

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Windsor and Annapolis Railway Company v. The Queen and the Western Counties Railway Company, and on the cross Appeal of The Queen v. The Windsor and Annapolis Railway Company from the Supreme Court of Canada; delivered 25th June 1886.

Present :

LORD WATSON.

LORD HALSBURY.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR RICHARD COUCH.

The Government of Canada, by an agreement dated the 22nd September 1871, undertook to give the Appellant Company the exclusive use of the Windsor Branch Railway, and also running powers over the trunk line, from Windsor Junction to Halifax, for the term of 21 years, from the 1st January 1872. The Appellant Company, in pursuance of that agreement, entered upon and worked the Windsor Branch Railway until the 1st August 1877, when Mr. Brydges, the Government Superintendent of Railways, took possession of the line, and put an end to the occupation of the Company. On the 24th September 1877, the same official gave possession of the line to the Western Counties Railway Company, under an

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arrangement, the terms of which are to be found in Schedules A and B of the Act of the Dominion Parliament, 37 Vict., c. 16.

The Appellant Company, on the 10th October 1877, filed a bill, on the Equity side of the Supreme Court of Nova Scotia, against the Western Counties Railway Company, in which they sought to obtain a declaration of their rights under the agreement of September 1871, to recover possession of the Windsor Branch, and to have an account taken of the receipts of the Defendant Company, from freight and passenger traffic. On the 19th September 1878 the Appellant Company presented a petition of right to the Exchequer Court of Canada, under the provisions of the Dominion Act, 39 Vict., cap. 27, in which they humbly prayed that the agreement of 1871 should be specifically performed, and also "that the sum of 150,000/. sterling, or such sum as may be reasonable, may be paid to your suppliants in compensation and by way of damages for the injuries and losses which have been occasioned to them by the breach and failure of Her Majesty's Government of Canada to perform the said agreement of the 22nd September 1871."

In the Equity suit, Mr. Justice Ritchie, on the 1st March 1880, decided that the Plaintiffs were "entitled to the judgement of the Court in their favour, with costs." That decision was affirmed by the Supreme Court of Nova Scotia, on the 6th April 1881; and on appeal to this Board, the judgements of both Courts below were affirmed, with costs, on the 22nd February 1882. Their Lordships held that that the agreement of 22nd September 1871 was valid and subsisting; and that the rights of the Windsor and Annapolis Railway Company under that agreement were not affected by the Canadian Act, 37 Vict., cap. 16.

During the dependence of these proceedings the Government of Canada put an end to their arrangement with the Western Counties Railway Company, and, on the 1st December 1879, they allowed the Appellant Company to resume possession of the Windsor Branch, and to exercise running powers over the trunk line, but that without prejudice to the rights or liabilities of Her Majesty, or the Appellant Company, except in so far as the question of damages might be thereby affected.

Her Majesty's Attorney General for the Dominion of Canada appeared in the petition of right, and lodged a statement in defence on behalf of Her Majesty, on the 18th October 1880, but no further proceedings were taken in the cause until the judgement of this Board had been given in the Equity suit. On the 18th May 1883 Mr. Justice Gwynne decided that damages were not, in the circumstances of the case, recoverable from Her Majesty, and dismissed the petition with costs, "leaving the "suppliants to pursue their remedy, for such "compensation against the Western Counties "Railway Company, under their judgement "already recovered against that Company." A motion for a rule to show cause why the judgement of Mr. Justice Gwynne should not be set aside was refused by the Court of Exchequer on the 26th June 1883. Upon an appeal against that decision to the Supreme Court of Canada, Sir W. J. Ritchie, C. J., and Taschereau, J., held that a petition of right lay against the Crown, but that the damages recoverable must be limited to the period of the Crown's possession of the Windsor Branch from 1st August to 24th September 1877. These learned Judges were of opinion that the Appellant Company, by their proceedings in Equity against the Western

Counties Railway Company, had elected to take that Company as their debtors for all claims of damage arising after the 24th September 1877, and were consequently barred from preferring these claims against the Crown. Fournier and Henry, J. J., whilst agreeing that the petition of right lay, held that the Crown was liable for damages suffered by the Appellant Company after its possession had ceased. Gwynne, J., adhered to his former decision, and Strong, J., concurred with him. The Supreme Court, accordingly, on the 16th February 1885, reversed the judgement of the Court below, and ordered and adjudged that the suppliants are entitled to recover from Her Majesty the Queen the profits of the Crown from the Windsor Branch Railway from the 1st August to the 24th September 1877, which they fixed at the sum of \$9,589. 07.

The principal appeal from that judgement is taken by the Appellants, the Windsor and Annapolis Railway Company, who object to it, in so far as it excludes their claim of damages after the 24th September 1877. The Respondent, Her Majesty's Attorney General for the Dominion of Canada, has brought a cross appeal, in which he seeks to have the judgement of the Supreme Court set aside, and to have the judgements of Mr. Justice Gwynne and of the Court of Exchequer restored.

The Respondent has not, in the Courts below, or at their Lordship's bar, impugned the decision of this Board in the Equity suit between the Appellant Company and the Western Counties Railway Company. He has conceded that the Appellant Company have still the right to possess and use the Windsor Branch line, under the Agreement of 1871; and, seeing that the Company was restored to possession in the year 1879, the Courts below have not thought it

necessary to dispose of those parts of the prayer of the petition of right which relate to performance of the agreement of September 1871.

Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown. Section 8 of the Canadian Petition of Right Act (39 Vict., cap. 27, Dom. Parl.), contemplates that damages may be recoverable from the Crown by means of such a petition; and the reasons assigned by Lord Blackburn for the decision of the Court of Queen's Bench in *Thomas v. the Queen* (L. R., 10 Q. B., 31), appear to their Lordships necessarily to lead to the conclusion that damages arising from breach of contract are so recoverable. A suit for damages, in respect of the violation of contract, is as much an action upon the contract as a suit for performance; it is the only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance has become impossible. In *Tobin v. the Queen* (16 C. B. (N.S.), 355) Chief Justice Eyre, whilst affirming the doctrine that the Sovereign cannot be sued in a petition of right, for a wrong done by the Executive, took care to explain that "claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs."

It was argued for the Respondent that, in *Thomas v. the Queen*, the claim of the suppliant was not for damages, but for a pecuniary consideration alleged to have been due in terms of the contract; and consequently that it was unnecessary for the Court to decide anything as to the liability of the Crown for unliquidated damages resulting from breach of contract. But

Lord Blackburn, in that case, deals with the suppliant's petition as alleging certain breaches of promises made to the suppliant on behalf of the Queen; and his reasoning appears to this Board to be quite as applicable to a claim of unliquidated damages for breach of contract, as to a claim for the contract price. Lord Blackburn rests the judgement mainly upon the "Banker's case" (14 Howard's State Trials, 1), which was a suit for annuities granted by Letters Patent under the Great Seal; but His Lordship at the same time points out that, from the time of Lord Somers, there had been repeated expressions of opinion by eminent Judges in favour of the view that a petition of right lay against the Crown on a contract. It is unnecessary to cite these opinions, which are all collected in *Thomas v. the Queen*. Their Lordships may, however, refer to the accurate exposition of the law given by the late C. J. Cockburn in *Feather v. the Queen* (6 B. and S., 293):—"We think it right to state that we see no reason for dissenting from the conclusion arrived at by the Common Pleas in *Tobin v. the Queen* (16 C. B., N. S., 310). We concur with that Court in thinking that the only cases in which the petition of right is open to the subject are, where the land, or goods, or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or when a claim arises out of a contract, as for goods supplied to the Crown or to the public service." Their Lordships desire to add that, upon this branch of the case, they agree with the reasoning of C. J. Ritchie, and the able judgment of Mr. Justice Fournier.

It was argued for the Respondent that no breach of the agreement of 1871 was committed

by the Crown, inasmuch as the taking possession of the Windsor Branch Railway on the 1st August 1877 was simply the tortious act of Mr. Brydges. The argument fails because it has no foundation in fact. The Respondent, in his statement of defence, alleges that, on or about the 25th July 1877, the Government of Canada, having completed arrangements for transferring the line to the Western Counties Railway Company, a minute was passed by the Governor General in Council directing that the arrangements then existing with the Appellant Company should be terminated on the 1st August 1877; that the Minister of Public Works was directed to resume possession on that day; and that, "in pursuance of the said minute of Council and of the said Act of 1874," the officers of Her Majesty dispossessed the Appellant Company and gave possession of the line to the Western Counties Railway Company. It is plain, therefore, that Mr. Brydges acted with the full authority of the Government, and merely carried out their instructions, which were issued in the belief that it was within their legal right to put an end to their agreement with the Appellant Company.

Another argument submitted on behalf of the Respondent was to the effect that the Crown is only liable in respect of breaches of contract occasioned by the omissions of Crown officials, and is not liable in respect of breaches due to their positive acts, even when these acts are done under direct authority from the Crown. Upon this point it is sufficient to say that, in the opinion of their Lordships, there is neither authority nor principle for recognizing any such distinction.

It was also argued for the Respondent that the Crown cannot be held liable as for breach of contract, inasmuch as all the acts of the Government of Canada, in putting an end to the

possession of the Appellant Company, were done (to use the language of Mr. Justice Strong) "expressly with the intention of acting in pursuance of the Statute of 1874, and for the purpose of carrying out the provisions of that Statute, a duty which Parliament had imposed on the Executive Government." If the effect of the Canadian Act of 1874 (37 Vict., c. 16) had been to make it the imperative duty of the Government to terminate their agreement with the Appellants, and to give possession of the Windsor Branch to the Western Counties Railway Company, the Crown would have incurred no liability to the Appellants by performing that statutory duty. But the decision of this Board in the previous suit was given in favour of the present Appellants, on the very ground that the Act of 1874 did not affect the validity or subsistence of the agreement of September 1871, and imposed no obligation on the Government to interfere with the Appellant's possession of the Windsor Branch Railway, or to transfer it to the Western Counties Railway Company.

The only matters remaining for consideration are the extent to which the Crown is liable for damages, and the amount of damages which ought to be awarded to the Appellants. Their Lordships are of opinion that, on the 1st August 1871, when they were ousted by the Act of the Crown, there arose to the Appellants a claim of damages, for loss of possession, during the whole remainder of the term specified in the agreement of 1871; and that their subsequent restoration, in December 1879, had merely the effect of reducing the amount of that claim. They are unable to assent to the view taken by Mr. Justice Henry, who was of opinion that damages must be restricted to the period between 1st August 1877 and 19th September 1878, the date when the petition of right was presented.

It has been argued, however, for the Respondent, and the Supreme Court of Canada has, by a majority, given effect to the argument, that the Appellants can only recover from the Crown such damages as were incurred by them whilst the Crown was in actual possession of the Windsor Branch Railway. It is said that the Appellants are estopped from preferring any claim against the Crown, after the 24th September 1877, by reason of their having elected to accept the Western Counties Railway Company as their sole debtors for damages accruing subsequently to that date. In the opinion of their Lordships, the plea thus advanced by the Respondent is without foundation either in fact or law, and must therefore be rejected.

The Respondent's statement in defence contains no plea of estoppel, and no allegation of fact, upon which such a plea could be founded. The argument has been based upon the print of proceedings in the Equity suit, which was tendered by the Respondent, at the trial of the present cause before Mr. Justice Gwynne, and received *de bene esse*. Even if it were competent in these circumstances to entertain the plea of estoppel, their Lordships would be of opinion that no case of election has been made out. Both suits were depending long before an operative judgement was pronounced in either of them. In the suit directed against the Western Counties Railway Company, which prayed *inter alia* for an account of profits, although the Appellants were found to be entitled to the judgement of the Court in their favour, there has been no order directing an account to be taken, none has been taken, and no decree has been made ordaining the Defendant Company to make a money payment to the Appellants. Had there been such a decree, any payment made under it by the Western Counties Railway Company would have operated

in satisfaction *pro tanto* of the liability of the Crown, it could have had no other effect.

Their Lordships have accordingly come to the conclusion that the Appellants are entitled to judgement for the whole damage sustained by them from the 1st August 1877 to the 1st December 1879. The evidence as to the amount of damage lies within a very narrow compass; it is not contradictory, and involves no question as to the credibility of witnesses. In these circumstances, their Lordships have thought it better, in order to obviate the necessity of further litigation, to determine the amount of damages themselves, and they have accordingly assessed the same at \$115,000.

Their Lordships will humbly advise Her Majesty that the cross appeal should be dismissed and the judgement appealed from in the original appeal, in so far as it orders and adjudges "that the Appellants, the suppliants, are entitled to recover from the Respondent, Her Majesty the Queen, the profits of the Crown from the Windsor Branch Railway from the 1st day of August 1877 to the 24th day of September 1877, both inclusive, which have been fixed and determined at the sum of \$9,589. 07, being portion of their relief sought by the petition of right," ought to be reversed; and that *quoad ultra* the said judgement ought to be affirmed, subject to the declaration that the Appellants, the suppliants, are entitled to receive from Her Majesty the Queen the sum of one hundred and fifteen thousand dollars (\$115,000), as the damages suffered by them by reason of their having been deprived of the possession and use of the Windsor Branch Railway from the 1st August 1877 to the 1st December 1879. Their Lordships also find that the Appellant Company are entitled to receive the costs incurred by them, in the principal and cross appeals.
