

CANADIAN PACIFIC RAILWAY } APPELLANTS; 1889  
 COMPANY *et al.* (DEFENDANTS)..... } May 8,9,10.  
 AND June 14.

THE WESTERN UNION TELE- }  
 GRAPH COMPANY (PLAINTIFF) } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT IN EQUITY OF  
 NEW BRUNSWICK.

*Foreign corporation—Telegraph company—Doing business in Canada—  
 Exclusive right—Contract for—Restraint of trade—Public interest.*

In 1869 the E. & N. A. Ry. Co. owning the road from St. John, N.B. westward to the United States boundary, made an agreement with the W. U. Tel. Co. giving the latter the exclusive right for 99 years to construct and operate a line of telegraph over its road. In 1876 a mortgage on the road was foreclosed and the road itself sold under decree of the Equity Court of New Brunswick to the St. J. & M. Ry. Co., which company, in 1883, leased it to the N.B. Ry. Co. for a term of 999 years. The telegraph line was constructed by the W. U. Tel. Co. under the said agreement, and has been continued ever since without any new agreement being made with the St. J. & M. Ry. Co. or the N.B. Ry. Co. The W. U. Tel. Co. is an American company, incorporated by the State of New York, for the purpose of constructing and operating telegraph lines in the State. Its charter neither allows it to engage, or prohibits it from engaging, in business outside of the State.

In 1888 the C.P. Ry. Co. completed a road from Montreal to St. John, a portion of it having running powers over the line of the N.B. Ry. Co., on which the W.U. Tel. Co. had constructed its telegraph line. The N.B. Ry. Co. having given permission to the C.P.R. to construct another telegraph line over the same road, the W.U. Tel. Co. applied for and obtained an injunction to prevent its being built. On appeal to the Supreme Court of Canada from the decree of the Equity Court granting the injunction—

*Held*, 1. That the agreement made in 1869 between the E. & N. A. Ry. Co. is binding on the present owners of the road.

\*PRESENT : Sir W. J. Ritchie C.J., and Fournier, Taschereau, Gwynne and Patterson JJ.

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2. That the contract made with the W.U. Tel. Co. was consistent with the purposes of its incorporation, and not prohibited by its charter nor by the local laws of New Brunswick, and its right to enter into such a contract and carry on the business provided for thereby is a right recognized by the comity of nations.
  3. The exclusive right granted to the W.U. Tel. Co. does not avoid the contract as being against public policy, nor as being a contract in restraint of trade.
- Held*, per Gwynne J. dissenting, that the comity of nations does not require the courts of this country to enforce, in favor of a foreign corporation, a contract depriving a railway company in Canada of the right to permit a domestic corporation, created for the purpose of erecting telegraph lines in the Dominion, to erect such a line upon its land, and depriving it of the right to construct a telegraph line upon its own land.

**APPEAL** by consent from the judgment of a judge of the Supreme Court of New Brunswick, sitting in equity, making perpetual an injunction restraining the defendants from erecting telegraph poles on the line of the New Brunswick Railway, between Vanceboro', in the State of Maine, and the City of St. John, N.B.

This road was originally built and operated by the European and North American Railway Company for extension from St. John, N.B., westward, and an agreement was entered into in 1869 between that company and the respondents, the Western Union Telegraph Co., by which the latter company was granted the exclusive right for 99 years to erect and maintain one or more lines of telegraph upon the said line of railway, and upon the lands of the said railway company, with all the necessary powers and privileges to the telegraph company, their successors and assigns, to enable them to construct and maintain such lines.

This road is now known as the St. John and Maine Railway, and is now under lease to the appellants, the New Brunswick Railway Co. No new agreement has ever been made between the Western Union Tele-

graph Co. and the New Brunswick Railway Co., in respect to the telegraph lines over the said road, although agreements have been made similar to the above with the New Brunswick Railway Co. in regard to its own road, and with other railway companies in New Brunswick. The Western Union has continued to operate the telegraph lines over the road in question under the original agreement.

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In 1888 the Canadian Pacific Railway Co. undertook the construction of a line of telegraph between Montreal and St. John, N.B., which they wished to place over the line of the St. John and Maine but on the opposite side of the track from that of the Western Union. The latter company then applied for and obtained a perpetual injunction restraining the Canadian Pacific from building the said line, as being a violation of their exclusive right to operate telegraph lines over the said road. From the judgment granting such injunction this appeal was brought.

The principal grounds upon which the appellants claimed that the injunction should be set aside are, that the Western Union is incorporated in the State of New York, for the purpose of building and operating telegraph lines in the State or beyond it, and this gives them no power to operate such lines in Canada; if it does it should be shown that the preliminary proceedings were taken to build such road as directed by the charter; that by its charter the European and North American Railway Co. had no power to enter into the agreement; and that the agreement is void as being in restraint of trade and against public policy.

*Weldon Q.C.* and *Ferguson* for the appellants. A foreign corporation cannot invoke the aid of the courts in Canada to have an agreement enforced giving them a monopoly of a particular business in any part of the

1889 Dominion. *Bank of Augusta v. Earle* (1); *Bank of*  
 THE *Montreal v. D. Bethune* (2); *Howe Machine Co. v.*  
 CANADIAN *Walker* (3); *Newby v. Colt's Patent Firearms Co.* (4);  
 PACIFIC *Lindley on Joint Stock Companies* (5); *Westlake on*  
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v. By their charter the plaintiffs could not operate out-  
 THE side of the State of New York; acts of 1851, 1853, 1855;  
 WESTERN acts of 1862, ch. 425; acts of 1870, ch. 568.  
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The original company had no power to enter into  
 the agreement. *Coleman v. Eastern Counties Railway*  
*Company* (7); *Mulliner v. Midland Railway Company*  
 (8); *Winch v. Birkenhead & Lancashire Railway Co.* (9);  
*Great Northern Railway Company v. Eastern Counties*  
*Railway Company* (10); *Hinckley v. Gildersleeve* (11);  
*Attorney General v. International Bridge Company* (12).

These cases show that a corporation cannot divest  
 itself of a franchise obtained from the Legislature with-  
 out the sanction of the same Legislature.

The following cases, also, were cited—*London &*  
*North Western Railway Company v. Evershead* (13);  
*Marriott v. London & South Western Railway Company*  
 (14); *Thomas v. Railroad Co.* (15); *Ashbury Railway Co.*  
*v. Riche* (16); *Western Union Telegraph Co. v. Chicago*  
*& Paducah Railway Co.* (17).

*Barker Q.C.* and *Cameron Q.C.* for respondents. A  
 court of equity will enforce an agreement such as the  
 one in question. *Brogden v. Metropolitan Ry. Co.* (18);  
*Duke of Devonshire v. Eglin* (19); *Somerset Canal Com-*  
*pany v. Harcourt* (20).

- (1) 13 Peters 587.
- (2) 4 U. C. O. S. 341.
- (3) 35 U. C. Q. B. 37.
- (4) L. R. 7 Q. B. 293.
- (5) 4 Ed. vol. 2, p. 1484.
- (6) Par. 286-7.
- (7) 10 Beav. 14.
- (8) 11 Ch. D. 619.
- (9) 5 De G. & Sm. 572.
- (10) 9 Hare 306.

- (11) 19 Gr. 215.
- (12) 20 Gr. 34.
- (13) 3 App. Cas. 1035.
- (14) 1 C. B. N. S. 499.
- (15) 101 U. S. R. 71.
- (16) L. R. 7 H. L. 653.
- (17) 86 Ill. 246.
- (18) 2 App. Cas. 666.
- (19) 14 Beav. 530.
- (20) 24 Beav. 571.

As to the status of the plaintiffs as a foreign corporation see *Runyan v. Lessee of Coster* (1); *Cowell v. Springs Co.* (2); *Christian Union v. Fount* (3).

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The original agreement was within the powers of the Railway Company. *Redfield on Railways* (4); *Morawitz on Corporations* (5); *Story on Contracts* (6).

The following authorities also were referred to:—*The Shrewsbury &c. Ry. Co. v. London & North Western Ry. Co.* (7); *Hare v. London & North Western Railway Company* (8).

*Weldon Q.C.* in reply.

SIR W. J. RITCHIE C.J. — The comity of nations distinctly recognises the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation, and not prohibited by its charter, and not inconsistent with the local laws of the country in which the business was carried on, subject always to the restrictions and burthens imposed by the laws enforced therein; for there can be no doubt that a state may prohibit foreign corporations from transacting any business whatever, or it may permit them to do so upon such proper terms and conditions as it may prescribe. With respect to foreign corporations generally, the statutes of New Brunswick provide for the service of process on foreign corporations carrying on business by agents in the Province "whose chief place of business is without the limits of the Province, and if established by the law of any other place," and provision is made for the proof of contracts by foreign corporations.

(1) 14 Peters 131.

(2) 100 U. S. R. 59.

(3) 101 U. S. R. 352.

(4) 6 Ed. Vol. 1 p. 265.

(5) 2 Ed. secs. 958, *et seq.*

(6) 5 Ed. sec. 674.

(7) 17 Q. B. 652.

(8) 2 J. & H. 80.

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Chapter 46 sec. 16, C. S. N. B., provides :

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16. Upon any trial of any cause before any court in this Province, wherein it shall be necessary to prove any contract or engagement entered into by any foreign corporation, or body politic or corporate, doing business in this Province, or which contract or engagement may have been entered into in this Province, it shall only be necessary for the party or parties, plaintiff or plaintiffs, defendant or defendants, seeking to prove such contract or engagement, or to put the same in evidence before such court, *to prove that such contract or engagement has been duly signed or issued by the accredited agent or officer of such foreign corporation*, body politic or corporate, in this Province ; and upon such proof having been given, the court before which such trial shall be had shall admit the same in evidence, and the same shall be considered as duly proved without any other or further evidence of the execution thereof by such foreign corporation, body politic or corporate, any law, usage or custom to the contrary notwithstanding.

Provision is also made for the assessment of foreign corporations by chapter 100, sec. 27 :

27. A foreign corporation having a place of business within the Province shall be assessed in respect of its personal property within the Province, and upon its income derived from its business within the Province, in the same manner as to personal property as a joint stock or other corporation referred to in the twentieth-fourth section, and as to its income as an inhabitant of the Province.

In the absence, as in this case, of any prohibition or restriction, no intention to exclude can be presumed. Why then should the telegraph company be prohibited from carrying on business in New Brunswick ? The establishment of a telegraphic line through New Brunswick connected with a telegraphic system of the United States is neither repugnant to the policy nor prejudicial to the interests of the Province of New Brunswick or the Dominion. On the contrary, the legislation in New Brunswick shows that such was a matter of great importance and highly desirable. We find in the recital of the act incorporating the New Brunswick Electric Telegraph Company, which it was admitted on the argument is now leased to the Wes-

tern Union Telegraph Company, the following language used (1) :—

Whereas the speedy transmission of information by means of electric telegraph has become a matter of great importance, and it is highly desirable that lines of communication by such telegraph should be established in this Province, and that the same should be connected with other lines in Nova Scotia, Canada and the United States ; and whereas certain persons are desirous of being incorporated for the purpose of establishing such communication \* \* \*

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It cannot be denied that the Western Union Telegraph Co., before and at the time when this contract was entered into, was carrying on its business as a telegraphic company in New Brunswick and Nova Scotia without let or hindrance, and was dealing, and being dealt with, from and before that time, as an existing company for certainly more than twenty years, and was recognized and taxed by the local authorities as a corporation legally carrying on such business under the provincial act to which I have referred ; and the right of this company to exist and do business in this Dominion may be said to have been recognized by the Dominion Government, as it is well known, though not, I think, in proof in this case, that all the telegraphic business over the Intercolonial Railway, through New Brunswick and Nova Scotia, is done through the instrumentality of special agents over the line of this company, the Intercolonial having no telegraph line of its own.

There was no law in force to prohibit or restrain this company from doing business in New Brunswick and Nova Scotia, and it is obvious they were doing business consistent with their charter, and by which they were, by their charter and the law of New York, authorized to transact and do outside of the State in which they were incorporated. The provision of the

(1) Local and Provincial Statutes of N. B., 11 V. c. 55, passed 30 Mar. 1848.

1889 act of the State of New York in evidence in this case  
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An Act further to amend the Act entitled "An Act to provide for the Incorporation and Regulation of Telegraph Companies," passed 12th of April, eighteen hundred and forty-eight.

Passed April 22nd, 1862 ; three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows :—

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Section 1.—Any telegraph company which is duly incorporated under, and in pursuance of the Act entitled "An Act to provide for the Incorporation and Regulation of Telegraph Companies," passed 12th April, eighteen hundred and forty-eight [which the present plaintiffs were], may construct, own, use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within, or wholly or partly beyond, the limits of this State, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining such line or lines, and may own and hold any interest in such line or lines, and may become lessees of any such line or lines, upon the terms and conditions and subject to the liabilities prescribed in said act, so far as such provisions are applicable to the construction, using, maintaining, owning or holding of telegraph lines, or any interest therein pursuant to the provisions of this act.

The Western Extension Railway Company, with whom the original contract was made, having been empowered to construct and operate a line of railway from St. John to the boundary line of the United States, had as incident to and necessary for the safe operation of the road the right and power to erect a line of telegraph, and had the exclusive right to do so along their line of railway, and having themselves such exclusive right I can see no reason why they should not confer such exclusive right and the other privileges mentioned in the contract whereby they were enabled to secure ample telegraphic services for the operation of the road, instead of erecting and equipping a line of telegraph for themselves. I think the contract was, at the time it was made, most fair and



reasonable, and this, to my mind, is conclusively shown by the fact that it has existed and been acted on from 23rd February, 1869, to the present day, notwithstanding the road was for two years in the hands of and operated by receivers appointed by the court in certain foreclosure proceedings taken for the foreclosure of a mortgage made by the Western Extension Railway Co., and after the sale in the foreclosure suit on the 23rd August, 1878, to the St. John & Maine Railway Co., and by that company from the 31st August, 1878, to the 21st May, 1883, and the New Brunswick Railway Co. leased it and have since that time operated the railway to the present day, during all which time the agreement has never been impugned or questioned, but, on the contrary, during the whole period has been recognized and acted upon by all parties; that the New Brunswick Railway Company deemed an agreement of this character reasonable, is shown by the fact that they made a similar agreement with the respondent in reference to a line of railway built by them; and after they had leased the line from Vanceboro' to Fairville they made another agreement with the respondents, dated 25th June, 1884, by which further concessions were given and the previous agreements were ratified, and not the slightest difficulty appears to have arisen, nor a suggestion made, that the agreement was not reasonable, valid and binding until the Canadian Pacific Ry. Co., who are not shown to have any interest in the line from Vanceboro' to St. John, along which they desire to erect a telegraph line, appear for the first time to have put forward the claim which is now contended for.

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If, then, there is a reasonable valid contract, what is more just and proper than that the plaintiffs should be protected in their rights under it, and above all from the acts and doings of the Canadian Pacific Ry. Co.,

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who have shown no right whatever to interfere with either the railway or the line of telegraph erected thereon?

The main objections seem to be that this agreement creates a monopoly, and its provisions are against public policy?

If the railway company deem it in the interest of the company that there should be only one telegraphic line on the right of way, why may they not give an exclusive right to a telegraph company to occupy the right of way, and prohibit other telegraph companies from interfering with such exclusive right except by consent of the company to whom the exclusive right is given? If the railway company can give a right at all, why may it not give an exclusive right? A telegraph along the line may be, and no doubt is, indispensable for the safe working of the road. The financial condition of the railway company may render it impossible for it to work the telegraph line for itself, and assuming that no telegraph company could be found who would erect it without the exclusive privilege, and so be protected against competition, what law is there to prevent the railway company from securing the line by granting such an exclusive privilege? I know of none. I fail entirely to see how this creates a monopoly and prevents competition. It certainly prevents the erection of another telegraphic line on the roadway, but how does it prevent the erection of a line on either side of the track, if the parties can secure the privilege of doing so over adjoining lands? If they cannot do so, in what different position are they than if the railway had erected this line for their own exclusive use, and refused to grant the privilege to any other person or company?

That there was no monopoly is abundantly clear from the fact proved on the trial and admitted on the

argument, that the Canadian Pacific Ry. Co. have, at this very time, built their line on the railway track, having their poles just beside the right of way between Vanceboro' and St. John, ranging in places from twenty-five to thirty feet from the track.

The argument that an exclusive right to erect a telegraphic line along the line of railway is against public policy would seem to rest necessarily on this delusion, if it has any foundation at all, that the public generally have a right to erect telegraphic lines along and on the line of railroad, and therefore their exclusion of any such right may cripple and prevent competition, and tend to create monopolies ; but as the public have clearly no such rights, and as there is nothing to prevent telegraph lines from being erected contiguous to and parallel with railroads, provided the right of way is secure, how can it be said to cripple and prevent competition and tend to create monopolies any more than the erection of the line of telegraph unconnected with the railway by private individuals for their own exclusive use on a line they have procured at their own expense would prevent competition, on a line parallel or contiguous thereto ? What is there to prevent the erection of a dozen different lines by a dozen different companies for their own exclusive use respectively ?

When the Western Extension Railway Company and the New Brunswick Railway Company recognized the Western Union as a telegraph company existing and doing business as a telegraph company in New Brunswick, and induced the Western Union, under a valid agreement, to erect this line on the line of railway, are they or any parties claiming under them, who have recognised and acted on the agreement, in a position to repudiate the contract as void and, as a consequence, appropriate the line to their own use, on

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the ground that a foreign corporation, specially incorporated for the purpose of constructing telegraph lines, has no power whatever to construct or manage telegraph lines within any part of the Dominion of Canada; and, therefore, such a corporation cannot enforce any contract for the purpose of acquiring an interest in the Dominion, in order to enable it to construct or manage telegraph lines therein. Assuming that the Western Extension had itself built the telegraph line and leased it to the Western Union, would the New Brunswick Railway Company not be bound by such a contract, and could not such a contract be enforced in the courts of this Dominion? Or suppose that the New Brunswick Railway Company had sold the line so erected by it to the Western Union and received the price, could the New Brunswick Railway Company keep the line and the money on the ground that the Western Union had no right to own or maintain a telegraph line in New Brunswick, and could not enforce any contract for acquiring such an interest?

I should not have discussed the matter at this length but that I understand it to be the view of one of the members of this court that a foreign corporation cannot own or maintain telegraph lines in this Dominion, and that all contracts in reference thereto are void. But the defendants do not venture to go so far as this. Their contention, as I understand it, is not that the Western Union and the railway company cannot contract, but that in a contract between them they cannot agree to prohibit and exclude all other lines from the track of the roadway. By paragraph seven of the appellant's factum this is very clearly put forward :

7. It must be remembered that this controversy does not arise upon any effort to displace the lines of wire established by the Western Union, nor in any way to interfere with the free use and enjoyment

thereof, but arises upon an interference, as is claimed, with its exclusive right to occupy the entire right of way—that is, that no other telegraph company, except by its consent, shall ever use or occupy any part of the right of way.

But would it not be most unreasonable and unjust that having contracted for a good and valuable consideration to give the Western Union an exclusive right over the railway they could, in defiance of their contract, ignore the exclusive right, and grant similar privileges to other companies? What could be more natural and reasonable than that the railway company and the Western Union, dealing legally with the subject matter of the contract, the former should debar themselves from the right practically to destroy the subject matter dealt with by the contract, and that the latter should insist, as an essential condition of entering into the contract, that the exclusive use of the road should be secured to them?

The following authorities, both English and American, may be cited to establish the principles before indicate

The law of Domicile. A. V. Dicey. Rule 42, p. 198;

The existence of a foreign corporation duly created under the law of a foreign country is recognized by our courts.

The principle is now well established that a corporation duly created in one country is recognized as a corporation by other States. Thus it is a matter of daily experience that foreign corporations sue and are sued in their corporate capacity before English tribunals.

Story on Conflict of Laws, ch. 4, sec. 106 :

The power of a corporation to act in a foreign country depends both on the law of the country where it was created and on the law of the country where it assumes to act. It has only such powers as were given to it by the authority which created it. It cannot do any act by virtue of those powers in any country where the laws forbid it so to act. It follows that every country may impose conditions and restrictions upon foreign corporations which transact business within its limits. *Liverpool Insurance Co. v. Massachusetts* (1); *Attorney General v. Bay State Mining Co.* (2); *Bard v. Poole* (3); *Phoenix Insurance Co. v. Commonwealth* (4)

(1) 10 Wall. 566.

(2) 99 Mass. 148.

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(3) 12 N. Y. 495.

(4) 5 Bush (Ky.) 68.

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Lindley J.—I am of opinion that the company are liable to pay income-tax upon the annual profits which they receive in this country. It appears that the company is a foreign corporation resident in Denmark, and having its principal place of business there, so that in one sense in which the phrase is used it would be held "to carry on its business" abroad. It further appears that the company have three marine cables in connection with this country, and that these cables are brought into communication with telegraph wires belonging to the post office at Aberdeen and Newcastle.

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Watkin Williams J.—I am of the same opinion. This company, although not resident in England, nevertheless carry on trade here. They make their contracts and demand and receive payments in respect of them in this country. The ownership of the different cables by which they forward their messages is for the present purpose immaterial, for the only matter for our consideration is whether they carry on business in this country.

In *Merrick v. Van Santvoord* (2) Porter J. says :—

We think the policy of this State is in harmony with that of the country, and that it would be neither provident nor just to inaugurate a rule which would unsettle the security of corporate property and rights, and exclude others from the enjoyment here of privileges which have always been accorded to us abroad.

\* \* \* \* \*

The rules of comity are subject to local modification by the law-making power; but until so modified, they have the controlling force of legal obligation. The franchises and immunities which they secure it is the duty of the courts to respect, until the sovereign sees fit to deny them. The rights of a foreign suitor or defendant, so far as they are unabridged by legislation, are as imperative and absolute as those of the citizen. These rules have their place in every system of jurisprudence.

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The rights of foreign corporations have been protected in the English courts on the same general principle of public law. *The Nabob of Carnatic v. The East India Co.* (3); *The Dutch West India Company v. Henriquez* (4); *The King of Spain v. Hullett* (5). We had the benefit of the rule in the suit instituted in Great Britain, in the case of *The United States v. Smithson's Executors*. Indeed, the law of international comity in the interest of commerce, which has so long prevailed in

(1) 7 Q. B. D. 16.

(3) 1 Ves. 371.

(2) 34 N. Y. 216.

(4) 1 Strange 612.

(5) 2 Bligh's N.S. 31.

that country, is recognised in a provision of Magna Charta, which elicited from Montesquieu the encomium, that the English have made the protection of foreign merchants one of the articles of their own liberty.

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It was a suggestion in answer to the argument that, inasmuch as the corporation could not migrate, it could neither contract nor sue, except in the State of its domicile. He admitted its incapacity to migrate, but held that it did not follow that its existence there would not be recognised elsewhere. It was accordingly adjudged, in that case, that contracts made in the city of Mobile, between citizens of Alabama and a Georgia bank, a Pennsylvania bank and a Louisiana railroad company respectively, could be enforced under the general law of comity as contracts within the scope of their respective charters, though unauthorised by the State of Alabama. The Chief Justice expressed the opinion that no valid reason can be assigned for refusing to give effect to the contracts of foreign corporations "when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person, created by the laws of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognising the law of another State" (1). The concession referred to was reiterated in the same sense by Judge Thompson, and in answer to a similar argument in the case of *Runyan v. Costar*, in which it was adjudged that a coal company organised in New York, for the purpose of mining coal in Pennsylvania, could exercise its franchise by purchasing and holding lands in the latter State; and though, by a statute of Pennsylvania, lands so acquired were subject to forfeiture, the title of the company was good so long as the forfeiture was not enforced by the State. (2).

In *Bank of Augusta v. Earle* (3) Taney C.J. says:—

It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible

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(1) 13 Peters 519, 588-590.

(2) 14 Peters 122, 129.

(3) 13 Peters' 588.

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and intangible ; yet it is a person for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of *The United States v Amedy* (1) and in *Beaston v. The Farmer's Bank of Delaware* (2). Now, natural persons through the intervention of agents are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made ; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside ; provided such contracts are permitted to be made by them by the laws of the place ?

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Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction ; and we can perceive no sufficient reason for excluding them when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the laws of another State. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts since the case *Henriques v The Dutch West India Company*, decided in 1729 (3). And it is a matter of history, which this court are bound to notice, that corporations, created in this country, have been in the open practice, for many years past, of making contracts in England of various kinds, and to very large amounts ; and we have never seen a doubt suggested there of the validity of these contracts by any Court or any jurist.

\* \* \* \* \*

It has been decided in many of the State courts, we believe in all of them where the question has arisen, that the corporation of one State may sue in the courts of another. If it may sue, why may it not make a contract ? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power, why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same

(1) 11 Wheat. 412.

(2) 12 Peters 135.

(3) 2 Ld. Raym. 1532.



sovereignty—where the last mentioned power does not come in conflict with the interest or policy of the State? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time, to accept something else in satisfaction, to give him a release, and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue that the latter could not be effectually exercised if the former were denied.

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We think it is well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union.

\* \* \* \* \*

But we have already said that this comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made.

\* \* \* \* \*

We have already shown that the comity of suit brings with it the comity of contract, and where the one is expressly adopted by its courts, the other must also be presumed according to the usages of nations, unless the contrary can be shown.

The result, then, is that the comity of nations and the express legislation of New Brunswick recognizes the right of foreign corporations to carry on business and make contracts outside the country where incorporated, consistent with the purposes of its incorporation, and not prohibited by its charter, and not inconsistent with the local laws of the country in which the business is carried on: but the plaintiffs have shown the business to be carried on consistent with their charter, and expressly permitted to be carried on outside the limits of the place of incorporation; that the contract in this case is binding on the New Brunswick Railway Company, does not create a monopoly, and is not contrary to public policy or the laws of New

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Brunswick or the Dominion, nor inconsistent therewith; that the carrying on business in New Brunswick and Nova Scotia has been recognized alike by the local and Dominion authorities, by the local by assessing the company for the business so carried on, and by the executive of the Dominion in contracting and dealing with the company for the use of their line over the Intercolonial Railway, which is an historical fact; that the New Brunswick Railway Company are estopped, by acquiescence and adoption of the contract, with full knowledge, from raising any objection to the contract, and the Canadian Pacific Ry. Co. have shown no *locus standi* to interfere with it; and I feel constrained to add that I think it would be a sad scandal on the administration of justice if this court should hold that this company, having brought in an enormous amount of capital in this Dominion, and without let or hindrance, in peace and quietness, carried on the large business, in fact, the entire electric telegraph business between St. John and the United States for a period of twenty years, and throughout all portions of New Brunswick and Nova Scotia for still longer periods, constructing, leasing, managing telegraphic lines, and otherwise carrying on the telegraph business for which they were incorporated, and having paid their scot and lot with others doing business in the Dominion, should now be told, at this day, that they had no rights the courts of this Dominion would recognize and protect.

FOURNIER J. concurred.

TASCHEREAU J.—I concur with the Chief Justice that this appeal should be dismissed. I do not think that the appellants have the right to put in view, in this case, the right of the respondent to enter into the contract in question.

GWYNNE J.—I am of opinion that this appeal should be allowed with costs, upon the simple ground that an act of incorporation passed by the Legislature of a foreign country, incorporating certain persons for the purpose of constructing telegraph lines in the foreign country, confers no power whatever upon the corporation to construct a telegraph line within any part of this Dominion, and that therefore the foreign corporation cannot enforce any contract for the purpose of acquiring an interest in land in the Dominion in order to enable it to construct and maintain a telegraph line therein. The right of foreign corporations to bring actions in the courts of this country is recognized only upon the principle of the comity of nations, and that comity does not require the courts of this country to enforce a contract of the nature of that before us in the present case, which purports to deprive the New Brunswick Railway Company of the right to permit a domestic corporation created for erecting telegraph lines in the Dominion, to erect such a line upon any of its land, and to deprive the railway company of the power of constructing a telegraph line upon their own land. Such a power vested in a foreign corporation might be very prejudicial to the interests of the Dominion and its inhabitants, and of the railway companies, nationally and commercially, and should not therefore be recognized or given efficacy in the courts of this country.

For these reasons, I am of opinion that the appeal should be allowed.

PATTERSON J. concurred in the judgments dismissing the appeal.

*Appeal dismissed with costs.*

Solicitors for appellants : *Weldon & McLean.*

Solicitors for respondents : *Barker & Belyea.*

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