

Privy Council Appeal No. 80 of 1915.

The Commercial Cable Company - - - *Appellants,*

v.

The Government of Newfoundland - - - *Respondents,*

FROM

THE SUPREME COURT OF NEWFOUNDLAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 31ST JULY, 1916.

Present at the Hearing :

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

LORD ATKINSON.

LORD SHAW.

LORD PARMOOR.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from the conclusion come to by a majority of the Supreme Court of Newfoundland. What has to be determined is whether the appellants, who are an American company incorporated in the State of New York, are entitled to recover two sums of \$12,000 and \$10,916.13, alleged to be due under an agreement under the Great Seal of Newfoundland, dated the 18th February, 1909, to which the parties were the appellants and the Governor of Newfoundland in Council.

The agreement was made under the following circumstances. Prior to 1905 the appellants owned and worked five submarine cables laid between Waterville, in Ireland, and Canso, in Nova Scotia. None of these cables reached to Newfoundland. By an agreement dated the 26th August, 1905, made between the appellants and the Government of Newfoundland, and subsequently confirmed by statute of the Legislature of Newfoundland (6 Ed. VII, c. 10), to which it was scheduled, the Government agreed to grant to the appellants, on certain terms and conditions, the right to land any of its through cables in Newfoundland.

In September 1905 a cable had been laid by the appellants from Port aux Basques, on the south coast of Newfoundland, to

Canso, in Nova Scotia. This cable became the property of the Government, who worked it. It was in order to develop the system so brought into existence that the agreement of the 26th August was entered into. That agreement provided for the maintenance of the new cable and for exchange of traffic. It also provided that the Government should grant to the appellants the right to land any of their through cables in Newfoundland on certain terms and conditions, and for grants of cable stations and wayleaves. The duration of this agreement was to be ten years.

Later on, in 1909, Sir Robert Bond, who was then Premier of Newfoundland, entered into negotiations with the appellants with a view to the appellants landing one of their transatlantic cables at St. John's, and these negotiations culminated in the agreement of the 18th February, 1909, now in controversy. By this agreement the appellants contracted to cut one of their transatlantic cables and extend it to Newfoundland and thence to New York, and also to establish a cable station at St. John's. The duration of the agreement of the 26th August, 1905, was to be extended to twenty-five years. The appellants were to pay the Government a certain proportion of their receipts for messages. The Government were to pay to the company \$4,000 annually for the facilities thus to be afforded, and to grant them the right to land the new cable in Newfoundland, as well as lands for cable stations and wayleaves for the cables. The appellants were to have entry duty free for their materials and appliances, and the contract was to last for twenty-five years.

The appellants selected a landing-place and entered into a contract with a construction company for the manufacture and laying of the new cable. The cable appears to have been made and landed, and some work was done by the appellants towards establishing a cable station at St. John's. The Government used the cable on certain occasions, but it appears to their Lordships that this was done under special arrangements, and that it cannot be taken to have amounted to an adoption in itself making the contract binding on the Government.

For the purpose of installing the new cable the appellants imported into Newfoundland certain articles which would have been admitted duty free had the contract been carried out by the Government. But the Government has claimed duty on these articles on the footing that the contract is not binding, and the appellants have paid in respect of duties sums amounting to \$10,916.13. This is the second amount claimed, and it is claimed as recoverable by the appellants under their contract. They allege that they are entitled to have it repaid to them, and to receive the first item of \$12,000, being the amount for three years of the annual subsidy of \$4,000.

In 1909 the Government of Sir Robert Bond, who had negotiated the agreement in controversy, went out of office, and a new Government came in. The new Government was dis-

satisfied with the agreement, announced that it regarded it as not being binding in the absence of legislative sanction, and declined to recommend it to the House of Assembly for ratification. As a consequence, the Legislature of Newfoundland has not ratified the agreement, as it did in the case of the agreement of 1905.

There is no doubt that the agreement in controversy was executed with all due solemnities so far as the Governor in Council was concerned, and the question is whether it is binding in the absence of sanction from the Legislature. With the policy of the new administration in Newfoundland in repudiating it their Lordships have no concern. The administration may have acted harshly or they may have been simply doing a public duty. Such a question is not one for a court of law, but is a domestic issue for the Government of Newfoundland, and those to whom they are responsible. The only point before this Board is whether the claims of the appellants in proceedings which are analogous to a petition of right ought to succeed as claims valid in point of law. The question turns on whether the then Government of Newfoundland had authority to make a contract, binding apart from legislative sanction, which would entitle the appellants to claim the sums in question under the terms of such a contract. In order to answer this question it is necessary to examine the position of the Governor of Newfoundland when, acting in Council, he executed the agreement.

Newfoundland has not had its constitution defined by Imperial statute after the fashion of Canada and the Canadian provinces, but it has for many years possessed not only representative but responsible government. Its elected Chamber has assumed the form of a House of Assembly, which has regulated its own proceedings by rules, made under the authority of one of its own statutes, which precludes alterations of these rules except by a vote of two-thirds of the members. One of these rules is that in all contracts extending over a period of years and creating a public charge, actual or prospective, entered into by the Government, there shall be inserted the condition that the contract shall not be binding until it has been approved by a resolution of the House. Their Lordships are of opinion that this rule is part of the constitution of Newfoundland, and is binding on the executive, which is responsible to the Legislature and which was of course party to the statute under which the rule was made.

There is another statute which was invoked in the argument for the appellants as relating to the subject-matter of the agreement of 1909. It is the Newfoundland statute of 62 and 63 Vict., c. 34, which, by section 79, enables the Governor in Council, on the recommendation of the Treasury Board, to remit any duty or toll payable to the Crown and imposed and authorised to be imposed by an Act of the Colony. But looking at the context of the section, their Lordships do not read the

statute as applying to a contract such as that before them, which is dealing not with remission in a particular case, but with an exemption of a prospective and continuing character. Such an exemption would, in their opinion, require the special sanction of the Legislature.

Turning to the position of the Governor, it is plain that, according to well-settled principles, he is not a Viceroy in the sense of being a person to whom the full prerogative power of the Crown has been delegated. His capacity is defined and limited by his commission and instructions. The commission which defines the powers of the Governor is contained in Letters Patent of the 28th March, 1876, which enable him, with the advice and consent of the Legislative Council and Assembly of the Colony, to make laws for the public peace, welfare, and good government of the Colony. They authorise him to "do and execute in due manner all things that shall belong to his said command, and to the trust we have reposed in him, according to the several powers and authorities granted or appointed him by virtue of these present Letters Patent, and of such commission as may be issued to him under Our sign manual and signet, and according to such instructions as may from time to time be given to him under Our sign manual and signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and according to such laws and ordinances as are or shall hereafter be in force in Our said Colony." The Letters Patent also set up an Executive Council, to be nominated with the approval of the Legislature of the Colony, and a Legislative Council, not exceeding fifteen in number.

Their Lordships think it clear that the Governor is by these provisions subjected to constitutional restriction, and that any persons dealing with him, whether or not they actually know the character of his authority, must be taken to deal subject to such restriction. No doubt, if he chose in unambiguous language to bind himself by any contract personally, the Governor could do so and take the consequences, but he could not by so doing bind the Parliament and the people over whom he is only appointed to exercise authority subject to the constitutional conditions already referred to. And when he makes a contract it is well settled that the presumption is that he contracts in his public capacity and subject to the particular restrictions which the constitutional practice of the Colony imposes. These restrictions everyone transacting public business with him must be taken to accept in so transacting, and any contract entered into with him in his public capacity will be presumed, unless the contrary plainly appears, to have been entered into on this footing.

From what has been said it follows that the agreement of the 18th February, 1909, must be presumed, from the character of its subject-matter, to have been made on the footing that it would be submitted to the Legislature of the Colony for its approval,

and that it was not to become a binding agreement in the absence of such approval. The agreement must, moreover, be read as a whole, and as it was beyond the power of the Executive to make it binding in the points already indicated, it cannot be made binding piecemeal. What view the Legislature might have taken had it been properly submitted is a topic into which no court of law can enter, and no damages can be recovered for breach of any implied promise to so submit it. For all grants of public money, either direct or by way of prospective remission of duties imposed by statute, must be in the discretion of the Legislature, and where the system is that of responsible government, there is no contract unless that discretion can be taken to have been exercised in some sufficient fashion. Their Lordships will therefore humbly advise His Majesty that the appeal fails, and should be dismissed with costs.

In the Privy Council.

THE COMMERCIAL CABLE COMPANY

vs.

THE GOVERNMENT OF
NEWFOUNDLAND.

DELIVERED BY VISCOUNT HALDANE.

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