a binding contract of sale had been entered into. It was not until long after the present proceedings were instituted that it was for the first time suggested that no contract had ever in fact been made.

**21.** On 29th December, 1925, the Appellant Forgie applied by telegram addressed to the Deputy Minister, asking for a further extension of time under the contract until 31st January, 1926. No written reply refusing or explicitly granting this extension was ever received, but the Appellant Forgie stated in his evidence that, in January, 1926, he had a conversation with the Minister in Toronto and told him that he was very much exercised over the fact that his last application had not been answered. To this the Minister replied “I do not see what cause you have to worry, Forgie, I have not cancelled your contract . . . there is no necessity to worry—the matter stands as it did.” The Minister in his evidence, while not being prepared to deny that a conversation may have taken place in that month, denied that it amounted to a statement that the contract would be extended.

**22.** On 3rd February, 1926, the Appellant Forgie received a certified copy of the Order in Council dated 1st February, 1926, approving the proposed lease of the five floors in the new building for the use of the Department of Customs and Excise, and on the same day he wrote to the Minister stating that he would be ready to pay the balance of the purchase price on or about 10th February, 1926.

**23.** By two letters addressed to the Appellant Forgie and dated 8th and 12th February, 1926, respectively, the Minister stated that the Appellants were in his view in default and intimated that he would refuse

Record. to carry out the contract. In the second of these letters he informed the Appellant Forgie that there would be no more extensions and that he would oppose to the limit any application that might be made for a fiat to commence proceedings against the Crown.

**24.** The Appellants respectfully point out that at no time prior to the repudiation of the contract by the Minister had they been given any notice requiring payment of the balance of the purchase money by any specified date under penalty of repudiation, nor was time originally made of the essence of the contract. They also point out that the deposit of \$25,000 has at all times been and still is retained in the possession of the Respondent. 10

p. 1. **25.** In these circumstances the present proceedings were instituted by the Appellant Company and were referred by the then acting Minister of Railways and Canals to the Exchequer Court, as mentioned above. p. 1, D. The Statement of Claim was delivered on 25th November, 1926, and amended on 12th March, 1927. By the Statement of Claim of the Appellant Company (the Appellant Forgie was subsequently added as a party by leave of the Court) it was claimed that a valid contract of sale had been made and subsequently repudiated by the Respondent, and there was claimed as special damages for breach of contract a sum of \$752,774 and interest, and further such damages for breach of contract as the nature of the case might require. 20

pp. 7-12. **26.** The Respondent's Statement of Defence was filed on 29th January, 1930. By his Defence the Respondent (A) denied that any contract of sale capable of binding him had ever been made, relying (*inter alia*) on the provisions of Section 15 of the Department of Railways and Canals Act; (B) alleged that no valid assignment of the contract had ever taken place; (C) denied that any extensions of time under the contract had ever been made or authorised by the Respondent and (D) alleged that if any such contract was made the Appellants did not on 15th September, 1925, or within a reasonable time thereafter perform the necessary conditions of the contract. 30

p. 125. **27.** The action was heard in the Exchequer Court of Canada at Ottawa before the President The Hon. Mr. Justice Maclean on 25th, 26th and 27th June, 1930, and by the judgment of the Court dated 4th March, 1931, it was ordered and adjudged that the Appellants were entitled to recover from the Respondent damages for breach of the contract of sale the amount of damages to be reserved, and that the Appellants were entitled to the costs of the action.



**28.** The learned President in giving his Reasons for Judgment in favour of the Appellants decided as follows :— Record.

(A) That the offer dated 27th July, 1925, coupled with the Order in Council dated 29th July, 1925, and the communication of the Order to the Appellant Forgie constituted a valid parol contract between the Respondent and the Appellant Forgie. pp. 113,  
l. 36 et seq.

(B) That the contract so made was assignable and was in fact assigned to the Appellant Company. p. 120, l. 15.

10 (C) That the Respondent was not entitled to repudiate the contract at the date when he purported to do so, on the ground of delay or any other ground. p. 120, l. 11.

(D) That Section 15 of the Department of Railways and Canals Act did not apply to the contract for three separate reasons :—

(I) The sale of public lands, such as the lands in question was not a matter pertaining to any Department of Government. p. 115, l. 16

20 Consequently the sale was effected by virtue of the provisions of Section 4 of the Public Lands Grants Act with the authority of the Governor in Council and the case was “distinguishable in fact from the line of cases governed by statutory limitations upon the right of a Minister of a Department to make informal contracts enforceable against the Crown.” p. 115, l. 14.

(II) “ ‘Contract’ in Section 15 . . . means a written contract that is to say, when a contract in writing is made, or is required by law to be made in writing, it can only be signed in the case of the Department of Railways and Canals by the person or persons therein mentioned. That provision of the Statute does not require that every contract must be reduced to a formal written contract signed by the persons mentioned in the Statute.” p. 117, l. 4.

30 Consequently the learned President held, following on this point the decision of the Supreme Court in *The Queen v. Henderson*, 28 S. C. R. 425, that the contract in question being an oral contract was not within the mischief of the Statute.

(III) There had been certain acts of part performance of the contract on the part of the Appellants in making payments and incurring expenses in connection with the Home Bank property which, on the analogy of the doctrine of part performance in relation to the Statute of Frauds, disentitled the Respondent in any event from relying on Section 15 of the Department of Railways and Canals Act in this case. p. 121, l. 19.

Record.  
p. 133.

**29.** The Respondent appealed to the Supreme Court of Canada from the judgment of the Exchequer Court and the appeal having been heard on the 11th and 12th November, 1931, was allowed by judgment of the Supreme Court (Anglin C.J., Rinfret, Lamont and Smith JJ.) dated 15th March, 1932. By the Judgment it was ordered and adjudged that the appeal should be allowed and the judgment of the Exchequer Court reversed and the Appellants' action dismissed with costs and the costs of the appeal, the Respondent being directed to return to the Appellants the deposit of \$25,000 paid in July 1925.

**30.** The reasons for judgment of the Supreme Court were delivered 10 by The Hon. Mr. Justice Smith and were concurred in by the other members of the Court. The reasons given by the learned Judge were as follows :—

p. 136, l. 42.

(I) There never was at any time a concluded contract between the Respondent and the Appellant Forgie, because there had never been a valid acceptance of the offer, having regard to Section 15 of the Department of Railways and Canals Act. The learned Judge said:

p. 137, l. 15.

“ I am therefore of opinion that the Order in Council of the 29th July, 1925, did not in itself constitute an acceptance of Forgie's offer of the 27th of that month because in the first place the offer was not made to His Excellency the Governor General in Council and the Order does not purport to accept the offer, and Secondly, because there is no evidence that the making of such an Order in Council was communicated to Forgie on behalf of His Majesty by the Minister of Railways and Canals, or anybody else duly authorised. Section 15 of the Railways and Canals Act Ch. 35 R.S.C. 1906 reads in part as follows :—” (the learned Judge here read the material words). “ As shown by the evidence already quoted the acceptance referred to in the report of the Minister set out in the Order in Council, if there was any, was not in writing, signed in compliance with this section, and therefore was not binding upon His Majesty.” 20 30

p. 138, l. 37.

And again the learned Judge observed : “ The question therefore is whether or not there was in fact an acceptance that complies with the terms of this Section 15, and it seems to me impossible to say that there was.”

p. 138, l. 40.

p. 139, l. 42.

(II) If there was no contract by virtue of the offer, the Minister's report and Order in Council and the correspondence, “ there was no part performance of the proposed contract which would have the effect of an acceptance of the offer and thus constitute a binding contract.” The learned Judge explained the doctrine of part performance as follows : “ The doctrine of part performance implies that one party to an intended contract stands by and knowingly 40

p. 139, l. 7.

“ allows the other party to perform acts by way of carrying out the  
 “ proposed contract that places (*sic*) the party so performing in a  
 “ changed position with regard to the subject matter.” Record.

(III) The effect of the various extensions of time for the completion of the contract which had been granted to the Appellant Forgie had been to make time of the essence of the contract, and “ the claim could not be sustained even if there were a contract.” p. 141, l. 12.

10 (IV) The Department of Railways and Canals Act Section 15 did apply to the contract because in the light of the judgment of the Judicial Committee of the Privy Council in the *Dominion Building Corporation Limited v. The King* [1930] A.C. 90, the matter, even if it were originally not a departmental but a Government affair, must be treated as appropriated to the Department of Railways and Canals by the Order in Council and was thereby made part of the Minister’s administration. p. 141, l. 17.

20 **31.** The Appellants respectfully submit that the learned Judge misconstrued the effect of the judgment of the Judicial Committee in the *Dominion Building Corporation v. The King*, supra, which was a decision on the construction of the Exchequer Court Act only and the point involved in the present case was not either argued or raised before the Judicial Committee in that case.

**32.** The Appellants humbly submit that the judgment of the Supreme Court allowing the Respondent’s appeal was wrong and ought to be reversed and that the judgment of the Exchequer Court was right and ought to be restored for the following among other

## REASONS.

- 30 (1) BECAUSE the written offer of the Appellant Forgie dated 27th July, 1925, was accepted by the making of the Order in Council dated 29th July, 1925, and the retention of the deposit, and thereupon a binding contract between the Respondent and the Appellant Forgie was created.
- (2) BECAUSE such a contract did not require for its validity that it should satisfy the provisions of Section 15 of the Department of Railways and Canals Act.
- (i) Because it was not a contract in writing and therefore not within the provisions of such section in any event.
- (ii) Because that section does not apply to a contract for the sale of Crown Lands, a transaction which is not a

matter pertaining to any Department of the Government and is governed by Section 4 of the Public Lands Grants Act. The provisions of the last-mentioned Act were satisfied by the Contract.

- (3) BECAUSE, if the contract did have to satisfy the provisions of Section 15 of the Department of Railways and Canals Act in order to be binding on the Respondent, the provisions of that section were satisfied.
- (i) Because in the circumstances it ought to be inferred that there was in existence in the possession of the Respondent a document recommending the acceptance of the offer signed in accordance with the section. 10
- (ii) By the terms of the Minister's letter dated 17th November, 1925 set out in paragraph 19 above.
- (4) BECAUSE if the making of the Order in Council did require communication to the Appellant Forgie on behalf of the Respondent, there was no doubt on the evidence that the fact that such Order had been made was actually communicated to such Appellant on behalf of the Respondent. 20
- (5) BECAUSE time was not of the essence of the contract as made and neither the making of the successive extensions nor any other circumstance had operated to make time so of the essence by the month of February 1926.
- (6) BECAUSE since time was not and had not been made of the essence of the contract the Appellants were not in default by the month of February, 1926, or were not in such default by that date as to entitle the Respondent to repudiate the contract. 30
- (7) BECAUSE the Respondent is debarred in any event from relying on the Department of Railways and Canals Act, Section 15, as preventing the enforcement of the contract by reason of acts of part performance of the contract done by the Appellants.
- (8) BECAUSE the judgment of the Supreme Court was wrong and ought to be reversed, and the judgment of the Exchequer Court was right and ought to be restored.

WILFRID GREENE.

I. F. HELLMUTH.

CYRIL RADCLIFFE.

**In the Privy Council.**

No. 50 of 1932.

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*On Appeal from the Supreme Court of  
Canada.*

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BETWEEN

DOMINION BUILDING CORPORA-  
TION LIMITED (*Claimants*) and  
JAMES L. FORGIE (added as a Party  
Claimant by Order made by the President  
of the Exchequer Court of Canada, on  
the 4th day of March, 1931) *Appellants*

AND

HIS MAJESTY THE KING (*Respondent*)  
*Respondent.*

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**CASE FOR THE APPELLANTS.**

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BLAKE & REDDEN,

17 Victoria Street, S.W.1.