16, 1941

APPELLANT'S CASE.

In the Privy Council.

No. 23 of 1940.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

INTERNATIONAL RAILWAY COMPANY .. (*Plaintiff*) *Appellant*,

AND

THE NIAGARA PARKS COMMISSION .. (*Defendant*) *Respondent*.

CASE FOR THE APPELLANT.

Record.

1. This is an appeal by the Appellant from the Judgment of the Court of Appeal for Ontario affirming the Judgment of the Trial Judge which dismissed the Appellant's action. p. 58. p. 46.

2. The action was brought to recover interest on the amount of compensation representing the value of the Appellant's Railway taken over by the Respondent, such interest being claimed from the date when the Respondent took possession of the Railway until the date of payment of the amount of the award made by a Board of Arbitrators, as finally determined by a decision of their Lordships in *International Railway Co.* v. *The Niagara Parks Commission*, April, 1937 ; reported (1937) O.R. 607 ; (1937) 3 D.L.R. 305 ; (1937) 3 All E.R. 181. Possession of the Railway was taken by the Respondent on the 12th September, 1932, although by arrangement between the parties this was to have been considered as of the time when it should have been taken, namely, the 1st September, 1932. The amount of compensation, although fixed as of the 1st September, 1932, was not finally determined until the 23rd April, 1937. No interest was included in the award for the reason that the duty of the Arbitrators was only to ascertain the actual value of the Railway at a certain time and that the right to interest, if any, was a matter outside the scope of the arbitration ; see at page 624 of (1937) O.R., in the above-mentioned Judgment of the Privy Council.

3. Two questions are raised by this appeal. The first is as to the right of the Appellant to interest on the amount of compensation for the period in question, and the second is whether, if entitled to interest, the Appellant can sue the Respondent therefor by action or whether its only remedy is by way of Petition of Right against the Crown.

Vacher.—69781.

Record.

pp. 70-79. **4.** The contract under which the Appellant's claim arises was made on the 4th December, 1891, between the Appellant's predecessor in title, The Niagara Falls Park and River Railway Company (hereinafter called the Railway Company), and the Respondent; and all the rights and liabilities of the Appellant's predecessor in title under that contract have passed to the Appellant. By that contract, which was confirmed by Statute 55 Vict. pp. 62-79. cap. 96 of the Province of Ontario, the Railway Company, desiring to build and operate a Railway, acquired the right to construct an electric railway in the main upon lands of the Respondent but partly upon other lands to be acquired by the Railway Company. The land on which the railway tracks p. 72, l. 45. were to be laid, the "right of way" as it is generally called in Canada, was to be provided by the Respondent. (Their Lordships will remember that in Canada the land on which the tracks run is normally not held in fee simple by the Railway undertaker but the fee is retained by the original landowner who grants an easement or right of way to the railway).

pp. 70-79. The Railway Company by the contract agreed to construct and equip a p. 73, l. 3. railway which would run through the Public Park at Niagara controlled by the Respondent and to operate such railway for a period of forty years, with an option to prolong the operation for a second period of twenty years.

pp. 70-79. **5.** In clause 29 of the contract provisions were made as to the railway being and remaining the property of the railway company until it should be transferred to the Respondent at the end of the period of operation. The p. 78, ll. 31-47. said clause run as follows :—

"Subject always to the terms and provisions of this agreement, and
"to the rights of the Commissioners* as the owners in fee simple of the
"right of way in the park proper and on the chain reserve, the said rail-
"ways and their equipment and the other works constructed or required
"under this agreement, shall upon such construction or acquisition, as
"the case may be, be vested in and shall be the property of the company*
"who shall, subject as aforesaid, be entitled to operate, manage and
"control the same during the period or periods respectively above
"mentioned, it being however hereby declared, understood and agreed,
"that at the end of the said first or second periods, as the case may be,
"the whole of the company's said high level railway from Queenston to
"Chippawa, and the said low level railway, if then held by the company
"under this agreement, together with their equipment and the machinery
"and works aforesaid, including the elevators or lifts acquired or built
"and including also the works in Queenston and Chippawa, shall become
"the property of the Commissioners, subject to the payment of com-
"pensation to be agreed upon or awarded as the case may be, and as is
"hereinbefore provided for."

* i.e., the Respondent.

* i.e., the railway company.

6. The Railway Company in pursuance of the contract acquired the pp. 70-79. necessary lands and built the railway, and operated it for the said period of forty years. At the end of this period the Appellant, who had by then succeeded to the rights and obligations of the Railway Company, did not

Record.

exercise its option to extend the operation of the railway for the further twenty years.

7. The forty-year period actually expired on the 1st September, 1932. It would have been inconvenient to the public if the operation of the Railway had ceased on that date, as the Labour Day holiday was early in September and the Appellant at the request of the Respondent continued the operation of the Railway until the 12th September, 1932, without prejudice to the position or the rights of the parties. Possession was taken of the Railway by the Respondent pursuant to the contract on the 12th September, 1932.

p. 16, l. 12.

pp. 84, 85.

8. Under clause 26 of the said contract, it is provided that at the end of the period of operation " the company shall be duly compensated by the " Commissioners for their railways, equipment, machinery and other works " including the low level railway, if the same shall have been constructed and " then held by the company under this agreement, as also the high level " railway from Chippawa to Queenston, and including also their works in " Chippawa and Queenston, but not in respect of any franchises for holding " or operating the same, such compensation to be fixed by mutual agreement, " or in the case of difference, by arbitration . . . but the failure before the " expiration of any such term to fix such compensation in manner aforesaid, " or to pay before such expiration the amount of compensation so fixed, shall " not entitle the company to retain possession meanwhile of the said railways, " equipment, machinery and works, by this agreement to be constructed or " operated, but the same shall nevertheless and notwithstanding that the " Commissioners may have taken possession thereof remain subject to such " liens and charges, save as to possession as aforesaid, as may exist in favour " of bond-holders or debenture-holders of the company, and the company " shall retain a lien or charge thereon, save as to possession as aforesaid, " for the compensation of their railway, equipment, machinery and works to " be agreed upon as aforesaid, or so to be awarded to them provided, how- " ever, that all such liens and charges shall not exceed the amount that may " be agreed upon or may be awarded for such compensation as aforesaid."

p. 77, l. 47 to p. 78, l. 19.

9. It will be seen that the provisions for arbitration cannot be brought into operation until there is failure to agree upon the amount of compensation. The Respondent, however, postponed and delayed attempts on the part of the Appellant to reach an agreement from the time when possession was taken in September, 1932, until March, 1934, when the Appellant's patience became exhausted and it named its arbitrator, demanding that the Respondent name its arbitrator. The Respondent further delayed the appointment of its arbitrator and of the third arbitrator until an Order was made on the 2nd November, 1934, appointing the third arbitrator.

p. 91.

pp. 98, 99, 102.

10. The arbitrators by a majority made their award on the 29th May, 1935, fixing the amount of compensation to be paid for the Railway at the sum of $179,104.00 on the basis of the scrap value of the component parts of

pp. 103-110.

Record.

the railway. They did not deal with the Appellant's right to interest, it being plain both from the observations of Lord Cave in *Toronto City Corporation* v. *Toronto Railway Corporation*, which is cited in paragraph 17 below, and from those of Lord MacMillan in the above mentioned judgment in the previous appeal between the parties hereto (1937) O.L.R. p. 604 at p. 624, that the question of interest did not and does not fall to be dealt with by the arbitrators, but is a matter for the Courts.

The Arbitrator appointed by the Appellant dissented from this award, being of the opinion that the amount of compensation which the arbitrators were required to fix should be the value of the Appellant's Railway as a going concern.

11. An appeal was taken by the Appellant from this award to the Court of Appeal for Ontario and that Court by Order dated the 31st December, 1935, varied the award in minor respects not now material, but otherwise affirmed it.

12. A further appeal was taken by the Appellant to the Privy Council as above mentioned and the Privy Council, adopting the view that the arbitrators were required to value the Railway as a going concern by Order dated the 23rd April, 1937, allowed the appeal, increasing the amount of the award to the sum of $1,057,436.00. This amount did not include any amount for interest, for the reasons already given.

p. 99, l. 25. p. 100. **13.** On or about the 3rd June, 1937, the Respondent paid to the Appellant the amount of the award with interest thereon from the 21st May, 1937, being the date of the entry of the Order of the 23rd April, 1937, above

pp. 111, 112. mentioned. On the 12th August, 1937, the Respondent made a further payment representing interest on the amount originally awarded by the arbitrators from the date of their award, plus interest on the total amount awarded for the period from the date of the Order of the Privy Council to the said 21st

p. 101, and p. 111, l. 8. May, 1937.

14. At this time the Appellant was claiming a much larger sum for interest, contending that interest should be paid from the time when the Respondent took possession of the Railway, and the Respondent in making

p. 101, ll. 32-7. the payment of the 12th August, 1937, proposed that if the Appellant insisted on further interest being paid it should sue therefor by writ. The Appellant

p. 113. acted on this suggestion and issued its writ in this action, service of which was accepted by the solicitors for the Respondent on the 7th September, 1938.

15. The Appellant's claim to interest depends of course on the law of Ontario, which is more generous than was the law of England prior to recent amendments. In Ontario the matter is regulated by Section 33 of The Judicature Act, R.S.O. 1937, c. 100, which reads :—

> "Interest shall be payable in all cases in which it is now payable "by law and in which it has been usual for a Jury to allow it."

This Section is a reproduction of a provision contained in a pre-Confederation Statute of Upper Canada, 7 Will. IV, Cap. 3, Sec. 20.

16. The provisions of the Ontario law as to interest were discussed by the Privy Council in the case of *Toronto Railway Company* v. *City of Toronto* (1906) A.C. p. 117, where Lord Macnaghten said, at p. 120 :—

" The question as to interest is not so simple. If the law in Ontario " as to the recovery of interest were the same as it is in England, the " result of modern authorities ending in the case of *The London Chatham* " *and Dover Ry. Co.* v. *The South Eastern Ry. Co.* (1893) A.C. 429, would " probably be a bar to the relief claimed by the corporation. But in " one important particular the Ontario Judicature Act (Revised Statutes " of Ontario, 1897, c. 51), which now regulates the law as regards interest, " differs from Lord Tenterden's Act. Sec. 113, which is a reproduction " of a proviso contained in the Act of Upper Canada, 7 Will. 4, c. 3, s. 20, " enacts that ' interest shall be payable in all cases in which it is now " ' payable by law or in which it has been usual for a jury to allow it.' " The second branch of that section (as Street J. observes) is so loosely " expressed as to leave a great latitude for its application. There is " nothing in the statute defining or even indicating the class of cases " intended. But the Court is not left without guidance from competent " authority. In *Smart* v. *Niagara and Detroit Rivers Ry. Co.* (1862) " 12 C.P. 404, Draper C.J. refers to it as a settled practice ' to allow interest " ' on all accounts after the proper time of payment has gone by.' In " *Michie* v. *Reynolds* (1865) 24 U.C.R. 303, the same learned Chief Justice " observed that it had been the practice for a very long time to leave it " to the discretion of the jury to give interest when the payment of a " just debt had been withheld. These two cases are cited by Osler J.A " in *McCullough* v. *Clemow* 26 O.L.R. 467, which seems to be the earliest " reported case in which the question is discussed. To the same effect " is the opinion of Armour C.J. in *McCullough* v. *Newlove*, 27 O.L.R. 627. " The result, therefore, seems to be that in all cases where, in the opinion " of the Court, the payment of a just debt has been improperly withheld, " and it seems to be fair and equitable that the party in default should " make compensation by payment of interest, it is incumbent upon the " Court to allow interest for such time and at such rate as the Court may " think right."

17. The Appellant's contention that it is entitled to interest from the date of taking possession rests mainly upon the equitable principle applicable to cases of Vendor and Purchaser or quasi Vendor and Purchaser which requires the Purchaser when completing the contract to pay interest on the amount of purchase money from the time when the Purchaser takes possession of the property. In *Toronto City Corporation* v. *Toronto Railway Company* (1925) A.C. 177, Viscount Cave, delivering the judgment of the Privy Council, said at p. 193 :—

" The Company claimed that the award of the arbitrators, so far

Record.

" as it allowed interest on the value of the property taken over from the " date when possession was taken to the date of the award, should be " restored. Upon this point their Lordships agree with the view taken " by the Supreme Court. The general rule under which a Purchaser " who takes possession is charged with interest on his purchase money " from that time until it is paid is well established, and has on many " occasions been applied to compulsory purchases ; and their Lordships " are not aware of any circumstances which would prevent that principle " from applying in the present case."

18. The main contentions advanced by the Respondent in answer to the Appellant's claim are as follows :—

On the question whether interest was payable in respect of the period between the Respondent's taking of the railway into its possession and the fixing by the Privy Council of the principal amount due, the Respondent argued that :—

(i) the said contract did not create the relation of vendor and purchaser between the parties, the Appellant having nothing to sell at the end of the period of operation, and not then owning a railway ;

(ii) the equitable doctrine on which the Appellant mainly relied, as stated in paragraph 17 above, is limited to contracts for the sale or transfer of land, and what was transferred here was not in the main to be regarded as " land " ;

(iii) the contract as a matter of construction impliedly excluded the right to interest.

On the question whether action would lie, the Respondent argued that it must be regarded as an emanation from the Crown, and as the servant or agent of the Crown, because—

(i) by amendment made in 1909 (by 9 Edw. VII, cap. 24, section 3) the Statute incorporating the Respondent (which has frequently been amended since the contract was made, and is now chapter 93 of R.S.O. 1937) was made to declare that all works and lands whereon any expenditure was authorised pursuant to the Statute were to be deemed to be " public works " of the Province, the result of which was, by The Public Works Act (R.S.O. 1937, cap. 54, section 7) to vest them in the Crown, and

pp. 70-79.

(ii) by a further amendment in 1913 (3 & 4 Geo V, cap. 14) it was provided that surplus revenues of the Respondent not required for its statutory purposes should be paid over to the Consolidated Revenue Fund of the Province.

19. The argument that the said contract did not create the relation of vendor and purchaser, it is submitted, contradicts both the terms of the contract and the opinion expressed by the Privy Council in the previous case already mentioned.

Record.

In clause 29 of the contract set out in paragraph 5 above, the railways and works are to " be vested in and shall be the property of the company," i.e., the railway company, and at the end of the period of operation and only then are " to become the property of the Commissioners," i.e., of the Respondent, and in clause 26 which is set out in paragraph 8 above, it is provided that what the railway company are to be compensated for is " their railways, equipment, machinery and other works." p. 78, ll. 31-4. p. 77, l. 45 to p. 78, l. 19.

It is important to realise that it was in 1891 that the Railway Company agreed to sell and that it was by virtue of the contract then made that the property was to pass to the Purchaser at the end of the Franchise Period. Until the property passed to the Purchaser in 1932 under that contract the Railway Company at first and later the Appellant did own a Railway, which it had agreed to sell at the end of the period. pp. 70-79

The Railway Company had built this Railway at its own cost. It first acquired the necessary real property rights by buying from the Respondent the benefit of existing contracts with other landowners which had been made by or on behalf of the Respondent prior to that time and the right-of-way north of the Park proper, paying for these rights the sum of $10,000.00. p. 63. p. 73, l. 34.

The Respondent, while retaining the fee in its Park lands, granted to the Railway Company on terms the requisite rights-of-way through the Park lands and other lands belonging to the Respondent or over which it had rights, and for this the Railway Company paid an annual rental of $10,000.00. p. 76, l. 11.

Other provisions in the Statute and contract refer to the desire of the Company to construct and operate a Railway and to secure the rights-of-way to construct " *their* " Railway, the Respondent agreeing to provide the right-of-way and other rights necessary for the operation of the Railway. These rights are referred to in the contract as having been " *conveyed* " by the Respondent to the Railway Company. Even the word " *grant* " is used in reference to the rights acquired by the Railway Company from the Respondent. There are also provisions in the contract and in the Statute empowering the Railway Company to borrow money and issue bonds and to secure them by a charge upon the Railway and provisions in the contract making the liabilities and engagements of the Railway Company under the contract, including the rentals, a charge upon the Railway. p. 71, l. 4. p. 71, l. 17. p. 76, l. 25. p. 75, ll. 6, 19. p. 67, l. 21. p. 72, l. 27. p. 79, l. 10.

20. The Appellant also submits that when the award of the arbitrators was before the Privy Council in 1937 the Privy Council in construing the contract took the view that there was a sale and transfer of a railway undertaking under the contract. In the judgment of the Privy Council in that case at pp. 618, 620, 621 of (1937) O.R., Lord MacMillan said :— pp. 70-79.

" It is a railway complete with equipment, machinery and works, " which the company were bound to hand over to the Parks Commissioners " on Sept. 1, 1932, and not the components of a railway . . . That for " which they are to be duly compensated is the same thing as that which " they were bound to hand over, namely, their railway, with its equip- " ment, machinery, and other works, a going concern, and not a mere " collection of materials . . .

" What is in question . . . is the compensation to be paid to private " undertakers . . . for the physical structure which they have created " and which has then to be transferred to a public authority . . .

" The Company have transferred to the Parks Commissioners their " railway as a complete entity, duly equipped and capable of performing " its functions as an operating railway."

Lord MacMillan, at p. 617, rejected the suggestion of similarity to a landlord taking over his tenant's building at the end of a lease.

21. With reference to the contention of the Respondent that the principle upon which the Appellant mainly relies only applies to the case of a purchase and sale of land, and that even if the relationship of Vendor and Purchaser did exist in this case the purchase was not a purchase of land, the Appellant's submissions are: firstly, that the principle is not limited to land but is applicable to any purchase agreement of which specific performance would ordinarily be decreed; secondly, that the property involved, the value of which was to be fixed by arbitration, was a Railway and as such could not exist apart from the intangible interests in real estate which the contract conveyed; and thirdly, that in whatever category of property the Railway may fall, the decision of the Privy Council in *Toronto City Corporation* v. *Toronto Railway Company*, 1925 A.C. 177, above cited shows that the principle applies to the case of railway property such as is involved here.

pp. 70-79. **22.** On the further contention of the Respondent that the Appellant is not entitled to interest on the purchase money because interest is excluded as a matter of construction by the provisions of the contract itself, the provisions relied upon by the Respondent are the provisions of clauses 26 and 29 of the agreement, already quoted above, in paragraphs 8 and 5. Under these two clauses at the end of the operation period, the Railway Company shall be compensated by the Respondent for its railway equipment, machinery and works, and these railways, equipment, etc., shall become the property of the Respondent subject to the payment of the compensation. Under clause 26 it is further provided that the failure before expiration of the term to fix the compensation or to pay before such expiration the amount fixed shall not entitle the Railway Company to retain possession but notwithstanding the taking of possession by the Respondent the property shall remain subject to such liens and charges save as to possession as may exist in favour of bondholders or debenture holders, and the Railway Company shall retain a lien on the property for its compensation. It is argued for the Respondent that, the contract being silent as to interest, the provision entitling the Respondent to possession notwithstanding that the compensation has not been fixed or paid should be given the effect of excluding payment of interest which on equitable principles is allowed in the place of possession. The Appellant contends that this argument is not sound; that the equitable principle applies unless it is excluded by express language or by necessary implication from the contract; that a clear intention to exclude it is necessary; and that

p. 78, ll. 31-47.

p. 77, l. 45 to p. 78, l. 19.

Record.

the language of the clause is not sufficient to exclude it. The contract did not fix a date for payment later than the date for possession. It was at the end of the forty-year period that the Appellant was to be duly compensated and that possession was to pass. The time for payment and the time for taking possession were plainly provided to be the same time. The fact that the clause provides for possession at the time fixed although the purchase money may or may not have then been fixed or paid does not alter the date at which payment ought to be made, or exclude payment of interest on the purchase money if it was not paid when it should have been ; it merely prevents the performance of the one obligation being construed as dependent upon the performance of the other. p. 77, ll. 45-8.

It is significant that the clause deals in the same way with both events, namely, the event of compensation being fixed and not paid and the event of the compensation not being fixed. If the clause is to be construed as excluding the right to interest which would otherwise be payable it would equally exclude the right to interest after the amount was fixed but not paid as well as where the amount was not fixed. That could not be the true construction. In *Toronto City Corporation* v. *Toronto Railway Company* (1925) A.C. 177, the contract provided for the Corporation taking possession notwithstanding that the amount of the compensation had not been fixed or paid. It was held that the principle upon which the Appellant relies applied and that interest was payable although the contract was silent as to interest.

23. On the question of the right to sue, the Appellant submits that neither its cause of action nor the action itself is in any sense directed against the Crown. The Respondent is not sued as representing the Crown nor is the Appellant seeking to reach Crown property. The action is simply one against a Corporation created by statute with express power to sue and be sued, based upon a contract made by that Corporation on its own behalf, and not merely or solely on behalf of the Crown. The contract itself sets out that the Park Commissioners (i.e., the Respondent) were acting " on their own " behalf as well as on behalf and with the approval of the Government of the " Province," and the statute 55 Vict., cap. 96, which confirmed the contract declared it to be " valid and binding on the parties thereto," without any provision that the Crown should be bound. pp. 62-79. pp. 70-79. p. 70, ll. 38-9. p. 62, l. 40.

24. The Respondent was created by statute of the Province of Ontario (50 Vict., cap. 13) which is set forth in the Appendix to this Case, not to perform any function of government but to operate a public park. By virtue of the Interpretation Act of the Province as in force at that time (R.S.O. 1877, cap. 1, sections 7, 8), which is still in force in substantially the same terms (R.S.O. 1937, cap. 1, section 28), the Respondent was given and has always since had the right to sue and be sued in its corporate name. Appendix p. 14.

25. When the statute incorporating the Respondent was passed, the Province of Ontario owned certain lands which comprised a Park at Niagara. By section 3 of this statute these Park lands were vested in the Respondent corporation as Trustee for the Province. The Respondent was authorised

Record.

to purchase a toll road and upon acquisition thereof the right to tolls was to become extinguished. The Lieutenant-Governor-in-Council was authorised by section 5 to vest in the Respondent any Crown lands lying along the bank of the Niagara River, to be held for the purposes of the Park and subject to any conditions which might be imposed by Order-in-Council. The Respondent was authorised by section 7 to borrow moneys and to issue debentures for the purposes of the Park. The debentures to be issued were declared to be a charge upon the revenues of the Respondent, although provision was made whereby payment might be guaranteed by the Province. The moneys to be raised by means of debentures were to be applied in payment of the purchase money of lands acquired ; in payment of necessary improvements, constructions and appliances to be used in connection with the Park ; in recouping the Province for expenses incurred by it with reference thereto ; and in paying current expenses of the Park and interest on the debentures until the Park revenues would be sufficient for such purposes. The revenues of the corporation were by section 12, to be applied first to the payment of necessary outgoing expenses in connection with the Park, including salaries and wages ; secondly, to payment of the interest on the debentures ; and thirdly, to provide a Sinking Fund for the debentures.

26. It will be observed from perusal of this Statute that while the Crown retained certain measures of control over the Respondent it neither retained nor acquired any interest in the properties or revenues of the corporation save in so far as the lands in the Park proper, which the Province previously owned, were declared to be held in trust for the Province, and it would seem quite unreal to suggest either that the Respondent was contracting as agent for the Crown and not on its own behalf, or that the revenues of the Respondent were not to be available to meet the claims of the Appellant, or that the Appellant should have any right to be paid by the Crown the moneys due to it under the contract.

27. The Appellant humbly submits that the amendments to the Respondent's statute in 1909 and 1913 which are mentioned in paragraph 18 above could not in any view alter ex post facto the position that the railway company and the Appellant as its successor had a contract with the Respondent and not with the Crown, that the Respondent was liable on that contract, and that the Respondent could be sued thereon by an ordinary action. In this connection it is to be observed that it is in any case only the surplus revenues after payment of debentures and other expenses of the Respondent under the Act, including expenses of all works necessary to the preservation, improvement and maintenance of the Park, that are to form part of the Consolidated Revenue Fund of Ontario. The dates and obligations of the corporation were clearly intended to be paid first, before there could be any revenues available by way of surplus revenue for the Province. It is important to note that under section 7 of the Statute as it now reads, which has been in force in this form for many years, the Respondent was authorised with the approval of the Lieutenant-Governor-

Appendix p. 20, l. 17.

Record.

in-Council to borrow money and issue debentures to meet any indebtedness of the Commission accruing due.

28. If it were permissible to rely upon provisions of the Statute incorporating the Respondent which have been introduced into it by amendment since the date of the contract, it may be mentioned that what is now section 3 of R.S.O. 1937 c. 93 vests all property real and personal in the Respondent without reference to any trust for the Province of Ontario, section 24 drawing a distinction as to the Park lands and retaining the provision in the original Statute which declared that the Park lands were to be held in trust for the Province. Section 7, relating to the issue of debentures, makes provision whereby the debentures issued by the Respondent may be guaranteed by the Province, putting the Crown and the Respondent corporation in the respective positions of guarantor and principal debtor as to these debentures.

pp. 70-79. Appendix p. 20, l. 12. Appendix, p. 21, l. 22.

29. The Appellant further contends that even if the Respondent corporation were otherwise entitled to claim some immunity from action in this case it is not entitled to take such position in this action because the Respondent prior to the commencement of this action through its Counsel proposed by letter of the 12th August, 1937, that the controversy between the parties as to interest which has been put in issue in this action should be determined by writ, and agreed to accept and thereafter did accept service of such writ on behalf of the Respondent. By reason of this the Appellant has been prejudiced. If its only remedy was to proceed against the Crown by Petition of Right it could have asked for the necessary fiat long ago and at a time when one would not expect it to be refused in view of the declared willingness then existing on the part of the Respondent to have the question determined by the Supreme Court.

Record. p. 101, ll. 32-37. p. 113, l. 20.

30. Mr. Justice Kelly in his Reasons for Judgment expressed the view, on the claim for interest, that the equitable rule relied upon by the Appellant, whilst applying to cases of vendor and purchaser of land, including cases of compulsory purchase, did not apply to chattels. He thought that the contract, on its true construction, was no more than a contract to construct and equip a railway on the lands of the Respondent and to deliver that railway to the Respondent on a fixed day, retaining no more than a right to possession, and that it was not an agreement for the sale of land at all, no land having been acquired by the railway company or the Appellant and transferred by them to the Respondent save to the extent of $30,450.

pp. 46-55. pp. 70-79.

On the question whether the Respondent was acting on behalf of the Crown, so that the claim for interest should in any case be the subject only of proceedings by Petition of Right, the learned Judge came to the conclusion that the Respondent was the servant or agent of the Crown, and held that the action of the Appellant must fail on that ground also. He also held that the Respondent was not precluded by its letter of the 12th August, 1937, from taking this point.

p. 101.

Record.

pp. 58-61. **31.** The Court of Appeal, in their Reasons for Judgment, which were delivered by McTague J.A., thought that there was no relation of vendor and purchaser. The learned Judge said :—

p. 59, ll. 27-43. " I rather prefer to view it as an agreement by which the Defendant " granted the Plaintiff's predecessors as private undertakers a franchise " for a limited period, coupled with an obligation on the part of the " Plaintiff at the end of the period to accept compensation to be ascertained " by arbitration in the manner provided in the agreement for whatever " investment they had made pursuant to the franchise originally granted " them.

" Viewed in this way, it must be apparent that at the end of the " period the Plaintiff had nothing to sell. They did not then own a " railway. All they had was a right to compensation for the loss of " their investment under their original contract. . . . In my opinion " this is not a vendor and purchaser transaction in the true sense of the " word at all . . ."

pp. 59-60. On the point as to the right to sue, the Court of Appeal took much the same view as the learned trial Judge.

32. The Appellant submits that the Judgments of the Court of Appeal p. 58. for Ontario and of the Trial Judge are wrong and should be set aside and p. 46. that Judgment should be directed to be entered for the Appellant for the interest claimed as set forth in the Statement of Claim, for the following among other

REASONS.

1. Because the Appellant is entitled in law to the interest claimed.

2. Because the relation of Vendor and Purchaser existed between the parties with regard to the Railway taken over by the Respondent in September, 1932.

3. Because the interest claimed is interest on purchase money and should be payable from the time when possession of the property purchased was taken by the purchaser.

4. Because this equitable principle is applicable to property such as the property in question.

5. Because it would require clear language in the contract to exclude the Appellant's ordinary right to interest.

6. Because there is nothing in the contract to exclude the Appellant's right to interest.

7. Because the purchase money was due under the contract on the 1st September, 1932, and was not then paid, and in such cases it is usual for a Jury to allow interest.

8. Because the Respondent is not the Crown.

9. Because the Respondent was not created for the performance of any Crown function of government and is not an emanation from the Crown in the sense of being entitled to any Crown immunity.

10. Because the Statute creating the Respondent corporation provides that it may sue and be sued in its own name.

11. Because there is nothing in the Statute creating the Respondent corporation that takes away the liability to be sued for its debts which ordinarily flows from the creation of a corporation.

12. Because in making the contract in question the Respondent was not acting solely on behalf of the Crown but on its own behalf as well.

13. Because this action is not brought against the Respondent in a capacity of representative of the Crown.

14. Because the Crown is not liable for the Respondent's obligations and a remedy by way of Petition of Right against the Crown does not exist in this case.

15. Because this action is not one that can or is intended to reach Crown property through action against a representative of the Crown.

16. Because the Respondent is by its actions precluded from asserting in this action that it is entitled to some Crown immunity from action.

D. N. PRITT.

J. W. PICKUP.

Appendix.

APPENDIX OF STATUTES

REFERRED TO IN THE WITHIN CASE FOR THE APPELLANT

STATUTES OF ONTARIO
50 Vic. Chapter 13 (1887)

An Act respecting the Niagara Falls Park.
(Assented to 23rd April, 1887.)

Preamble.

"WHEREAS, in pursuance of The Niagara Falls Park Act, the Lieutenant-Governor in Council did approve of certain lands selected by the commissioners for the purposes set out in the preamble of the said Act; and a map of the park, shewing the boundaries thereof and the lands taken, was submitted to the Lieutenant-Governor and approved in Council, and copies duly certified and authenticated were filed and deposited in the office of the registrar for the county of Welland, and in the office of the Commissioner of Crown Lands; and whereas the prices to be paid for the said lands have been ascertained and determined, and it is expedient to make provision for the payment thereof, and for the means required to establish, maintain, improve, and develop the said lands, as and for a public park;

"Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Name.

"1. The Park shall be called 'The Queen Victoria Niagara Falls Park,' and this Act may be cited as The Queen Victoria Niagara Falls Park Act, 1887.

Commissioners incorporated.

"2.—(1) From and after the commencement of this Act, Colonel Casimer Stanislaus Gzowski, of the city of Toronto, Aide-de-Camp to the Queen; John Woodburn Langmuir, and James Grant Macdonald, both of the city of Toronto, Esquires, the persons forming the Board of Commissioners for Niagara Falls Park, and two other persons to be appointed by the Lieutenant-Governor in Council if he thinks fit, shall be a corporation by the name of 'The Commissioners for the Queen Victoria Niagara Falls Park,' and shall continue to hold their respective offices, as members of the said corporation, during the pleasure of the Lieutenant-Governor in Council, and the Lieutenant-Governor in Council may, upon the death of any of such persons respectively, or on their resignation or removal from office, and from time to time thereafter, appoint other persons to fill their places during pleasure as aforesaid.

"(2) The Commissioners shall receive no compensation except their actual disbursements in discharging their duties.

Lands vested in the commissioners.

" 3.—(1) The lands selected by the commissioners of Niagara Falls Park, approved by the Lieutenant-Governor, and marked upon the map, and contained within a red verge line marked on the said map, with the exception hereinafter mentioned, are hereby vested in the said corporation as trustees for the Province, subject to the payment being made which is hereinafter mentioned. The amounts agreed to be paid or awarded are to be paid upon proper conveyances being executed to the said commissioners, subject as hereinafter mentioned ; or in case no proper conveyance is executed, the money may be paid into Court, in accordance with and subject to the terms of The Niagara Falls Park Act and The Revised Act respecting the Public Works of Ontario as incorporated in the Park Act.

" (2) The payment is to be made within fifteen days from the passing of this Act, with interest to be computed from the 30th March, 1887, to the day of payment, at the rate of six per cent. per annum ; and payment within such period shall be as effectual as if made within the period fixed for payment by The Niagara Falls Park Act.

" (3) The costs, which shall be payable under awards where amounts are paid into Court, may be paid to such of the persons interested as appeared before the official arbitrators.

" (4) The land so excepted is the following :—

" Excepting a strip of land, lying between Range No. 6, as laid down in the plan of the city of the Falls, in the township of Stamford, on the North and by Street's Mill Road and the lands held by the Carmelite Monastery on the South, the easterly boundary whereof is at a distance of 130 feet east of the centre line of the Canada Southern Railway, and the westerly boundary whereof being the westerly line of the park, as appears in the park plan, filed and registered, between said Range No. 6 and Street's Mill Road, and Monastery Lands and approximately of the width of seventy-nine feet between said Range No. 6 and Street's Mill Road, which said strip is by this Act excluded from the park ; and except also that until the municipal corporation otherwise orders by by-law, subject to section 546 of The Consolidated Municipal Act, 1883, Robinson and Murray Streets shall be public entrances to the park for visitors by carriages, or on horses, or on foot.

Purchase of part of St. Catharines, Thorold and Niagara Falls Road authorised.

" 4.—(1) The commissioners may agree with the person or persons, or association of persons, whether incorporated or not, who exercise, own or control the taking and collecting of tolls upon that portion of the gravelled or macadamized road known as the St. Catharines, Thorold and Niagara Falls road, between Table Rock and the north boundary line of the park on the aforesaid plan marked, as well as the title, interest and possessory right, which such person or persons as aforesaid have to the said road and the land whereon the same is laid out, together with the toll-house and appurtenances between the said points, for the price to be paid for the said rights to take tolls, and the title, interest and possessory rights, land, toll-house and appurtenances aforesaid ;

Appendix.

" (2) And if the commissioners and the said persons as aforesaid are unable to agree, the sums to be paid shall be determined by arbitration in the manner provided by The Niagara Falls Park Act; and any party to the arbitration may appeal from the award in manner and according to the provisions of The Act respecting awards under the Niagara Falls Park Act;

" (3) The right and power which the persons aforesaid have to collect tolls over the residue of the road known as the St. Catharines, Thorold and Niagara Falls road shall not be affected by reason of the acquisition by the commissioners of that portion between the Table Rock and the north boundary line of the park on the aforesaid plan marked, except by reason of the diminution of mileage, although that part of the road held or retained by the said persons beyond the limits of the park may be shortened to less than five miles in length;

" (4) In case of an arbitration the arbitrators shall take into account any depreciation, if such there may be, in the value, to the persons aforesaid, of the remainder of the road;

" (5) The arbitrators shall also determine the value of the whole road between the Table Rock and a point about five miles therefrom in respect of which tolls are now collected, in order that the commissioners may have the opportunity of, paying to the persons aforesaid, if sanctioned by the Legislature at its next session, the difference between the value of the whole road between said points and the value of the part hereinbefore mentioned of the road aforesaid; and in case of such payment being sanctioned and made within fifteen days after the end of such session, that part of the road built upon the military reservation or ordnance property shall vest in the commissioners, and the park shall then extend over and include, as well the military reservation, as the land lying between such reservation and the Niagara River, as far as the limit between lots numbers 92 and 93 of Stamford, but not affecting or interfering with the rights of any companies having bridges over the Niagara River. And all the provisions of this Act and The Niagara Falls Park Act shall apply to such extension of the park as if included within the park at the time of the passing of this Act, saving the reservation of a public way between the Clifton House and the limit between said lots 92 and 93, such public way being subject to reasonable tolls upon horses and carriages passing over the same.

" (6) All costs in respect of the matters in this section contained shall be in the discretion of the arbitrators.

" (7) Upon the acquisition by the commissioners of the interests and rights in that portion of the said road within the park as now limited, all rights to take and collect tolls, as well as the public rights in the said portion of the road, shall be extinguished.

" (8) Nothing in this section is intended to extend to or affect any right or title of the Dominion of Canada to any property known as the military reservation or ordnance property.

" 5. The Lieutenant-Governor in Council may at any time, or from time to time, vest in the commissioners, to be held for the purposes of the Park, and subject to any conditions which may be imposed by Order in Council, any part or portions of the Crown Lands the property of Ontario, lying along the bank of the Niagara River, and not included in the original survey of lots laid out in the townships of Stamford and Niagara, which lands so vested shall thenceforth form part of the park and be subject to the control of the commissioners like the other lands aforesaid.

Grant of Crown Lands authorised.

" 6. The provisions hereinbefore and in the former Act contained for authorising the commissioners to take, use or acquire, and authorising all persons to sell and convey, lands, hereditaments or rights, shall extend to any lands, hereditaments and rights which the commissioners, with the consent of the Lieutenant-Governor in Council shall hereafter think proper or expedient to be acquired for the purpose of making, forming and completing any new roads, avenues or approaches to the park, but nothing in this section contained shall authorise the commissioners to take any lands for the purpose aforesaid, against the consent of the parties interested therein.

Power to acquire lands.

" 7.—(1) The commissioners may raise, for the purposes and objects intended to be secured by The Niagara Falls Park Act and this Act, the sum of $525,000, and no more, by the issue of debentures. The appropriation and application of the money shall be assured to the satisfaction of the Lieutenant-Governor.

Issue of debentures authorised.

" (2) The debentures shall be under the corporate seal and the hands of two of the commissioners, and shall be countersigned by the Treasurer of Province, and the same shall be for such respective amounts payable on the 1st of January, 1927, and at such rate of interest not higher than four per cent. per annum, and shall be disposed of at such prices and on such terms as may be determined by the commissioners, and approved by the Lieutenant-Governor in Council. The interest shall be paid half-yearly on such days as shall be mentioned in the debentures.

" (3) The debentures shall, equally and without preference of one over another, be a charge on all the revenues of the corporation, and the Lieutenant-Governor by Order in Council may also guarantee payment of the same.

" (4) The debentures so issued and countersigned shall be conclusive of the same having been issued in pursuance of this Act, and of the same being guaranteed by the Province of Ontario.

" (5) The debentures shall be transferable by delivery, and the coupons for interest annexed thereto shall also pass by delivery.

" (6) The moneys to be raised by means of the said debentures shall be applied in paying the purchase moneys of the lands to be acquired, in making necessary improvements, constructions and appliances to be used in connection with the park, in recouping the Province for expenses incurred by it with reference thereto, and in paying current expenses of the park and interest on the said debentures until a sufficient revenue for the said purposes is obtained from the fees charged.

Appendix.

Powers of commissioners.

" 8.—(1) Subject to any direction of the Lieutenant-Governor in Council, the commissioners may construct and operate inclined planes and hydraulic or other lifts, to be worked by any powers ; and may build and operate boats or vessels to be used in connection with the park.

" (2) Subject as aforesaid, the commissioners may pull down all houses and other erections and buildings on lands acquired and purchased by virtue of this Act, or such of them or such part thereof as they shall think proper to be pulled down, and may level and clear the ground whereon the same stand, in such manner as they think proper, and sell or cause to be sold the materials of the houses and other buildings to be taken down and removed ; and the moneys to be produced by the sale thereof, after deducting expenses, and also the rents and profits to which they may be entitled meantime, shall be applied and disposed of for or towards the purposes of this Act.

" (3) Subject as aforesaid, the commissioners shall lay out, plant and enclose the park in such manner as they think fit, and improve and develop the same in accordance with the objects of The Niagara Falls Park Act.

" (4) Subject as aforesaid, the commissioners shall have power to take and collect tolls for the use of works, appliances, vessels, or works required to afford facilities to visitors to reach and view the points of interest within the park, and involving the expenditure of money in construction and maintenance, as well as for services to be rendered for the convenience or accommodation of visitors.

" (5) Subject as aforesaid, the commissioners may from time to time make orders and regulations for opening and closing the gates and entrances of the park or any of them, at such hours as they may think fit. This is not intended to interfere with, or affect, an agreement which has been heretofore entered into between the commissioners and the Canada Southern Railway.

Plans of works, tolls and by-laws to be subject to approval of Lieutenant-Governor in Council.

" 9. The plans of all works proposed, and all tariffs of tolls or payments for the use of works, vessels or services, as well as all by-laws, shall require the approval of the Lieutenant-Governor in Council before being acted upon.

Grounds to be open to public.

" 10. The park grounds shall be open to the public, subject to any rules and regulations as to management approved by the Lieutenant-Governor in Council.

Power of Commissioners as to by-laws.

" 11.—(1) The commissioners may make by-laws, to be approved by the Lieutenant-Governor in Council, for the use, government, control or management of the park, and for the protection and preservation of all works from injury of the same, and of the trees, shrubs, walks, seats, gates, fences and palings, and all other parts thereof, and for the exclusion of improper persons from the same, and may alter or revoke any such by-laws, and shall appoint a penalty, not exceeding $20, for any breach of a by-law.

" (2) The commissioners may from time to time appoint such officers as may be required for the superintendence and management of the park,

and may also appoint park keepers and other officers to preserve order in the park, and may from time to time dismiss any persons so appointed; the appointments or dismissals being subject to the approval of the Lieutenant-Governor; and the salaries of such officers shall be payable out of any funds in the hands of the commissioners.

"(3) Any person entrusted by the commissioners with the custody or control of moneys, by virtue of his employment, shall give security in the manner and form provided by The Act respecting Public Officers.

"(4) The commissioners may from time to time employ gardeners and workmen, as they may deem necessary, and may from time to time dismiss or dispense with the services of such persons, subject to any directions of the Lieutenant-Governor in Council.

"(5) The commissioners shall cause books to be provided and kept, and true and regular accounts to be entered therein, of all sums of money received and paid, and of the several purposes for which the same were received and paid; which books shall at all times be open to the inspection of any of the commissioners, and of the Treasurer of Ontario, and of any person appointed by the commissioners or Treasurer for that purpose, and of any other person appointed by the Lieutenant-Governor; and the commissioners and persons aforesaid may take copies of or extracts from the said books.

Application of revenue.

"12. The revenue to be received from the sources authorised by this Act shall be applied as follows:—

"1st. To the necessary outgoing expenses of all works necessary to the preservation, improvement, and maintenance of the park, and to the payment of the salaries of officers and others employed by the commissioners, and other incidental expenses.

"2nd. To the payment half-yearly of the interest payable on the debentures authorised to be issued by the commissioners.

"3rd. To pay a sinking fund at the rate of one per cent. per annum on the entire amount of the debentures authorised to be issued as aforesaid.

Application of sinking fund.

"13.—(1) The annual sums for the sinking fund shall be remitted by the commissioners to the Treasurer of Ontario by half-yearly payments in such manner as the Lieutenant-Governor in Council from time to time directs, for the investment and accumulation thereof under the direction of the Lieutenant-Governor in Council.

"(2) The sinking fund shall be invested in such securities as the Lieutenant-Governor in Council from time to time thinks proper, and shall, whether invested or not, be applied from time to time under the direction of the Lieutenant-Governor in Council in discharging the principal and the interest thereon of the debentures.

Annual report.

"14. The commissioners shall make an annual report for the information of the Legislature, setting forth the receipts and expenditure of the year and such other matters as may appear to them to be of public interest in relation to the park, or as the Lieutenant-Governor in Council may direct.

Appendix.

49 V. c. 24, ss. 24-27 to apply.

" 15. Sections 24 to 27 of the Act to provide for the better Auditing of the Public Accounts of the Province, shall apply to the accounts of the commissioners in respect of receipts and expenditures.

49 V. c. 21, ss. 12-15 repealed.

" 16. Sections 12, 13, 14 and 15 of The Niagara Falls Park Act are hereby repealed."

EXTRACTS FROM REVISED STATUTES OF ONTARIO, 1937, CHAPTER 93.

* * * *

Niagara Parks Commission.

" 2.—(1) The body corporate heretofore constituted by the name of ' The Commissioners for the Queen Victoria Niagara Falls Park ' is continued and shall hereafter be known as ' The Niagara Parks Commission ' hereinafter called the ' Commission.'

Rights and powers of Commission.

" 3. All real and personal property and all rights, powers and privileges heretofore vested in and exerciseable by the commissioners for the Queen Victoria Niagara Falls Park are hereby vested in and shall be exerciseable by the Niagara Parks Commission. R.S.O.1927, c.81, s. 3.

* * * *

Commission authorised to issue bonds, debentures, etc.

" 7.—(1) In addition to the powers conferred upon the Commission under any other provisions of this Act the Commission, with the approval of the Lieutenant-Governor in Council, may from time to time borrow money to meet any indebtedness of the Commission accruing due, or for the purchasing or otherwise acquiring real or personal property, or making improvements, or for any other purpose of the Commission and may issue bonds, debentures notes or other securities to provide for the repayment of any moneys so borrowed and such securities may be payable at such times and in such manner and at such place or places in Canada or elsewhere and may bear such interest as the Commission may deem proper.

Guaranteeing bonds.

" (2) The Lieutenant-Governor in Council may authorise the Treasurer of Ontario for and on behalf of Ontario to guarantee the payment of any securities issued by the Commission for the purposes aforesaid.

Form of guaranty.

" (3) The form of guaranty and the manner of its execution shall be determined by the Lieutenant-Governor in Council. R.S.O. 1927, c. 81, s. 7.

* * * *

Nuisances.

" 19. The Commission shall not carry on or allow to be carried on in the Parks or upon any of the lands so acquired by them, any noisome or offensive trade or business whatever. R.S.O. 1927, c. 81, s. 19.

Collection of revenues and rentals.

" 20. Subject to any direction or order of the Lieutenant-Governor in Council, and to the provisions of this Act, the Commission may continue to collect the revenues and rentals payable or collectible under the several agree-

ments made by and between the Commission acting on its own behalf and with the approval of the Government of Ontario and the Canadian Niagara Power Company, the Ontario Power Company of Niagara Falls and the Electrical Development Company of Ontario, Limited. R.S.O. 1927, c. 81, s. 20. Appendix.

Application of revenues and rentals.

" 21. The revenues and rentals mentioned in section 20 and the revenue received from the other sources authorised by this Act shall be applied as follows :—

" 1. To the payment half-yearly of the interest payable on the debentures issued by the Commission ;

" 2. To provide for the retirement of the said debentures at maturity by a sinking fund or otherwise according to the terms of the debentures issued by the Commission hereunder ;

" 3. To the necessary outgoing expenses of all works necessary to the preservation, improvement and maintenance of the Parks, and to the payment of the salaries of the officers and others employed by the Commission, and other incidental expenses ;

and all revenues and rentals which are not required for such purposes shall on or before the 1st day of July in each year be paid over by the Commission to the Treasurer of Ontario, and shall form part of the Consolidated Revenue Fund of Ontario. R.S.O. 1927, c. 81, s. 21.

* * * *

Boundaries of Park.

" 24.—(1) The land in the vicinity of Niagara Falls selected by the Commission and approved by the Lieutenant-Governor in Council, whereof the boundaries as surveyed upon the ground are shown by a red verge line marked upon a map, whereof copies duly certified and authenticated are filed and deposited in the office of the registrar of the County of Welland and in the Department of Lands and Forests, excepting thereout the strip of land lying between Range No. 6 as laid down in the plan of the City of the Falls, in the Township of Stamford, on the north, and by Street's mill road and the land held by the Carmelite Monastery on the south, the easterly boundary whereof is at a distance of one hundred and thirty feet east of the centre line of the Canada Southern Railway, and the westerly boundary whereof is the westerly line of the Park as marked upon the map, shall constitute the " Queen Victoria Park," heretofore known as the " Queen Victoria Niagara Falls Park," and shall be vested in the corporation as trustees for Ontario.

Entrances Rev. Stat. c. 266.

" (2) Until the municipal corporation otherwise enacts by by-law, passed in compliance with section 495 of The Municipal Act, Murray street shall be a public entrance to the Park for visitors in carriages or on horses or on foot, and Robinson street shall be a public entrance to the Park for visitors on foot. R.S.O. 1927, c. 81, s. 24."

In the Privy Council.

No. 23 of 1

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

INTERNATIONAL RAILWAY COMPANY
(*Plaintiff*) *Appe*

AND

THE NIAGARA PARKS COMMISSION
(*Defendant*) *Respon*

CASE FOR THE APPELLANT

BLAKE & REDDEN,
17, Victoria Street,
Westminster, S.W