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In the Supreme Court of Canada

On Appeal from the Exchequer Court of Canada

BETWEEN:

HIS MAJESTY THE KING,
(Respondent) APPELLANT,

AND

DOMINION BUILDING CORPORATION LIMITED (Claimant), 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).

RESPONDENTS.

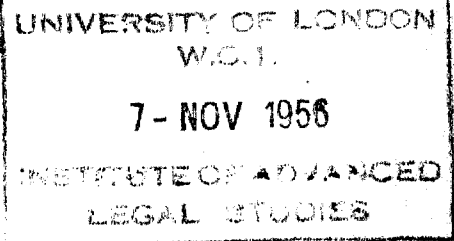
FACTUM

On Behalf of the Attorney-General of Canada

W. STUART EDWARDS,
Solicitor for the Attorney-General.

In the Supreme Court of Canada

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PART I

STATEMENT OF CASE

1. This is an appeal from the judgment of the President of the Exchequer Court of Canada, delivered March 4, 1931 (Case, pp. 195-212), holding that the claimant, the Dominion Building Corporation, Limited, is entitled to recover damages from His Majesty the King for breach of an alleged contract to sell to the party claimant, James L. Forgie, or the claimant company, as his assignee (Case, p. 20 134, ls. 1-14), a certain parcel of land, situated at the northwest corner of King and Yonge streets in the City of Toronto.

2. The learned Judge reserved the assessment of damages, (Case p. 211, ls. 32-36; p. 213, ls. 24-25) and, none having been assessed when the present appeal was instituted, the only question raised on this appeal is whether His Majesty is liable to pay any damages for breach of the alleged contract.

3. The action came before the Exchequer Court of Canada on a reference, dated September 16, 1926, by the Acting Minister of Railways and Canals, (Case, p. 1, ls. 1-19) under the authority of sec. 38 of the Exchequer Court Act, R.S.O. 1906, Chap. 140, of a claim, dated September 4, 1926, addressed to the Honourable the Minister of Railways and Canals by the claimant company, as assignee of a contract alleged to have been made by His Majesty with the party claimant, one James L. Forgie, in July, 1925. (Case pp. 1A-1C).

4. At the time the alleged contract was made, the title to the property in question stood vested in His Majesty the King, as represented by the Minister of Railways and Canals, under a Deed, dated August 17, 1923, from the Imperial Bank of Canada, (Case p. 151, ls. 15-22) and the property was occupied by the Canadian National Railway Company for the purposes of a City Ticket Office. (Case p. 103, ls. 10-15; p. 105, ls. 22-23).

5. The contract of sale and purchase is alleged (Case p. 1D, ls. 16-24; p. 2; p. 3, ls. 1-2) to have been constituted by a written offer of purchase by the said James L. Forgie, dated July 27, 1925, (Case, pp. 119-121) addressed to His Majesty the King, represented by the Minister of Railways and Canals, and the acceptance of the said offer by Order in Council, based upon the report of the Minister of Railways and Canals, dated July 29, 1925, (P.C. 973) (Case pp. 116-118).

20 On August 5, 1925, Forgie purported to assign all his right, title and interest in the alleged contract to the claimant company. (Case p. 134, ls. 1-14).

6. The main terms of the alleged contract were the following:—

A. That Forgie offered to purchase from His Majesty the property above mentioned for the sum of \$1,250,000 cash, and with the offer paid a deposit of \$25,000 to be applied on account of the purchase price in the event of its acceptance; the balance of the said purchase price was to be paid “at such time as possession of the said premises be given to the undersigned, not later than September 15, 1925.” (Case p. 119, ls. 8-32).

30 B. That Forgie agreed upon his obtaining possession of the property on or before the 15th September, 1925, immediately to proceed with the erection of a twenty-six storey modern fire-proof office building on the said lands, and on certain adjoining lands (formerly known as the Home Bank of Canada Head Office site), of which he represented himself to be the owner, and to complete and have the said office building ready for occupancy by His Majesty, as tenant, not later than the 25th day of October, 1926. (Case, p. 120, ls. 16-36).

C. That His Majesty agreed to execute a lease of the ground and three next floors of the said building on specified terms, for the use of the Canadian National Railways. (Case p. 120, ls. 37-40; p. 121, ls. 1-14.)

D. That the conveyance from His Majesty to Forgie should, by its own terms, vest title of the said lands in the latter, only upon the execution and delivery of the said lease by him to His Majesty, and the due furnishing of the bond provided for under the terms of the said lease. (Case p. 121, ls. 15-22.)

7. Though the matter is not referred to in the alleged contract, the claimant, in its claim referred to the Exchequer Court of Canada and in its statement of claim, (Case pp. 1-1C; p. 3, ls. 16-29) alleges that it was represented and warranted throughout the whole course of the negotiations, that His Majesty would also lease the fifth, sixth, seventh, eighth and ninth floors of the building to be
 10 erected on the lands in question, for the use of the Department of Customs and Excise; that it was well understood by the Right Honourable the Prime Minister, the Right Honourable the Minister of Railways and Canals; the Honourable the Minister of Public Works, and other Ministers of the Crown, as well as the Canadian National Railway Company, that the successful financing of the whole transaction depended upon the leasing of these floors; that it was well known that until the passage of the necessary Order in Council, making quite certain that the floors in question would be leased, definite arrangements which would enable the completion of the purchase, could not be made.

8. By letter of 15th August, 1925, the Secretary of the Department of Rail-
 20 ways and Canals notified Forgie that, pursuant to the requirements of his offer of purchase as accepted by Order in Council of July 29, 1925, (P.C. 973), His Majesty was taking steps to vacate the premises by the 15th of September, 1925, and requiring him to be ready finally to close the transaction on or before that date. (Exh. A, Case p. 151, ls. 13-26; p. 152, ls. 1-14.)

By letter of August 19, 1925, Forgie acknowledged the receipt of the above letter, and stated that he expected to be "in Ottawa next week and will discuss this matter fully with you." (Exh. B, Case p. 155, ls. 21-29.)

Following up this letter, Forgie came to Ottawa for the purpose of arranging an extension of time to complete the transaction. (Case p. 48, ls. 27-36; p. 49, ls.
 30 29-34.)

9. By telegram, dated September 14, 1925, to the Deputy Minister of Railways and Canals, James H. Spence, representing Forgie and his associates, (Case p. 51, ls. 16-20) requested an "extension of time for making payment due to-morrow until twenty-fifth September. Delay caused in change in financing arrangements." (Exh. 9, Case p. 157, ls. 4-13.)

10. By letter, dated September 16, 1925, to the Deputy Minister of Railways and Canals, Forgie stated that he had not been given possession of the premises on 15th September, as stipulated by his offer of purchase, and was advised that

possession of the property could be given by the 28th instant, "when, and in which case, I will be in a position to take possession and make payment of the balance of the purchase price performing and carrying out the other details of the contract." He accordingly asked for an extension of time for taking possession of the premises and paying purchase price, etc., to the 28th September. (Exh. 11, Case p. 158, ls. 4-23).

11. The evidence shows that the premises were vacated by the Canadian National Railway Company on September 19, 1925, the reason for their not having vacated the premises before the 15th idem being that Forgie had instructed the
 10 Canadian National Railway Passenger Agent on August 13, that he would not require possession until October. (Case p. 103, ls. 10-25).

Forgie admitted, under cross-examination, that the premises had been vacated on the above date. (Case p. 51, ls. 13-15).

12. By letter, dated September 16, 1925, the Deputy Minister of Railways and Canals professed to grant Forgie an extension of time for completing the transaction, until September 28, 1925.

20 "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 carry out all the covenants and conditions within the extended period which on your part under and as provided for by the said contract were to be performed and carried out within the original period, now hereby extended." (Exh. 12, Case p. 158, ls. 27-30; p. 159, ls. 1-16).

13. Subsequently, Forgie requested, and was granted, further extensions of time, each of them by letter from the Deputy Minister of Railways and Canals (other than the last extension which was by letter from the Minister of Railways and Canals), containing a reservation identical in terms with that set out in his letter of September 16, 1925 (Exh. 12, Case p. 158) for completing the alleged contract of sale and purchase as follows:—

- 30
- (1) From September 28 to October 12, 1925. (Exhs. E and F, Case p. 160, ls. 1-26; Exhs. 14 and 15, Case p. 161, ls. 1-30; p. 162, ls. 1-10).
 - (2) From October 12 to October 19, 1925. (Exhs. 21 and 22, Case p. 169, ls. 1-36).
 - (3) From October 19 to October 26, 1925. (Exhs. 23 and 24, Case p. 170, ls. 1-35).
 - (4) From October 26 to November 17, 1925. (Exhs. 25 and 26, Case p. 171, ls. 1-36).

- (5) From November 3 to November 17, 1925. (Exhs. 27 and 28, Case p. 172, ls. 1-31; p. 174, ls. 1-25).
- (6) From November 17 to December 30, 1925. (Exhs. 29 and 30, Case p. 173, ls. 12-25; p. 174, ls. 1-25).

By letter, dated December 29, 1925, to the Deputy Minister of Railways and Canals, Forgie requested a further extension of time until January 31, 1926. (Exh. 31, Case p. 175, ls. 1-13; p. 39, ls. 11-16; 26-27), but no reply to this letter was ever made.

10 14. Forgie admitted, under cross-examination, that the various extensions of time for the completion of the alleged contract of sale and purchase had been requested because the Order in Council authorizing the leasing of five floors in the proposed new building for the Department of Customs and Excise had not been passed and he wanted delay until it had been passed. (Case p. 48, ls. 32-36).

Forgie also stated in direct examination (under objection), that he had been definitely told that it was necessary to wait until Parliament had met, following the general election in October, 1925, before the necessary Order in Council could be passed, and that this was the reason why the extensions were granted (Case p. 38, ls. 19-36; p. 39, ls. 17-24); but he could not remember who had told him so. (Case, p. 51, ls. 29-31).

20 On the other hand, Honourable George P. Graham (then Minister of Railways and Canals) in his evidence emphatically denied that the extensions of time had been granted on any understanding with him that the completion of the contract could await the conclusion of an arrangement for the leasing of space for the Customs and Excise Department. He further stated, that he had informed Forgie, time and again, that the contract had no connection directly or indirectly with what the Public Works Department might do about the Customs lease; that the two matters were absolutely separate, and that if the claimant was able to carry out his contract, there should be no delay. (Case p. 98, ls. 30-38.)

30 15. Order in Council, dated February 1, 1926, (P.C. 148), authorized the Minister of Public Works to lease the fifth, sixth, seventh, eighth and ninth floors of the building proposed to be erected on said lands on terms and conditions therein specified. (Case p. 175, ls. 17-30; p. 176, ls. 1-37; p. 177, ls. 1-34.)

Forgie claims to have received a copy of this Order in Council, (Case p. 40, ls. 20-23), although none was ever officially communicated to him; and it was ultimately rescinded by Order in Council, dated June 10, 1926, (P.C. 910) (Exh. K. Case p. 181, ls. 15-32.)

16. By letter, dated February 3, 1926, Forgie advised the Minister of Railways and Canals that he would be in a position to complete the purchase and to pay the purchase money called for by the agreement, on or about the 10th February, 1926, and would be glad to take up at once with the officials of his Department, the completion of the necessary details for closing the transaction. (Exh. 33, Case p. 178, ls. 5-21.)

17. By letter, dated February 8, 1926, to Forgie, in reply to his letter of 3rd idem, the Minister of Railways and Canals stated that Forgie had failed to implement his original agreement, and the various extensions of it, and that whatever failure there had been, had been the fault of those he represented, and not the fault of either the Government or the Canadian National Railways. (Exh. 34, Case p. 178, ls. 25-30; p. 179, ls. 1-8.)

18. By letter, dated 12th February, 1926, in answer to a letter from Forgie of the 10th idem, in which the latter intimated that he proposed to ask for a fiat in order to enter action against the Government, the Minister of Railways and Canals stated, "There will be no more extensions and I will oppose to the limit, any application you may make for a fiat." (Exh. 37, Case p. 179, ls. 12-29.)

19. By letter, dated 15th February, 1926, in answer to the Minister's letter of the 8th idem, Forgie stated that he could not consent to the view that failure to complete the transaction had been due to any fault on his part or on the part of those he represented. He added:—

"As you are aware, the Government decided last summer to lease five floors in this building, for different departments of the Government, and this was one of the factors in financing the construction of the building. Through circumstances with which you are familiar, and with which we had nothing to do, the Order in Council dealing with this matter, which was promised last October, was not passed until the 1st day of February, A.D. 1926. It was not our fault that the Order was not passed before the expiry of the extension of time, and if there has been any default it is not on the part of those I represent." (Exh. 35, Case p. 180, ls. 5-23.)

20. By letter, dated February 20, 1926, in answer to Forgie's letter of the 15th idem, the Minister of Railways and Canals said:—

"I cannot allow you to mix up the bargain made by the Canadian National Railways with any secondary consideration, which was not at all in evidence when the former's arrangement was made with the Railway Company. Neither the Canadian National Railways, nor this Department, has anything to do, nor ever had, directly or indirectly with any proposed lease to be taken by the Public Works Department. It was not mentioned, nor considered, in any

way, when the bargain was made between those you represent and the Railway Company. It is of no interest to the Railway Department, nor to the Canadian National Railways whether you lease or do not lease any part of the property to the Public Works." (Exh. 36, Case p. 180, ls. 27-32; p. 181, ls. 1-11.)

21. The case was tried and argued before the President of the Exchequer Court of Canada on the 25th, 26th and 27th days of June, 1930, and the learned judge having taken time for consideration, delivered judgment on the 4th day of March, 1931, as above stated.

PART II

10

POINTS IN ISSUE

22. It is submitted that the learned President of the Exchequer Court of Canada erred in deciding,

(1) That Forgie's offer of purchase and the Order in Council of July 29, 1925, (in view of the delivery of a certified copy thereof to Forgie and of the retention of his deposit) constituted and evidenced an enforceable contract between the parties in respect of the sale and purchase of the property in question.

20 (2) That compliance with the provisions of sec. 15 of the Department of Railways and Canals Act, R.S.O. 1906, chap. 35, was not necessary to constitute an enforceable contract against the Crown, and that, in any case, the payments made by Forgie in respect of the purchase of the Home Bank Head Office site, constituted part performance sufficient to take the contract out of the requirements of said sec. 15.

30 (3) That time was not, by necessary implication, of the essence of the alleged contract, and that, Forgie having failed to perform the conditions of the alleged agreement on or before the date mentioned therein, or in the several extensions of time for completion, it was necessary for the respondent to give Forgie, or his assignee a distinct notice in writing limiting a time, at the expiration of which the respondent would consider the contract at an end.

(4) That Forgie's rights and liabilities under the alleged contract were assignable to the plaintiff without notice to, or the consent in writing of, the Minister of Railways and Canals.

PART III

ARGUMENT

1. No contract, binding on His Majesty, was ever made or concluded between His Majesty, as represented by the Minister of Railways and Canals, and the said James L. Forgie, for the sale to him of the property in question.

23. The claimant relies upon Forgie's offer of purchase of July 27, 1925, and its alleged acceptance by His Majesty by Order in Council of July 29, 1925 (P.C. 973), as constituting the alleged contract with His Majesty. (Case p. 1D, ls. 16-24; p. 2; 10 p. 3, ls. 1-2.)

The learned President of the Exchequer Court decided that the Order in Council by itself should be so construed as to constitute an acceptance, and that the delivery or communication of the Order in Council to Forgie was in the nature of a written notification of the acceptance of the offer. (Case p. 202, ls. 22-28.)

24. The said Order in Council recites, in the narrative thereof, that,—

“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 (Case p. 116, ls. 25-27);

but no acceptance of the said offer of purchase by the Minister, either in writing or 20 orally, was proved in evidence, or had in fact been made.

The evidence of the then Minister of Railways and Canals (Honourable George P. Graham), upon whose report the said Order in Council was passed, shows that the statement in the narrative thereof, above quoted, was merely meant to import that, the Canadian National Railway Company having approved of the acceptance of the said offer of purchase, he (the Minister) also approved. (Case p. 100, ls. 9-21.)

The Crown was not concluded or estopped by that recital from denying the truth of the fact so recited and establishing the true fact: Chitty's Prerogatives of the Crown, p. 381; Robertson's Civil Proceedings by and against the Crown, 30 p. 577; The Alton Woods Case, 1 Co. Rep. 40B. The Order in Council cannot, therefore, be treated as an approval of an acceptance which had already been made.

25. The operative clause of the said Order in Council reads as follows:—

“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 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. (Case p. 118, ls. 31-37.)

It thus appears that the action taken by the Governor in Council took the form, not of granting approval of an acceptance professed to have already been given, but of granting authority to the Minister for the acceptance of the said offer of purchase, subject to the terms mentioned in the clause last above quoted.

26. It is submitted that the Order in Council itself could not, consistently either
 10 with its own terms or with the decision of the Judicial Committee in *Dominion Building Corporation vs. The King* (1930) A.C. 90, be treated as constituting an acceptance of Forgie's offer of purchase; otherwise the conclusion of the alleged contract could hardly have been held to be properly a part of the administration of the Minister of Railways and Canals, so as to satisfy the requirements of sec. 38 of the Exchequer Court Act. In that case the Judicial Committee upheld the validity of the reference of the present claim, and for the purpose of deciding that question, the validity of the contract (which is now in issue) was assumed; see (1930) A.C. 90, 94. After pointing out that the administration of the ownership rights of the property in question had remained with the Minister of Railways and
 20 Canals, notwithstanding that the property had been entrusted in respect of the management and operation thereof to the Canadian National Railway Company, Lord Thankerton, who delivered the judgment of their Lordships, said ((1930) A.C. 90, 96).

“In their Lordships' opinion the negotiations and conclusion of the contract of sale in the present case were properly part of the administration of the Minister of Railways and Canals, and the incidental matters of the leases do not affect that position for the purposes of s. 38 of the Exchequer Court Act. If the contract is assumed to be a binding contract the Order in Council of
 30 July 29, 1925, shows that it was treated as properly matter for his administration, and its repudiation, out of which the claim arises, was equally part of his administration. Further, even if the matter were originally not a departmental but a government one, their Lordships would be of opinion that it was appropriated to the Department of Railways and Canals by the Order in Council, and was thereby made part of the Minister's administration for the purposes of s. 38.”

In holding that the conclusion of the alleged contract (as distinct from its negotiation) was properly part of the administration of the Minister of Railways and Canals, the Judicial Committee appear to have proceeded upon the view (which appears to be the only view consistent with the terms of the operative clause of

the Order in Council), that, apart from other considerations, the Order in Council, on its true interpretation, had effect to make it so by authorizing the acceptance by the Minister of Forgie's offer of purchase. It follows, then, that the Order in Council in itself cannot be properly held to constitute an acceptance of the said offer of purchase.

27. No acceptance of the offer of purchase was ever communicated by the Minister, pursuant to the authority conferred by the said Order in Council, to Forgie, or the claimant as his assignee. The officers of the Department of Railways and Canals, and the Minister himself, appear, however, to have acted on the
 10 assumption that the said Order in Council in itself constituted an acceptance of the offer of purchase (See e.g. Exh. J, Case p. 151, ls. 12-26; p. 152, ls. 1-23); and the learned President of the Exchequer Court of Canada suggests that if it were necessary to show a written acceptance by the Minister to implement the Order in Council, the Minister's letter of November 17, 1925 (which professed to grant Forgie an extension of time for completion: See Exh. 30, Case p. 174), is an acknowledgment of the acceptance of the offer and of the existence of a contract. (Case p. 202, ls. 28-30). It is, of course, manifest that that letter itself could not constitute an acceptance of an offer which called for the completion of the contract on September 15, 1925; and, no acceptance by the Minister of that offer
 20 having in fact been given, its absence could not, it is submitted, be supplied by a letter written on the mere assumption that an acceptance of the said offer had been given. If the alleged contract be not otherwise valid, the fact that officers of the Crown, including the Minister of Railways and Canals, acted on the assumption that the Order in Council of July 29, 1925, in itself, constituted an acceptance of the said offer, does not estop or preclude His Majesty from setting up the invalidity of the contract. The Crown cannot be prejudiced by any laches or omissions of duty, or unauthorized exercise of power, on the part of its officers or agents; Robertson's Civil Proceedings by and against the Crown, p. 577, 578; Beven, Negligence in Law, 3rd ed., Vol. I, p. 220; *The Queen v. McFarlane* (1882), 7 S.C.R. 216, 241, 242; *Rex vs. Bank of Montreal*, 10 O.L.R. 117, 132, 133, 134; affirmed
 30 11 O.L.R. 595 and 38 S.C.R. 258; *The Queen v. Belleau* (1882) 7 A.C. 473, 480, 481.

28. By the law of agency, at common law, there is this difference between individuals and the Government: the former are liable to the extent of the power they have apparently given to their agents, while the Government is liable only to the extent of the power it has actually given to its officers. Story's Law of Agency, 9th ed., p. 375, note 1; *Pierce v. United States*, 1 Nott & Hun. (Ct. of Claims), 270; s.c. nom. *The Floyd Acceptances*, 7 Wall. 666).

Every person, therefore, who seeks to obtain, through dealings with a public officer, the obligation of His Majesty must, at his peril, ascertain that the proposed

act is within the scope of the authority which the law has conferred upon the officer. Where a statute expressly defines the power, it is notice to all the world. Hence the Crown is bound by the acts and contracts of its officer or agent only when such officer or agent has acted strictly within the scope of his authority as created, conferred and defined by law, and it is not bound where such officer or agent has transgressed or exceeded his lawful and legitimate powers.

Mechem on Public Officers, pp. 555, 556, 557.

The Queen v. Henderson, 28 S.C.R. 425, 450.

The Queen v. Woodburn, 28 S.C.R. 425, 450.

10 Canadian Pacific Railway Co. v. The King (1930) S.C.R. 574, 594.

Commercial Cable Co. v. Government of Newfoundland (1916) 2 A.C. 610, 616, 617.

29. It is submitted that it follows from the decision of the Judicial Committee, that the negotiation and conclusion of the alleged contract were properly part of the administration of the Minister of Railways and Canals, that all statutory limitations affecting the power of the Minister to make such a contract were applicable.

Section 15 of the Department of Railways and Canals Act, R.S.C. 1906, Chap. 35, under the heading "Execution of Contracts," provides as follows:

20 "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 authorized 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."

30 It is submitted that due compliance with the requirements of this section was essential to the constitution of a valid contract between the Minister of Railways and Canals and Forgie, for the sale and purchase of the property in question. There never was a contract made with Forgie in compliance with the requirements of that section; and the section is imperative.

Woods v. The Queen (1877) 7 S.C.R. 634;

Chevrier v. The Queen (1880) 4 S.C.R. 1, 91;

The Queen v. Smith (1883) 10 S.C.R. 1, 60, 61;

Canadian Pacific Railway Company v. The King (1930), S.C.R. 574, 594, 595;

Hall v. The Queen (1893) 3 Ex. C.R. 373, 376;

The Queen v. Woodburn (1898) 29 S.C.R. 112.

It is submitted, therefore, that the contract alleged by the claimant is void and unenforceable for non-compliance with the requirements of the statute.

30. Section 23 of R.S.C. (1886) Chap. 37, which corresponds with the above quoted section 15 was held by the Supreme Court of Canada to be inapplicable to an executed oral contract for goods actually sold and delivered to and accepted by officers of the Crown, for the Crown (*The Queen v. Henderson* (1898) 28 S.C.R. 425, 432, 433); but the contract alleged by the claimant is an executory contract in writing and not an executed oral contract, and is, therefore, within the mischief of said sec. 15 of the Department of Railways and Canals Act. (*Canadian Pacific*
10 *Railway Co. v. The King* (1930) S.C.R. 574, 594, 595).

31. The decision of the learned President of the Exchequer Court that sec. 15 of the Department of Railways and Canals Act has no bearing on the case, appears to be directly at variance with his own decision on the question of the validity of the reference reported in *Dominion Building Corporation v. The King* (1927) Ex. C.R. 101, and with that of the Judicial Committee which affirmed it: (1930) A.C. 90. On that question, it was argued for the Crown that the claim which was the subject of the reference had arisen, not "in connection with the administration of" the Department of Railways and Canals within the meaning of sec. 38 of the Exchequer Court Act, but out of a transaction negotiated and
20 concluded on behalf of the Executive Government in relation to a matter outside the administrative powers of his (the Minister of Railways and Canals), or any other department of the Government; and that the reference was, therefore, invalid. The learned Judge now appears to have adopted the contention which he then rejected. In rejecting it, Maclean, J. said ((1927) Ex. C.R. 101, 105),—

"The claim arises, I think, in connection with a matter entirely connected with the Department of Railways and Canals and none other."

The Judicial Committee affirmed that view.

32. The learned President of the Exchequer Court of Canada held, however, that the payments amounting in all to \$60,000 made by Forgie on account of the
30 purchase of the Home Bank property, were so made in furtherance of the alleged contract with His Majesty, and that these payments would be held sufficient acts of part performance to take a parol contract out of the operation of the Statute of Frauds, and should have like effect with respect to the requirements of sec. 15 of the Department of Railways and Canals Act.

The theory on which the learned Judge founds this view, is that Forgie was, in substance, merely agreeing, as part of the whole scheme, to acquire the Home Bank property. (Case p. 210, ls. 20-40; p. 211, ls. 1-30.)

It is submitted that this view of the transaction is clearly inconsistent with the terms of the alleged contract with His Majesty, the evidence, and the law.

On the claimant's own allegation, the earliest date at which any contract with His Majesty was concluded, was July 29, 1925, Forgie's offer of purchase of July 27, 1925, and the Order in Council of July 29, 1925, (P.C. 973) being relied upon as constituting the alleged contract. (Case p. 1D, ls. 16-24; p. 2, ls. 1-2.) By that offer of purchase Forgie agreed, upon his obtaining possession of the lands to be acquired from the Crown, on or before the 15th September, 1925, to proceed immediately with the erection of a twenty-six story office building "on the said lands
10 and on the lands (formerly known as the Home Bank of Canada Head Office site), now owned by the undersigned, and adjoining immediately to the west thereof, on King street." (Case p. 120, ls. 16-22.)

There is here no agreement on the part of Forgie to acquire the Home Bank property. He represented himself then (i.e., on July 27, 1925), to be the owner of it. The acquisition by him of that property, though essential to enable him to perform his obligations under the said contract, did not arise under or pursuant to the said contract. It was merely a preparatory act on his part, and not a part performance of the alleged contract; see *O'Reilly v. Thompson*, 2 Cox. 271, 273; cited with approval by Lord Selborne in *Maddison vs. Alderson* (1883) A.C. 467,
20 480, 481.

33. The evidence shows that Forgie had, in point of fact, acquired in the name of one Hugh H. Donald as his nominee, (Case p. 23, ls. 1-4; 19-24), an option to purchase that property on May 7, 1925 (Exh. 4, Case pp. 106, 107); that he exercised that option on June 8, 1925 (Exh. 39, Case p. 134, ls. 19-32; p. 135, ls. 1-3), and had paid \$30,000 on account of the purchase price prior to July 29, 1925 (Exh. 41, Case p. 191, ls. 23-34; p. 192, ls. 1-13.)

The alleged act of part performance consequently preceded, and, therefore, could not be evidence of, the alleged contract with His Majesty. As Fry on *Specific Performance*, 6th ed., p. 295, says:—

30 "As acts done prior to a contract cannot be referred to it as done in pursuance to it, they can never be treated as acts of part performance."
See *Parker v. Smith*, 1 Collyer 608, 621, 623, and *Maddison v. Alderson* (1883) 8 A.C. 467, 480, 481.

34. The learned judge admitted (under objection from counsel for (respondent) appellant: (Case p. 19, ls. 6-8) evidence of negotiations, preliminary and antecedent to the formation of the alleged contract, between Forgie on the one hand, and Sir Henry Thornton, President of the Canadian National Railway Company, and the Honourable George P. Graham, Minister of Railways and Canals on the other. (Case p. 17, ls. 30-35; pp. 19, 20, 21, 22, 23). It is from this evidence that the

learned judge drew the inference that the Canadian National Railway Company and the Government were willing promoters of the idea of having some one promote the construction of a large and attractive office building on the combined properties at the intersection of King and Yonge streets, Toronto, wherein the needs of the Canadian National Railways in Toronto might be more amply and satisfactorily supplied, and that, in substance, Forgie was merely agreeing as part of the whole scheme, to acquire the Home Bank property. (Case p. 210, ls. 20-40; p. 211, ls. 1-3).

10 It is submitted that that evidence affords no sort of foundation whatever for the inference which the learned judge has drawn from it, and that such evidence was in any case improperly admitted, in so far as it was admitted and applied, not for the purpose of explaining any points of ambiguity in the alleged written contract (and it was not pretended there were any), but of varying, or adding to, it; see *Inglis v. Buttery*, 3 A.C. 552, 558, 571, 572, 577, 578.

35. It is submitted that the only view of the transaction which is consistent with the terms of the alleged contract with His Majesty, the evidence, and the law, is that Forgie's purchase of the Home Bank property was made for his own benefit, in the expectation that he would be able to negotiate a contract with His Majesty, and not a purchase arising out of or in pursuance of the alleged contract, and that
20 the payments made on account of the purchase price of that property, not being "unequivocally and in their own nature referable to some such agreement as that alleged" against His Majesty (*Maddison v. Alderson* 8 A.C. 467, 479; *Chaproniere v. Lambert* (1917) 2 Ch. 356) would not constitute acts of part performance sufficient to take the alleged contract out of the Statute of Frauds.

36. It is further submitted that, even if such payments had been made under circumstances which would render them acts of part performance sufficient to take the alleged contract out of the Statute of Frauds, it is a *non sequitur* to conclude that that would suffice to relieve the alleged contract from the requirements of sec. 15 of the Department of Railways and Canals Act.

0 The equitable doctrine of part performance rests upon the principle that when one or two contracting parties has been induced or allowed by the other to alter his position on the faith of the alleged parol contract, it would be a fraud in the other party to set up the invalidity of the contract. (*Catton v. Catton*, L.R. 1 Ch. 137, 148; *Morphett v. Jones* (1818) 1 Swanst. at p. 181; *Pollock*, Principles of Contract, 9th ed., p. 706; *Fry on Specific Performance*, p. 269, s. 561; pp. 276-277, s. 580; p. 280, s. 586). The doctrine is not in direct contradiction of the Statute of Frauds. As Lord Selborne pointed out in *Maddison v. Alderson*, 8 A.C. 467, 475, "In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and

not (within the meaning of the statute) upon the contract itself". The plaintiff's right thus rests, as Pollock observes, *op. cit.* at p. 705, "on a principle akin to estoppel; the defendant's conduct being equivalent to a continuing statement to some such effect as this: It is true that our agreement is not binding in law, but you are safe as far as I am concerned in acting as if it were".

But it does not follow "that equity will relieve against a public statute of general policy in cases admitted to fall within it." (*Maddison v. Alderson*, 8 A.C. 467, 474.) Hence, in the present case, if the alleged contract be one which could only be made in accordance with the requirements of s. 15 of the Department of
 10 Railways and Canals Act, (as the (respondent) appellant submits), no officer of the Crown had any authority to dispense with the statutory requirements. The language of the section is unmistakably clear and imperative. "No . . . contract . . . 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, etc." This section was enacted "with the view, in so far as the Department of Railways and Canals is concerned, of preventing the public funds of the Dominion being affected by . . . loose, improper and unauthorized proceedings." (*The Queen v. Henderson*, 28 S.C.R. 425, 451, per Gwynne, J.) How, then, can Forgie's acts in acquiring an
 20 option to purchase the Home Bank property and making payments on account of the purchase price (even if referable to the alleged contract) be said to raise any equity in his favour against His Majesty, when he knew, or must be presumed to have known, the statutory requirements? The equitable doctrine of part performance cannot operate in direct opposition to an Act of Parliament.

If the proposition of the learned President of the Exchequer Court were conceded, the Court would in effect be repealing the Act of Parliament and depriving His Majesty of that protection which Parliament intended to secure for him. (See, e.g., *Young v. Mayor etc. of Royal Leamington Spa*, 8 A.C. 517, 522). *Hoare v. Kingsbury Urban Council* (1912) 2 Ch. 452, 463, 466, affords a recent illustration of a case in which part performance of a contract alleged against the urban author-
 30 ity, though held to be sufficient to take the contract out of the Statute of Frauds, was held not to be sufficient to take the contract out of the operation of sec. 174 of the Public Health Act, 1875, which required the contract to be under seal. It is submitted that in equity as well as at law the alleged contract is unenforceable for non-compliance with sec. 15 of the Department of Railways and Canals Act.

37. The alleged contract would have involved, in respect of the obligation of His Majesty thereunder to lease space in the new office building proposed to be erected by Forgie on lands to be acquired from the Crown, the expenditure of a large sum of public money. Such expenditure required the previous sanction of Parliament, and no such previous sanction, either directly or under the provisions

of any statute, had or has been given. It is submitted that the alleged contract is, therefore, for this reason, apart from others, legally invalid. (Mackay v. Attorney-General for British Columbia, (1922) 1 A.C. 457, 461, per Viscount Haldane.)

10 2. If the contract alleged by the claimant constitutes a binding contract between His Majesty and James Forgie, or the claimant, as his assignee, time was by necessary implication of the essence of the contract, though not in terms expressed to be so; and, as neither Forgie nor the claimant was ready or willing on the date fixed by the contract, viz., 15th September, 1925, or on any of the dates fixed by any of the alleged extensions of time, to complete the sale and purchase thereunder, the Crown was entitled to treat the contract as at an end without notice.

38. The learned President of the Exchequer Court decided that the present was a case where in equity, the claimant or Forgie, was entitled to a notice, before the (respondent) appellant sought to put an end to the contract, limiting a time at the expiration of which the respondent would treat the contract as at an end. (Case p. 208, ls. 11-14.) It is submitted that the learned judge's decision, on this point, is, in the circumstances of the case, erroneous in point of law.

20 39. First, as to the law: It is well established that time may be of the essence of a contract by necessary implication, as well as by express stipulation; (Roberts v. Berry (1853) 3 D.M. & G. 284, 291: per Turner, L. J.; Parkin v. Thorold (1852) 16 Beav. 59, 65: per Lord Romilly, L. R.; Patrick v. Milner (1877) 2 C.P.D. 342, 349); as where, for example, there is something in the "express stipulations between the parties, the nature of the property or the surrounding circumstances" which would render it inequitable to treat the time fixed for completion as a non-essential term of the contract; Tilley v. Thomas (1867) 3 Ch. A.C. 61, 67: per Lord Cairns, L. J.; Stickney v. Keeble (1915) A. C. 386, 402, 416. The maxim that "in equity the time fixed for completion is not of the essence of the contract" as Lord Parker of Waddington pointed out in Stickney v. Keeble, supra, p. 416,—

30 "never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or *where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.*"

So time has been held to be of the essence of a contract, though not in terms so stipulated, where the property which was the subject matter of the contract was required for present occupation, or some other immediate purpose such as a building project, or the prosecution of a trade: Fry on Specific Performance, 6th ed.,

p. 505, s. 1081, pp. 507, 508, s. 1086. Dart on Vendors and Purchasers, 8th ed., Vol. I, pp. 428, 429; *Parkin v. Thorold* (1852) 16 Beav. 59, 65: per Lord Romilly, M.R. The tendency of the decisions, as Sir James Wigram stated in *Walker v. Jeffreys*, (1842) 1 Hare 341, 348, has been to hold persons concerned in contracts relating to land bound, as in other contracts, to regard time as material.

The following cases are illustrative of contracts relating to the sale of land in which the essentiality of the time fixed for completion was implied from the nature of the property or the surrounding circumstances connected in each case with the particular contract:—

10 *Tilley v. Thomas* (1867) 3 Ch. A.C. 61: sale of house for residence; possession with good title to be delivered to the purchaser on a certain day.

Gedye v. Duke of Montrose (1858) 26 Beav. 45: agreement for the sale of a lease of residential property “with possession on the 1st December.”

Levy v. Lindo (1817) Mer. 81, 84: sale of a house for residence.

Wright v. Howard (1823) 1 Sim. and St. 190: sale of lands for the purpose of erecting a mill.

Jones v. Gardiner (1902) 1 Ch. 191, 196: sale of lands for use as a building site.

Tadcaster v. Wilson (1897) 1 Ch. 705: sale of a licensed public house as a 20 going concern.

Coslake v. Till 1 Russ. 376, 379: sale of the possession, trade and good will of a public house, “possession to be given on or before 26th March then next.”

Bernard v. Williams (1928) 139 L.T.R. 22: sale of leasehold premises on possession to be given “on or about the 6th day of December, 1926” for use by purchaser in carrying on a garage business.

40. In the present case, it is submitted that the express stipulations of the alleged contract, the nature of the property concerned, and the surrounding circumstances, show that the parties really intended the time fixed for the completion of the contract to be essential and would render it inequitable to treat the time 30 so fixed as a non-essential term.

(a) By his offer of purchase Forgie stipulated for possession of the property in question “not later than the fifteenth day of September, 1925,” (Case p. 119, ls. 30-32) or, “on or before the fifteenth day of September, 1925,” (Case p. 120, ls. 17-18) with a good title free from all encumbrances except any easement in any other person over the lane in the rear of the said premises. (Case p. 119, ls. 37-39; p. 120, ls. 1-3.)

(b) The property which was the subject-matter of the alleged contract is situated on the northwest corner of King and Yonge streets in the city of Toronto; a strategic site of great value in the heart of the down-town section

of the city. The evidence led for the claimant at the trial was that this corner was "the best corner in Toronto, because it is the junction of the best financial street with the best commercial street in Toronto (Evid. of J. A. Gibson, realtor, Case p. 91, ls. 15-16, 18-21), and was "better than any corner in Montreal." (Evid. of James Anglin, Case p. 75, ls. 19-22.)

(c) The alleged contract provided for an adjustment "of all unearned fire insurance premiums, taxes, insurance, rentals, water rates and all local improvements" on or respecting the property in question as of the date of the completion of sale. (Case p. 117, ls. 13-16; p. 119, ls. 3-36.)

10 (d) At the time the alleged contract was made, the property was occupied, to the knowledge of Forgie and the claimant (Case p. 105, ls. 22-23), by the Canadian National Railway Company, for the purposes of a City Ticket Office; and both Forgie and the claimant knew (Case p. 103, ls. 10-25) that the Canadian National Railway Company would be obliged, and was in fact taking steps, to remove their office, records and equipment at great expense (Case p. 11, ls. 11-38; p. 12, ls. 1-2) to other quarters, in order to enable His Majesty to complete the contract on the date fixed for the completion thereof, and that, in the event of any delay in the completion of the contract, beyond the date fixed therefor, His Majesty would suffer the loss of the rental value of the
20 property. (See Case p. 11, ls. 7-10).

(e) The object of the contract was a building enterprise. Forgie agreed, upon his obtaining possession of the property "on or before the fifteenth day of September, 1925", to proceed immediately with the erection of a twenty-six storey modern fire-proof office building on the said lands and adjoining lands (formerly known as the Home Bank of Canada Head Office site), and to complete and have ready for occupancy by His Majesty, as tenant, "not later than the twenty-fifth day of October, 1926, subject to the usual delays, etc." (Case p. 120, ls. 16-30; p. 117, ls. 17-25) and under the terms of the draft lease, the claimant, as lessor, was required forthwith concurrently with the
30 execution of the lease, to deposit with the Minister of Railways and Canals, on behalf of the lessee, an indemnity bond of a guarantee or indemnity company, approved by the Minister, in the penal sum of \$200,000 securing, to the satisfaction of the Minister, the proper completion of the building by the 25th day of October, 1926, subject only to the delays specified which should not, in any event, extend the time for completion beyond the period of three months or beyond the 25th day of January, 1927 (Case p. 130, ls. 15-35).

(f) Forgie was required, by letter of August 15, 1925, from the Secretary of the Department of Railways and Canals, to be ready to complete the transaction on or before the 15th September, 1925. (Exh. A. Case p. 151, ls. 12-26;
40 p. 152, ls. 1-23.)

41. It is submitted that the findings of fact, upon which the learned President of the Exchequer Court of Canada appears to have founded his decision that, in equity time should not be considered as of the essence of the contract, are at variance with the evidence, and do not, in any case, justify his conclusion.

First, the learned judge says that neither the Canadian National Railways, which had vacated the lands in question on September 19, 1925, nor the respondent, had ever protested against Forgie's delay in completing the purchase. (Case, p. 207, ls. 15-22).

But the then Minister of Railways and Canals, in his evidence stated that
 10 "at different times, time and time again" he informed Forgie that his contract with that Department was "absolutely separate" from any arrangement the Public Works Department might or might not make with regard to the proposed Customs lease, and that "if the company (i.e., The Dominion Building Corporation Limited) was able to carry out their contract, there should be no delay". (Case, p. 98, ls. 30-38; p. 99, ls. 18-19, 24-26).

Secondly, the learned judge says that the respondent had granted extensions of time within which to complete the purchase up to December 31, 1925, without protest, and Forgie was, consequently, led to believe that time was not regarded as of the essence of the contract. (Case p. 207, ls. 22-32).

20 It seems to be clear, however, as a matter of law, that the various letters whereby the Deputy Minister of Railways and Canals, and in one instance, the Minister of Railways and Canals purported to grant Forgie extensions of time for the completion of the contract, were legally ineffective, for want of any power in those officers, to amend the terms of the Order in Council in regard to the date fixed thereby for the completion of the contract, and were for that reason void and of no effect to bind His Majesty: (The King vs. Vancouver Lumber Company, 50 D.L.R. P.C. 6; Halifax Graving Dock Limited v. The King (1921) 62 S.C.R. 338, 344; Gaston Williams and Wigmore of Canada Limited v. The King (1922) Ex. C.R. 370, 373; National Dock and Dredging Corporation Limited v.
 30 The King (1929) Ex. C.R. 40); or were, in any case, void for non-compliance with the requirements of s. 15 of the Department of Railways and Canals Act: The Queen v. Smith 10 S.C.R. 1, 60, 61: per Strong J.) But even if those letters were legally effective to grant the various extensions covered by them, they did not, it is submitted, justify the inference that Forgie was thereby led to believe that time was not regarded as of the essence of the contract. Each of the said letters contained a reservation in the terms set out in paragraph 12 above; and if time was originally of the essence of the contract, the mere extension of time, particularly under that reservation, did not amount to a waiver of the condition, but merely had the effect of substituting the extended time for that originally fixed:
 40 Dart on Vendors and Purchasers, Vol. I, p. 35; Fry on Specific Performance, 6 ed.,

59; *Barclay v. Messenger* (1874) 30 L.T.R. N.S. 351; *Bernard v. Williams* (1928) 139 L.T.R. 22, 25.

Thirdly, the learned judge says that the respondent did not apparently regard the delay as working an injustice against him. (Case p. 207, ls. 34-35).

But the fact that the then Minister of Railways and Canals protested to Forgie at different times about his delay in completing the contract, as above stated, and that he finally refused to grant him any further extension of time beyond December 30, 1925, affords some evidence that he (the Minister), at all events, regarded Forgie's delay as working an injustice against His Majesty.

10 Fourthly, the learned judge says that no notice was given to Forgie, after or just before the expiration of the last extension, limiting a time at the expiration of which the respondent would treat the contract as at an end. (Case p. 207, ls. 37-39).

But if time was of the essence of the contract, Forgie having failed to complete the contract either on September 15, 1925, or December 30, 1925 (the latter being the date fixed by the last extension), His Majesty was not required, it is submitted, to give Forgie such a notice, but was entitled to treat the contract as at an end.

Fifthly, the learned judge says that, in the meanwhile, at a considerable 20 cost, the plans of the proposed building were being prepared, expense had been incurred in connection with the proposed bond issue in connection with the proposed building, \$60,000 had been paid on account of the purchase price of the Home Bank property, and a contract had been entered into with Anglin Norcross Limited, for the construction of the building in the sum of \$1,750,000. (Case p. 207, ls. 39-40; p. 208, ls. 1-6).

But these were all matters antecedent to the formation of the alleged contract or the date fixed for the completion thereof, namely, September 15, 1925. The preliminary plans of the proposed building were prepared by Mr. Bird, the Architect, in 1923 or 1924 (Case p. 46, ls. 1-10), and the complete plans and specifications, prepared following submission of Forgie's original offer of purchase in 30 May, 1925 (Exh. 3, Case pp. 111, 113), were delivered to the building contractor, Anglin Norcross Limited, about the second or third week of July, 1925 (i.e. antecedent to the date of the alleged contract). (Case p. 46, ls. 1-13; p. 62, ls. 1-12; p. 63, ls. 13-15; p. 79, ls. 29-33; p. 80, ls. 1-12; p. 82, ls. 4-8). The option to purchase the Home Bank property was acquired by Forgie on May 7, 1925 (Exh. 4, Case pp. 106, 107), and exercised on June 8, 1925 (Exh. 39, Case p. 134, ls. 30-32; p. 135, ls. 1-3). The building contract between Anglin Norcross Limited and the Dominion Building Corporation Limited was entered into on August 7, 1925 (Exh. 1, Case p. 137, ls. 29-37; pp. 138, 151, ls. 1-8). There is no evidence when expense 40 was incurred in connection with the proposed bond issue.

Sixthly, the learned judge says that the terms of the contract did not make time of the essence of the contract. (Case p. 208, ls. 6-7.)

But this reason, in view of what has already been stated, is inconclusive.

10 **3. If the alleged contract constitutes a binding contract as between His Majesty and James Forgie, the assignment by Forgie of all his right, title and interest thereunder to the claimant, not having been notified to the Minister of Railways and Canals, and consented to by him, and such consent not having in any case been evidenced by instrument in writing in accordance with the provisions of s. 15 of the Department of Railways and Canals Act, is not binding on His Majesty and was wholly ineffectual to establish any privity of contract between His Majesty and the claimant.**

42. On the issue raised by paragraphs 6 and 7 of the Statement of Defence (Case p. 9, ls. 10-17), as to the assignment of 5th August, 1925, (Exh. 7, Case p. 134, ls. 5-14) by Forgie to the Dominion Building Corporation Limited of "all my right, title and interest" under the alleged contract with His Majesty, the learned President of the Exchequer Court of Canada held the assignment to be valid and binding on His Majesty. (Case p. 208, ls. 15-40; p. 209, ls. 1-18.)

20 The learned judge's decision on this point appears to be founded upon these findings, namely, (1) that the contract was assignable, and (2) that its assign-
ability at the time of the making of the contract was acquiesced in by the (respon-
dent) appellant, because (a) Forgie's offer of purchase was expressed to enure "to
the benefit of the undersigned, his executors, heirs and assigns" (Case p. 121, ls.
26-27); and (b) in the draft lease, which accompanied the said offer of purchase,
annexed to the Order in Council of July 29, 1925, the Dominion Building Corpora-
tion Limited was named as lessor. (Case p. 125, ls. 18-33; pp. 126-133, ls. 1-19.)
The learned judge, however, granted the application of the claimant at the trial
for an order permitting James Forgie to be added as a party to the proceedings, so
that the claim for damages under the alleged contract might be made in the name
of the assignor as well as in the name of the claimant, (Case p. 211, ls. 37-38; p. 212,
30 ls. 1-7); and a formal order adding Forgie as a party claimant was subsequently
made. (Case p. 212, ls. 12-27.)

43. It is submitted that the learned judge's decision on this point is erroneous in point of law. The provisions of sec. 49 of the Conveyancing and Law of Property Act, R.S.O. (1927) chap. 137, relating to assignments, may at once be laid out of consideration, because that enactment is not binding upon the Crown (Dominion): *Powell v. The King* (1905) 9 Ex. 374, 375; *Gauthier v. The King* (1818) 56 S.C.R. 176 and its requirements were not in any way complied with in the present case. The question is, consequently, governed by the general law applicable in Ontario as unmodified by that enactment.

44. It is submitted that, both in law and in equity, a party to a contract cannot assign his liability thereunder without the other party's consent, i.e. except by novation: *Tolhurst v. Associated Portland Cement Manufacturers* (1902) 2 K.B. 668, 677; and that the same rule applies with regard to the assignment of rights under a contract where such rights are coupled, as in the case of the contract now alleged against His Majesty, with liabilities: Pollock, *Principles of Contract*, 9 ed., p. 512; *Arkansas Smelting Co. v. Belden Mining Co.* 127 U.S. 379, 388; *Delaware County v. Diebold Safe and Lock Co.* 133 U.S. 473; *The Queen v. Smith* 10 S.C.R. 1, 55.

10 The assignment in question was an assignment of an executory contract as a whole, and if the fact that the draft lease was drawn in the name of the claimant company as lessor; may be taken to indicate that the parties contemplated that Forgie's rights and liabilities under the alleged contract should subsequently be assigned to the claimant, it does not necessarily follow that the parties intended that such an assignment should become effective to establish privity of contract between His Majesty and the claimant, as assignee, by mere implication of consent on the part of His Majesty, and informally, from the use of the word "assigns" in Forgie's offer of purchase. The word "assigns" is quite capable of having force without reference to such a construction.

20 It is in the highest degree improbable that the word "assigns" in Forgie's offer of purchase was intended, or was assumed by the Governor in Council to have been intended, to have effect to dispense with the necessity for any formal consent on behalf of His Majesty to any assignment of the contract by Forgie which might subsequently be made. The intention to render the contract assignable without any formal consent on behalf of His Majesty ought not to be inferred from the mere use of the word "assigns," or in the absence of an express provision manifesting such intention. "*Without any express provision to the contrary*, one contracting party has no right to delegate the obligations arising out of a contract made with him personally to another to whom he may think fit to transfer them": The
30 *Queen v. Smith*, 10 S.C.R. 1, 56, per Strong, J.

It is submitted, therefore, that the assignment in question, not having been notified, or consented to by the Minister of Railways and Canals, was wholly ineffectual to bind His Majesty and to establish any privity of contract between His Majesty and the claimant.

45. It is further submitted that if the alleged original contract was required to be executed in writing in accordance with the formalities prescribed by s. 15 of the Department of Railways and Canals Act (as the (respondent) appellant contends), so also was any consent on behalf of his Majesty to an assignment of the

contract; that it was beyond the power of the Minister to provide, even by an explicit stipulation to that effect, for consent to such an assignment otherwise than in conformity with the formalities prescribed by that enactment; and that for this reason, apart from any other, the (respondent) appellant is right in maintaining that he never entered into any contract with the claimant, and never came under any obligation or liability to it: *The Queen v. Smith* 10 S.C.R. 1, 60, 61.

46. For these and other reasons which will be urged in the argument of this appeal, it is submitted that the judgment of the learned President of the Exchequer Court of Canada is wrong and ought to be reversed, and the claim of the
10 claimant dismissed, with costs.

W. N. TILLEY.
C. P. PLAXTON.