1930
Jun. 25, 26 & 27.
1931
Mar. 4.

BETWEEN:

DOMINION BUILDING CORPORATION LIMITED .... CLAIMANT;

AND

HIS MAJESTY THE KING.............. RESPONDENT.

Contract—Sale of land—Crown—Offer to Crown represented by the Minister of Railways and Canals for Canada—Acceptance binding the Crown—Order in Council—Communication to offeror—Department of Railways and Canals Act, R.S.C., 1906, c. 35, s. 15—Public Lands Grants Act, R.S.C., 1906, c. 57, s. 4—Whether time of the essence—Assignability of contract—Damages for breach of contract when no specific performance decreed against Crown.

F., the claimant's assignor on July 19, 1925, sent to His Majesty the King, represented by the Minister of Railways and Canals for Canada, an offer to purchase certain land in the city of Toronto, occupied by the Canadian National Railways, for $1,250,000, depositing $25,000 (said deposit to be returned if offer not accepted), and agreeing, upon acceptance of the offer, to pay the balance of the purchase price at such time as possession "be given the undersigned (*F.*) not later than" September 25, 1925, and he further agreed that, upon his obtaining possession, on or before September 25, 1925, he would proceed with the erection of a 26 storey building upon said land and certain adjoining land, provided that His Majesty the King, represented as aforesaid, should execute a lease of certain floors for 30 years upon terms set out, the offer if accepted by Order in Council, to constitute a binding contract of purchase and sale subject to the conditions therein mentioned. In the draft lease attached to the offer, the Dominion Building Corporation Limited appears as lessor, and not *F.* On July 29, 1925, the Committee of the Privy Council authorized the acceptance of the offer, and a certified copy of the Order in Council was promptly communicated to *F.* In September, 1925, a recommendation of the Minister of Public Works to lease five floors in the proposed building for the Department of Customs and Excise was approved and on February 1, 1926, an Order in Council was passed granting authority for such lease. On September 19, 1925, the Canadian National Railways vacated the premises. Extensions of time, usually signed by the Deputy Minister of Railways and Canals, were given to *F.*, in which to proceed with the construction of the building, the last one by letter of the Minister of Railways and Canals dated November 17, 1925. On December 29, 1925, *F.*, asked for a further extension to January 31, 1926, within which to complete the purchase, but no answer to this request was ever obtained and the alleged contract was treated as at an end. No notice was given either to *F.*, or the claimant, requiring completion of the purchase within any specified period and the deposit of $25,000 was retained by Respondent. On August 5, 1925, *F.* assigned all his right, title and interest in the contract to the claimant who now sues for damages for breach of contract.

The Crown contends that it can only be bound on a contract executed according to section 15 of R.S.C. (1906) c. 35 (Department of Rail-

ways and Canals Act); that all dealings were with *F.*, and that it never recognized the assignment from *F.*, to the claimant and that there is no privity between it and the claimant Dominion Building Corporation Limited; that *F.*, failed to comply with his own offer within the time prescribed.

Held, that the land in question being public land belonging to the Crown in right of the Dominion of Canada, and not being a matter pertaining to the Department of Railways and Canals alone, could be dealt with under section 4 of c. 57 of R.S.C. (1906) (Public Lands Grants Act) and that section 15 of c. 35 (1906) does not apply.

2. That the offer of purchase, the passage of the Order in Council and its communication to *F.*, and other writings disclosed in the evidence, together with the retention of the deposit, constitute an enforcible parol contract between the Crown and *F.*, for the sale and purchase of the real property in question.
3. That the present case is one, where, in equity, time should not be considered as of the essence of the contract, and the fact that the premises were vacated and that no remonstrance was made by anybody against the delay in completing the purchase, strengthens the equities in favour of the claimant. Moreover, the terms of the contract did not make time the essence of the contract, and the claimant or *F.*, was entitled to a notice, before the Respondent sought to put an end to the contract, that the same would be treated as at an end if not completed within a limited time.
4. That this contract was assignable, and considering all the facts of the case, the Crown must be assumed to have known that *F.*, was acting for the company and that it acquiesced in the assignment.

REFERENCE by the Acting Minister of Railways and Canals of the claim of Dominion Building Corporation Limited for damages for breach of an alleged contract.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

I. F. Hellmuth, K.C., R. V. Sinclair, K.C., and *W. R. Wadsworth, K.C.,* for the Claimant.

A. Geoffrion, K.C., and *C. P. Plaxton, K.C.,* for the Respondent.

The facts and questions of law raised are stated in the reasons for judgment (1).

THE PRESIDENT, now (March 4, 1931), delivered the following judgment:

This is a Reference made in September, 1926, by the Acting Minister of Railways and Canals, and the same is expressed in the following terms:—

Reserving the right to plead and maintain that the said Dominion Building Corporation Limited is not entitled to any compensation, I

(1) The earlier report of this case was overlooked. It has since been considered by the Supreme Court of Canada, (1932) S.C.R. 511, and by the Judicial Committee of the Privy Council.

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hereby refer to the Exchequer Court of Canada the annexed claim of the said Dominion Building Corporation Limited for compensation alleged to be due by reason of the allegations therein set forth.

The claim is for damages for a breach of an alleged contract.

This matter presents many difficulties and I think it is desirable that all the salient facts be first stated. Some evidence was given, properly I think, regarding the events leading up to the alleged contract which is the basis of the claim here made for damages. In 1923, the Respondent acquired by purchase from the Imperial Bank of Canada the title to a certain property located at the corner of King and Yonge Streets, Toronto, for the use, it would appear, of the Canadian National Railways. A comparatively small building stood upon the property, and at the time the alleged contract was entered into, the Canadian National Railways was in occupation of the same. Early in 1925, one Forgie of Toronto, who as a solicitor had something to do with the Respondent's acquisition of the property from the Imperial Bank of Canada, suggested to the President of the Canadian National Railways, the desirability of the Respondent acquiring an adjoining property, known as the Home Bank of Canada property, with the view of erecting upon the combined properties a large modern office building. Forgie also made the same suggestion to the Deputy Minister of Railways, and he states he was instructed by the Deputy Minister to inquire upon what terms the Home Bank property might be acquired, and he did have some negotiations with the owners. The railway authorities, Forgie states, and probably the Respondent also, decided in the end to abandon the idea of the erection of a new building upon the property acquired from the Imperial Bank, and so the suggestion of the purchase of the Home Bank property by the Respondent ended. Thereupon Forgie, in May, 1925, made an offer in writing to the President of the Canadian National Railways to purchase the property of the Respondent for a stated sum, and to erect upon the combined properties of the Respondent and that of the Home Bank, a large office building, and it was a condition of the offer that the Canadian National Railways was to lease for the term of thirty years, the ground floor and the next three floors in the proposed building. This proposal was formally approved by

the Executive Committee of the Board of Directors of the railway company. In the same month of May, Forgie made an offer in writing to His Majesty The King, represented by the Minister of Railways and Canals, to purchase the property. Later, on the 19th day of July, 1925, Forgie made another offer in writing directed to "His Majesty The King represented by the Minister of Railways and Canals," and it is this offer with which we are presently concerned. The last mentioned offer is in precisely the same terms as that made to His Majesty in May; no explanation was given why the offer of the former date was not acted upon. Evidently negotiations were proceeding during the interval.

As I have just stated Forgie addressed his offer of purchase to "His Majesty The King represented by the Minister of Railways and Canals," and the price offered for the property was $1,250,000. Accompanying the offer was a deposit of $25,000 and in this connection the offer states:—

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

The undersigned undertakes and agrees, upon the acceptance of this offer to pay to His Majesty the balance (one million two hundred and twenty-five thousand dollars) of the said purchase price at such time as possession of the said premises be given to the undersigned not later than the fifteenth day of September, 1925.

The offer contained many provisions and no doubt was intended to operate as a complete contract, if accepted. Provision was made as to the distribution of unearned fire insurance premiums between the parties if Forgie took over the property. Forgie agreed to bear any cost and expense incident to the search of the title to the premises, and there were additional provisions in the offer respecting the title to the property which need not be mentioned. The offer provided that if Forgie obtained possession of the property, on or before the 15th day of September, 1925, he was to erect a twenty-six story buildiny on the combined premises of the Respondent and that of the Home Bank. That portion of the offer is expressed as follows:—

It is to be further understood that the undersigned agrees that upon his obtaining possession of the said lands hereinbefore referred to, on or before the fifteenth day of September, 1925, that he, the undersigned, will immediately proceed with the erection of a twenty-six story modern fireproof office building on the said lands 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, and complete and have ready the said office building for occupancy by His Majesty as tenant under lease as hereinafter provided, not later than the twenty-fifth day of October, 1926, subject to the usual delays that may happen in the construction of said office building beyond the control of the undersigned the contractors, builders and architects and as evidence of such undertaking or completion of said office building within the time above specified, the undersigned will furnish His Majesty, represented, as aforesaid, with a certified copy of the contractor's (constructing the said office building) bond guaranteeing the completion of the said building within the time specified; the said office building to be constructed in accordance with the plans, details and specifications prepared and to be prepared by Eustace G. Baird, Architect of the City of Toronto, and which said plans shall be subject to the approval, in so far as space in the said office building to be occupied by His Majesty as tenant under lease hereinafter referred to, by a representative or representatives of and to be named by the Canadian National Railways.

Further provided that His Majesty, represented as aforesaid, shall execute a lease for the renting space of the ground floor and of the next three typical floors of the said office building for a term of thirty years from the twenty-fifth day of October, 1926, at a rental of sixteen ($16) dollars per square foot per year for the ground floor and three ($3) dollars per square foot per year for the next three typical floors, for the first twenty years of said term, said rentals to be increased during the next ten years of said term by such amounts, if any, as will bring the rentals during the last period of ten years to the full market value as it will exist at the end of the twenty-year period provided, however, that the rental for the last ten year period of the said term of thirty years shall not be reduced below rental for the first twenty year period of the said term, the lease to be executed by His Majesty represented as aforesaid to be in and to embody the exact terms and provisions as in draft lease hereto annexed, marked A, set out, it being understood that in the event of any inconsistency between the above set out terms and provisions of the lease to be executed and the terms and provisions of the draft lease hereto annexed marked A, that the terms and provisions of the said draft lease hereto annexed marked A, shall prevail and govern in the lease to be executed under the provisions of this offer of purchase.

It may be convenient to recite fully the last two paragraphs of the offer which are as follows:—

That notwithstanding anything in this offer of purchase it is understood that in the discretion of His Majesty it may be a condition of the instrument of conveyance from His Majesty to the undersigned of the said lands in the terms of the said instrument that the title in and to the said lands by the said instrument to vest in the undersigned only upon the execution and delivery by the undersigned of the lease, hereinbefore referred to His Majesty, represented as aforesaid, and the due furnishing of the bond by the undersigned as under the terms and provisions of said draft lease provided for.

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

It is to be observed that in the draft lease referred to in the offer, and which accompanied the offer, the Dominion Building Corporation Ltd., the claimant herein, appears as lessor, and not Forgie. It is also to be pointed out that the offer if accepted by Order of His Excellency the Governor General in Council, should constitute a binding contract of purchase and sale, enuring to the benefit of Forgie and his assigns, and to the benefit of His Majesty, His Successors and Assigns, and further, there is no stipulation that time is to be of the essence of the contract and upon this fact the claimant places much reliance.

The next step in the transaction was, that upon the recommendation of the Minister of Railways and Canals, the Committee of the Privy Council on the 29th of July, 1925, authorized the acceptance of the offer of Forgie. The Order in Council recites the offer of Forgie, a copy of which is annexed to the Order in Council marked A, and it states that the Minister of Railways and Canals had " accepted said offer subject to the approval and authority of Your Excellency in Council." The main provisions of the offer are recited in the Order in Council; the offer made by Forgie to the President of the Canadian National Railways and the approval of the same by the Board of Directors is referred to, and documents evidencing all this are annexed to the Order in Council. A copy of the draft lease in which Dominion Building Corporation Ltd. appears as Lessor, and the Respondent as Lessee, is annexed to the Order in Council. The Order in Council concludes 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.
>
> The Committee concur in the foregoing recommendation and submit the same for approval.

The Order in Council was approved of by His Excellency the Governor General in due course. A certified copy of the Order in Council was promptly communicated to Forgie, and while it is not clear by whom, yet it may be inferred that this would be done by the direction of the Minister of Railways.

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It might be convenient at this stage to state that long before Forgie made the written offer of purchase dated July 19, 1925, he had commenced negotiations with the Respondent, represented by the Minister of Public Works, respecting the leasing of certain other floors of the proposed building for the use of the Department of Customs and Excise, at Toronto, and apparently an understanding was reached between Forgie and The Minister of Public Works respecting the leasing of five floors in the proposed building. For reasons which Forgie explained, a general federal election followed by uncertainty as to the result, delays occurring in obtaining the passage of an Order in Council approving of a recommendation made by the Minister of Public Works in September, 1925, for the leasing of the five floors for the use of the Department of Customs and Excise. Eventually, on February 1, 1926, an Order in Council passed granting authority for the leasing of five floors by the Respondent for the Department of Customs and Excise, from Dominion Building Corporation Ltd., notwithstanding, as will later appear, the Respondent had previously thereto repudiated the alleged contract which is the subject matter of this proceeding. Forgie stated in evidence, and I have no doubt it is correct, that the Department of Railways and Canals was aware of Forgie's effort to lease the additional five floors to Customs and Excise, which no doubt would greatly facilitate the financial arrangements necessary for his building project. They were, however, separate matters, and the negotiations for the leasing of space to Customs and Excise is of importance, only in that it affords the explanation for Forgie's delay in completing the purchase of the Respondent's property on the date specified in his offer.

For the reason just stated, Forgie alleges he was not ready to complete the purchase on the date specified in his offer. The Canadian National Railways vacated the premises on the 19th day of September, 1925, in order that Forgie or his assigns might have possession of the same. Forgie, acting either for himself or the claimant, secured an extension of time until September 25, for the completion of the purchase, and other extensions were later applied for and granted, usually by the Deputy Minister of Railways in the form of a letter. On November 17, the time

for completion of the purchase was extended to the 30th day of December, 1925. This last extension was made by the Minister of Railways in a letter addressed by him to Forgie, and that letter is as follows:—

DEAR SIR,—

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

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

In reply, I am to advise you that a further extension of time, namely, from November 17, 1925, to December 30, 1925, is hereby given, but without prejudice on the part of His Majesty as to, and without waiver on the part of His Majesty of, any of His rights, reservations or remedies under and as provided for by the said contract should you fail to perform and carry out, within the hereby extended period, all the covenants and conditions, which on your part, under and as provided by the said contract, were to be performed and carried out within the original period thereunder provided.

On December 29, Forgie wrote requesting of the Deputy Minister of Railways a further extension of time until January 31, 1926, within which to complete the purchase. To this no answer was ever obtained and consequently no further extension was ever made. On February 3, Forgie received a certified copy of the Order in Council passed on February 1, 1926, authorizing the leasing of five floors from the Claimant for the use of Customs and Excise, and on the same day he wrote the Minister of Railways stating that he would be ready to complete the purchase price on or about February 10. That was the end of negotiations for a further extension of time; the Minister of Railways and Canals declined further to extend the time and treated the alleged contract as at an end. No notice was given either to Forgie, or the Claimant, requiring the completion of the purchase within any specified period. The deposit of $25,000 made by Forgie on account of the purchase price was retained by the Respondent.

On the 5th day of August, 1925, Forgie assigned in writing to the Claimant, Dominion Building Corporation Ltd., all his right, title and interest in the contract alleged to be concluded with the Respondent by virtue of his offer and the acceptance made by the Order in Council, as

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already explained. The claimant company had been incorporated some time previous to the assignment. It was in existence on the date of the offer of purchase in question, and it is the Lessor referred to in the draft lease accompanying the offer of Forgie, and also in the draft lease annexed to the Order in Council when it was passed. While Forgie's offer stated that he was the owner of the Home Bank site so called, it transpires that he had only an option to purchase the same, and that in the name of another person. The draft lease referring to the Home Bank property states that it is " acquired or to be acquired by the Lessor from the Home Bank of Canada." The option of purchase of the Home Bank property Forgie caused to be assigned to the claimant company on or about the 5th day of August, 1925.

The Respondent, *inter alia,* contends that no contract was ever concluded between the parties and that the requirements of sec. 15 of the Department of Railways and Canals Act, R.S.C., 1906, Chap. 35, were not complied with. That statutory provision is as follows:—

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 Secretary of the Department, etc.

The Respondent also contends that he had no notice of the assignment of the contract to the Claimant and did not consent to the same, and further that the contract could not be assigned so as to give the assignee a cause of action against the Crown. It was also contended that the extensions of time made for completing the purchase were unauthorized by the Respondent, and that if any agreement was concluded with Forgie, it was an express term of the agreement, and of its essence, that the sale and purchase thereunder should be finally completed on the 15th day of September, 1925, on which date the Respondent was ready to deliver possession of the property, but Forgie failed or was not ready or willing on that date or within a reasonable time thereafter, to complete the said agreement of purchase and sale.

Disregarding for the moment the question of the applicability of sec. 15 of the Department of Railways and Canals Act, the first point for decision is whether there was

in law a contract reached between the parties, that is to say, does the offer of purchase, the passage of the Order in Council and its communication to Forgie, and the other writings disclosed in the evidence, constitute an enforcible parol contract between the parties in respect of the sale and purchase of real property. I think it does. There was an offer and there was an acceptance, both in writing. An acceptance by Order in Council is the way the Crown would express its will and intention to accept the offer in question. The Governor in Council alone, under the provisions of the Public Lands Grants Act, Chap. 57, R.S.C., 1909, could authorize the alienation of the property in question. The Order in Council is in itself either an acceptance of the offer, an authorization for some one to make an acceptance, or it is an approval of an acceptance already made; I do not think it matters much in which of these ways one construes it. It must be looked at in a sensible way, and there is no occasion, I think, for hair splitting about the matter of the language of the Order in Council. The report of the Minister of Railways to the Committee of the Privy Council was not put in evidence, but the Order in Council in two places states that the offer had been accepted, and it may therefore be assumed that the Minister in his report to the Committee, which would be signed by the Minister, stated that the offer had been accepted subject to the approval of the Governor in Council. I am not sure that the acceptance of the Minister at this stage would have any effect, but at any rate it is established that he recommended an acceptance. I do not think it is a matter of much importance in a case of this kind, who was named to inform the offeror that his offer was accepted, or if the information was not conveyed in a formal way. I think the Order in Council by itself should be so construed as to constitute an acceptance, and particularly because a certified copy of the same was promptly communicated or delivered to Forgie, and that would only have been done by the Minister of Railways or some one of his officers under his direction. I think one is fully justified in holding 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. If it were thought necessary to show that the Order in Council re-

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quired a written acceptance by the Minister to implement the Order in Council, then the Minister's letter of November 17, 1925, is an acknowledgment of the acceptance of the offer and of the existence of a contract. According to the authorities, that, I think, would constitute an acceptance in writing even at that date. Further, the retention of the $25,000 deposited with the offer was another way of expressing acceptance of the offer because it was a condition of the offer that the deposit was to be returned to Forgie, if the offer was not accepted by Order of His Excellency the Governor in Council. If the Order in Council may be construed as an acceptance, then the service of the same upon Forgie, together with the retention of the deposits makes that construction all the more reliant. Enactments which impose forms and solemnities in contracts on pain of invalidity are construed so as to be as little restrictive as possible of the natural liberty of contracting. *Maxwell on the Interpretation of Statutes*, p. 249. The essential elements of the contract must appear in writing, such as the subject matter, the consideration, the parties, but it has been held time and again that it is not necessary that they be contained in any formal document. The contract may be collected from a series of documents. I am of the opinion that in this case the written offer, the Order in Council, the delivery of a certified copy of the Order in Council to Forgie, the letter of the Minister stating that the offer had been made and accepted, the act of the retention of the deposit when related to the written offer and the Order in Council, constitute a sufficient memorandum or note of the contract in writing, and thus satisfies the Statute of Frauds. Moreover, the Statute of Frauds was not raised by the Crown in its defence.

Then there is the further question of the bearing of the Department of Railways and Canals Act on the contract as created between the parties. This case is, I think, distinguishable in fact from the line of cases governed by statutory limitations upon the right of a Minister of a Department to make informal contracts enforcible against the Crown. The sale of public lands, such as the lands in question, was not a matter pertaining to any Department of Government. Here, the facts in evidence establish that the subject matter in dispute was real property situated in

the city of Toronto, belonging to the Crown in the right of Canada, which the Crown was authorized and empowered, under the provisions of Sec. 4 of Chap. 57, R.S.C., 1906, to sell or lease. That section of the statute provides that the Governor in Council may authorize the sale or lease of any public lands which are not required for public purposes and for the sale or lease of which there is no other provision in the law. That was the statute in force at the time of the dealings between the parties which resulted in an offer by Forgie to purchase the land, and the alleged acceptance of the offer on behalf of the Crown; I think it is clear that it was under this statute the parties were purporting to act. A reference to the above-mentioned statute will show that in the case of a lease of such lands, section 5 of the statute empowered the Minister of the Department having the control and management of the lands to execute the lease on behalf of the Crown, but in that case only. In the case of a sale of public lands there is no method pointed out by which the sale would be formally effected. However, it would seem from the lack of special provision as to the form and method of sale in the Act in question that Parliament intended that the practice commonly prevailing in the English-speaking provinces of Canada before Confederation, should be continued under the Act. That, I think, is a fair construction where no other method is found in the statute. The omission to provide for the execution of an instrument by any Minister *in the case of a sale as distinguished from the case of a lease* makes such a construction tenable. Then again, section 2 of the Statute provides that a grant of land means and includes Letters Patent under the Great Seal of Canada. Section 3 mentions the term "grant" as applied to the disposition of public lands in the province of Ontario and other provinces therein mentioned. Had a patent issued in this case, according to the draft copy of patent introduced in evidence, it would not have been formally executed by the Minister of Railways. It is probably true, in a limited sense, that the property in question was under the control and direction of the Minister of Railways. I have no doubt that so long as the Canadian National Railways were in use and occupation of the property the Minister of Railways regarded the control and administration

of the property as a Departmental affair. When it came to a sale of the property I should say it was not a matter under the control or direction of the Department of Railways and Canals, and the Minister was merely an avenue of approach to the Crown, which alone could alienate the public property. I am therefore of the opinion, upon this ground alone, that section 15 of the Department of Railways and Canals Act has no bearing upon the case.

Now, was compliance with Sec. 15, Chap. 35, R.S.C., 1906, necessary to constitute an enforcible contract. With reference to the liability of the Crown under a parol contract in connection with a purely Departmental matter, some light is thrown upon it by the language of Taschereau J., in the case of *The Queen* v. *Henderson* (1), where he is dealing with the very section of the Railway Act which is invoked in the present case. He says:—

> We are of opinion with the Exchequer Court that this enactment has no application. The word "contract" therein means a written contract. . . . There is no statute here imperatively requiring that all contracts by the Crown should be evidenced by a writing, and in the absence of such a special statute the Crown cannot refuse to pay for materials bought by its officers in the performance of their duties and delivered to them for public works. If Parliament had intended that no oral contract should be binding on the Crown, it would have been so easy to say so in unambiguous terms; that we should not, by a forced construction of language in the section in question, make it say what it does not unambiguously say. . . . If this construction of the Act is contrary to the intentions of Parliament, the remedy lies in Parliament's own hands.

It is true this was said of a contract for the sale of goods, but it may be logically applied to a contract for the sale of land. Tracing the origin of this section back to 1867, when it first appeared in the Public Works Act of that year, the view that it only applies to departmental contracts and not to sales of lands by the Crown, receives very strong support. Sec. 7 of Chap. 12 of the Statutes of Canada, 1867, was as follows:—

> No deeds, contracts, documents or writing shall be deemed to be binding upon the Department or shall be held to be the acts of the Minister unless signed by him or his deputy, and countersigned by the secretary.

It is my opinion that "contract" in Sec. 15, R.S.C., 1906, Chap. 35, means a written contract, that is to say, when a contract in writing is made, or is required by law to be made in writing, it can only be signed in the case of the

(1) (1898) 28 S.C.R. 425 at p. 432.

Department of Railways and Canals, by the person or persons therein mentioned. That provision of the statute does not require that every contract must be reduced to a formal written contract, signed by the persons mentioned in the statute. "Control or direction of the Minister" as used in Sec. 15 of the Department of Railways and Canals Act, must have been intended to refer to matters over which the Minister was given control by the statute creating his Department or by some special Act. The Act provides that the Minister shall have the management, charge and direction of all Government railways, and all properties appertaining or incident to such railways. It was not shown that the property in question appertained or was incident to a Government railway, or that the Government railways were under the control or direction of the Minister of Railways at the times material here. If the property in question was transferred to the Canadian National Railways under sec. 19 of the Canadian National Railways Act,—and that was not shown—it would be difficult to hold in that case that the lands were then under the control and direction of the Minister. The property may have been under the direction of the Minister for certain purposes, but not by virtue of the Department of Railways and Canals Act or sec. 15 thereof, or for the purposes or in the sense there contemplated. Consequently I do not think that section 15 of the Department of Railways and Canals Act is applicable to the facts of this case, and I do not think it was necessary that the Minister of Railways enter into a formal written contract with Forgie subsequent to the passage of the Order in Council. A departmental statute requiring a writing signed by the Minister, is a provision of administrative law, and does not bind the Crown per se in alienating its lands.

Specific performance cannot be decreed against the Crown but a suit for damages in respect of breach of contract is as much an action upon the contract as a suit for performance. This, I think, is well settled law. In *Windsor and Annapolis Railway* v. *The Queen* (1), it was said by Lord Watson:—

Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the

(1) (1886) 11 A.C. 613.

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Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown. Sect. 8 of the Canadian Petition of Right Act (39 Vict., c. 27, Dom. Parlt.) 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* 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.

The respondent contends that neither Forgie nor the Claimant did on or before the 15th day of September, 1925, or within a reasonable time thereafter, perform the conditions of the agreement, that is to say, did not complete the purchase on or before the date mentioned in the alleged agreement or within a reasonable time thereafter. To this the claimant answers that time was not in equity of the essence of the agreement and that before repudiation of the agreement, it was entitled to a notice limiting a time, a reasonable time, at the expiration of which the Respondent would treat the contract as at an end. The law upon this point is very fully discussed in *Stickney* v. *Keeble* (1). As stated by Parker L.J., courts of law in a contract for the sale and purchase of real estate, have always held the parties to their bargain in respect of time, with the result that if the vendor was unable to deliver a title by the day fixed for completion, the purchaser could treat the contract as at an end and recover with interest any deposit made. But in such cases, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed a specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. Parker, L.J., points out that this is all that is meant by the maxim that in equity the time fixed for completion is not of the essence of the contract, and it had no application in cases in which the stipulation as to time could not be disregarded without injustice to the parties. In cases when the time fixed

(1) (1915) App. Cases, p. 386.

for completion is not in equity of the essence of the contract, the conduct of the party seeking equitable relief, before and after the date fixed for completion, might disentitle him to relief, and consequently that conduct had to be considered. In *Stickney* v. *Keeble*, supra, Parmoor, L.J., states that Joyce J., the trial Judge, accepted a passage from *Sugden on Vendors* (14th Edition, p. 268) as correctly expressing the general law: "Where time is not made of the essence of the contract by the contract itself, although a day for performance is named, of course neither party can strictly make it so after the contract; but if either party is guilty of delay a distinct written notice by the other, that he will consider the contract at an end if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given." As Lord Parmoor stated, the difficulty is in the application of the law to the facts of a particular case.

Now, is this not a case, where in equity, time should not be considered as of the essence of the contract? Forgie undertook to promote an extensive building project involving a large capital expenditure which the Canadian National Railways was apparently anxious to see consummated. The land in question was acquired by the Respondent primarily for the use of the railway, and the railway had at one time, according to Forgie, in contemplation the erection of a new building itself, but, for some reason, it did not or could not proceed with the project. It is quite evident that the railway and the Respondent were quite willing that some one should undertake the project, providing the railway should have the first choice for accommodation in the building proposed to be erected on the combined sites. On September 19, 1925, the Canadian National Railways vacated the premises and they remained out of the premises until long after the contract was repudiated by the Respondent, but it has not been shown that the railway even once protested against the delay in completing the purchase, and neither did the Respondent ever protest against the delays as occasioning any damage or detriment to the railway. The fact that the premises were vacated and that no remonstrance was made by anybody against the delay in completing the purchase, rather

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strengthen the equities in favour of the claimant than otherwise. The Respondent granted the extensions of time within which to complete the purchase up to December 31, 1925, without protest. The grounds given by Forgie for the delay seem not unreasonable. He was dealing with the Respondent through two different departments of government for long leases of certain floor spaces in the proposed building, and one can readily see that with such leases authorized, his financial operations incident to the building scheme would be materially assisted. Forgie says that the Department of Railways was aware of his negotiations with the Department of Public Works for the leasing of certain floors for the use of Customs and Excise. He received several extensions without any difficulty and consequently was led to believe that time was not regarded as of the essence of the contract. The parties were not dealing at arms length but seemed willing to accommodate one another. The Respondent apparently did not regard the delay as working an injustice against him. Upon the expiration of the last extension the Respondent refused to grant a further extension without any previous intimation that the last extension would be the final one, and no notice was given 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. In the meanwhile at a considerable cost the plans of the proposed building were being prepared, expense had been incurred in connection with a 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 which was ultimately forfeited to the owners of the property when an end was made of the contract, and a contract had been entered into with Anglin, Norcross Ltd., for the construction of the building in the sum of $1,750,000. And besides, the terms of the contract did not make time the essence of the contract. If there was a contract, it does not matter whether the Minister of Railways had authority to make the extensions or whether extensions were made at all, the fact is that neither Forgie nor his assignee was required to complete the contract at any time up to December 31, 1925, and were led to believe that time was not regarded as of the essence of the contract. I am

of the opinion that this is a case, where in equity, the Claimant or Forgie, was entitled to a notice, before the Respondent sought to put an end to the contract, that the same would be treated as at an end if not completed within a limited time.

Then as to the question of the assignability of the contract. The offer stated that if the same was accepted by Order of His Excellency the Governor General the same should constitute a valid and binding contract and would enure to the benefit of Forgie and his assigns, and also to the benefit of His Majesty and His Assigns. If I am correct in holding that there was a contract, then, I think, the contract was assignable and that its assignability at the time of the making was acquiesced in by the Respondent. In view of all the facts of the case, the provision contained in the offer that the contract would enure to the benefit of the parties and their assigns, was quite to be expected. If it was in the mind of the Respondent to assign the benefits of the contract to the Canadian National Railways, then the respondent should have the right to assign. That Forgie should have the right to assign the alleged contract is so obvious that it does not call for comment. But I think I may properly go further, and hold that it is an express condition of the contract, deliberately made, that the same was assignable by Forgie. When one considers the nature of the contract, the heavy obligations which Forgie was assuming, and considering that in the draft lease which was a part of the offer and acceptance the Dominion Building Corporation is named as the Lessor, I think I am warranted in holding that from the very start, it was understood between the parties, and that it is sufficiently expressed in documents forming the contract, that the contract was to be assigned by Forgie to the corporation named in the lease, the claimant herein. What else could have been in the minds of the parties? After the property had been alienated the Respondent had no further interest in the property and would only be a Lessee for the Canadian National Railways of certain space in a building owned by the Dominion Building Corporation Ltd. The condition that the offer if accepted, was to enure to the benefit of the parties and their assigns was not made for any sinister purpose, it was a thing which common sense and reason

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would suggest being done, and a point upon which all concerned would be expected to be in agreement. That an assignment to the Dominion Building Corporation Ltd., would be made was, I think, clearly in the mind of all the parties interested in the agreement, and if an assignment was made, it was because it was a condition of the agreement, and in which the Respondent was an acquiescing party. The recognition of the claimant in the Reference is not without its significance. At the time the Reference was made the question was entirely as to whether the Claimant was entitled to compensation, not whether it was entitled to make a claim for compensation. Then again, when later Forgie requested that the patent be made directly to the Dominion Building Corporation so as to avoid a second transfer no objection was made, except that the Department of Railways advised Forgie that he should confer with the Department of Justice in respect of the matter. Upon the question of the assignability of the contract, the parties appear to have been acting as if each understood that the building was to be constructed and owned by the claimant company, and that must mean that the assignment of the contract by Forgie was always within the contemplation of the parties. I think this is made sufficiently clear by the written documents which go to make up the contract.

I should have earlier referred to another aspect of this case. While I am persuaded that the facts in evidence in this case establish a parol contract between the Crown and the claimant, and a breach thereof giving rise to damages, the case of the claimant for relief in this Court might also be rested on the principle of part performance. The element of fact justifying the application of that principle inheres in the payment by Forgie of the sum of $60,000 on account of the purchase of the property of the Home Bank, and the consequent forfeiture of that sum to the owners of the Home Bank occasioned by the cancellation by the Crown of the contract in question here. Upon this point so much depends upon the facts, that it is necessary to refer to certain circumstances which probably have been already mentioned. While the property in question was in the end acquired by purchase from the owners, yet that was only after proceedings had been started by the Crown under

the Expropriation Act to acquire the property, it appears for the purposes of the Canadian National Railways. The needs of the railway so far as one can gather from the evidence, was the only consideration in acquiring the property. Following this, sometime after the Respondent acquired the property and the Canadian National Railways entered into occupancy of it, Forgie apparently induced the chief executive officers of the Canadian National Railways to consider the matter of the acquisition of the adjoining Home Bank property and the erection on the combined properties of a large office building. The idea of combining the properties for the purpose of erecting thereon a single structure must have possessed some merit, because the railway authorities looked favourably upon the suggestion and directed Forgie, as did the Deputy Minister of Railways, to negotiate with the Home Bank for the purchase of its property, but the price named by the owners seemed excessive, and the suggestion proved fruitless. Then the Canadian National Railways decided, so Forgie testifies, not to construct a new building upon the property acquired from the Imperial Bank. Technically, the railway may have had no authority to make a decision one way or the other, but they were a factor in having the property purchased, and they naturally would also be a factor in determining the future disposition of the property. Then Forgie enquired of the Canadian National Railways if it would not sell the property in question, and he additionally suggested that he would acquire the Home Bank property, and upon both sites would erect a large office building providing the railway would lease whatever space it required in the new building, and this offer Forgie put into writing in May, 1925. Of course, the Respondent would not sell its property, and the Canadian National Railways would not approve of a sale of the property unless it was to get what it required in the way of office facilities equivalent to if not better than it had in the building then on the property. The Canadian National Railways was intimately associated with all the negotiations leading up to the final offer of Forgie. That this should be so is not difficult to understand, in fact it was quite business like. Reviewing the whole course of the negotiations from the beginning to the end I cannot see that any other con-

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clusion can be reached, but that the Canadian National Railways and the Respondent were willing promoters of the idea to have some one promote the construction of a large and attractive office building on the combined properties at the intersection of Yonge and King streets, Toronto, wherein the needs of the Canadian National Railways in the city of Toronto might be more amply and satisfactorily supplied. Now it must have been known by the Respondent and the Canadian National Railways that Forgie did not own the Home Bank property, and they were not deceived, in my opinion, by anything in the offer which would seem to indicate that he did own it. He was merely agreeing, as a part of the whole scheme, to acquire the Home Bank property. It would be unreasonable to expect him to acquire the Home Bank property prior to his purchasing the Respondent's property. The building project was based upon the purchase of both properties as the site for the new building, and this no doubt, because the combined site would accommodate a more imposing structure than if it were limited to the Respondent's property; this prospect was no doubt pleasing to the railway company, and the Respondent by its conduct expressed a willing concurrence. I construe the whole thing as meaning this: The Respondent was willing to sell the property in question, if Forgie would agree to purchase the Home Bank property and erect on the combined properties a certain type of building the plans of which were subject to the approval of the Canadian National Railways; the leasing of the first four floors by the Canadian National Railways was a matter each desired and was therefore mutually agreed upon. If it was not the sense of the agreement that Forgie should acquire the Home Bank property, it is difficult to understand why the Respondent would agree to sell its property so early after a virtual expropriation of it from private owners. Forgie, or the claimant paid altogether $60,000 on account of the purchase price of the Home Bank property up to the time when the contract ended, and the question for decision is whether or not this constitutes part performance of the contract. I think it does. The rule as to part performance of a contract taking it out of the Statute of Frauds is well laid down in *McManus* v. *Cooke*

(1) by Kay, J.: "The doctrine of part performance applied to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing." This is in contra-distinction to payments made on account of the purchase price which does not of itself take a parol contract for the purchase of real property out of the Statute of Frauds. It is true the courts will not decree specific performance against the Crown, but that is only one reason why equity should extend its arm by applying the doctrine of part performance to an informal contract where the Crown is a party. To take a case out of the Statute, the acts of part performance must be unequivocably, and in their own nature, referable to some such contract as is alleged, that is, the acts or circumstances relied upon as part performance must be such that the existence of an agreement as alleged, is the only reasonable inference therefrom. The payments amounting to $60,000 on account of the purchase of the Home Bank property was, I think, in furtherance of the contract, and it was only by reason of the contract that the payments were made. The authorities clearly establish that payments of the nature made by Forgie, or by the claimant, in connection with the Home Bank property, would be held as part performance to take a parol contract out of the Statute of Frauds, and by the same reasoning it should have the like effect in respect to the requirements of Sec. 15 of the Department of Railways and Canals Act.

For the reasons stated I am of the opinion that the Claimant is entitled to damages, to be ascertained, for breach of the contract. For the present I reserve the matter of the assessment of damages. I do so because I would hope the parties might reach an agreement between themselves as to the amount of damages, and also for the reason that I wish yet to consider whether or not it is necessary to hear further evidence upon the question of damages.

A motion was made at the beginning of the trial, by the Claimant, for an Order permitting James Forgie to be added as a party to the proceedings, so that the claim for damages under the contract might be made in the name of the assignor, as well as in the name of the Claimant. It would also follow that any possible right or obligation

(1) (1886) 35 Chan. Div. 681 at page 697.

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between Forgie and the Respondent would be preserved. I know of no reason why this should not be done, it was a course always allowed at common law, and while in my view of the case it may not be necessary, yet I grant the application to do so. I do not think the Reference is to be construed so narrowly as to prevent this being done.

The claimant will have its costs of the Reference.

Judgment accordingly.