IN THE MATTER OF THE PETITION OF RIGHT OF

1901
April 2.

THE QU'APPELLE LONG LAKE AND SASKATCHEWAN RAILROAD AND STEAMBOAT COMPANY, THE QU'APPELLE LONG LAKE AND SASKATCHEWAN LAND COMPANY (LIMITED), THE HONOURABLE DONALD McINNIS, OSLER AND HAMMOND, AND THE HONOURABLE WILLIAM PUGSLEY ..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Contract for grant of part of public domain—Breach of—Remedy—Jurisdiction—Declaration of right.

The Exchequer Court of Canada has jurisdiction in respect of a claim arising out of a contract to grant a portion of the public domain made under the authority of an Act of Parliament.

2. Such a claim may be prosecuted by a Petition of Right.

3. Where the court has jurisdiction in respect of the subject-matter of a Petition of Right, the petition is not open to objection on the ground that a merely declaratory judgment or order is sought thereby. If on the other hand, there is no jurisdiction, no such declaration should be made. *Clark* v. *The Queen* (1 Ex. C. R. 182) considered.

PETITION OF RIGHT for relief in respect of an alleged breach of contract for a grant by the Crown of certain lands in the public domain.

The effect of the statutes, orders in council, and other matters of fact involved herein are stated in the reasons for judgment.

The limitations of the questions at issue, as decided by the present judgment herein, are also stated in the reasons for judgment.

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Argument of Counsel

1901, January 22nd.

The case came on to be heard at Ottawa.

Christopher Robinson, *K.C.* for the suppliants:

What the court is now asked to do is to decide whether there is a contract binding upon the government, and if so what that contract is. If the court should decide in favour of the suppliants' contention, then it must decide that the contract is that the Crown should give a certain quantity of land of a certain description, and that the suppliants have performed the consideration entitling them to that grant. This court is the only tribunal that can decide whether there is a binding contract entered into between the parties, in respect of which the court has jurisdiction to decide the rights of the parties.

He then proceeded to cite and discuss the statutes and orders in council upon which the suppliants rely to make out their contract. He contended that inasmuch as the subsidy Act of 1887 was assented to three days after the order in council undertaking to make the grant was passed, it must be taken to be a legislative confirmation of the act of the Governor-in-Council.

S. H. Blake, *K.C.* for the respondent:

We submit that there is no bargain or contract as between the parties to this action. The court cannot order specific performance against the Crown. The legislation simply enables the Crown to make a grant of the lands if it saw fit. Even if there were a valid contract, the court could not make a decree for specific performance against the Crown. Nor will the court make a mere declaration unless as a matter of law there is a right on the part of the suppliants as against the Crown.

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Now there was no consideration for any contract between the suppliants and the Crown. The legislation was simply permissive, enabling the Crown to make a "free grant" of lands.

Again, the subject-matter of the contract is so uncertain, the description of the lands is so vague and indefinite, that the transaction is impossible of enforcement in law. Unless there is a sufficient description of the land there is no binding agreement, and so the court will not make a declaration of right where the right itself cannot be ascertained and defined.

A grant of the Crown cannot be construed more favourably to the grantee. The suppliants are bound to take the lands as we define them. The legislation was passed upon the assumption, as the fact is, that the Crown is to make the selection of the lands. The suppliants must depend upon the honour of the Crown to deal fairly by them. The suppliants are bound to take what the Crown, in its discretion, allots to them.

Then, the Minister of the Interior has the right to approve of the selection, and his action is final. There is no appeal. The power must remain with some person, and when it is placed in his hands and he has examined it, there can be no gainsaying what he has concluded in regard to it. No order in council, or no statement of the minister can enlarge the statutory provision to simply grant 'lands of the Crown.' The order in council could not have said 'coal lands,' or 'mineral lands,' or 'best agricultural lands.' The plain words of the statute cannot be enlarged one way or the other. It is 'lands as they run,' and as the order in council states 'townships, or parts of townships,' it is perfectly evident that it could not mean any particular or specified land, but it must be the general run of lands as they go in that part of the public domain.

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That being so, and the lands having been set apart and tendered by the Crown to the suppliants, what default has the Crown been guilty of?

Upon the point that the grant is void for uncertainty, the following authorities are relied upon: *Sheppard's Touchstone* (1); *Cruise's Digest* (2); *Hungerford's Case* (3); *Brand* v. *Todd* (4); *Bacon's Elements* (5); *Doe d. Devine* v. *Wilson* (6); *Stockdale's Case* (7); *Luther* v. *Wood* (8).

Here the proceedings were adjourned, to be resumed, at Toronto, at a date to be fixed.

1901, February 11th.

Argument resumed at Toronto.

E. L. Newcombe, K.C. followed for the respondent:

The order in council of 20th June, 1887 is, I submit, in excess of the powers conferred upon the Government by Parliament. The contract, if there be any contract in the dealings between the suppliants and the Government, is *ultra vires*. All that the Crown was authorized to do was to make a free grant of lands. So that if the territory failed, or the land failed, out of which the selection was to be made, there would be no cause of action; or if there was a failure to carry out the undertaking of the Government for any cause which might be deemed sufficient in the minds of His Majesty's advisers, there would be no obligation entered into which could be enforced in any court.

If it is necessary to have express statutory authority to enable the Government to make an agreement to grant a money subsidy, then it must be equally necessary to have such authority to enable the Government to make an agreement to grant a land subsidy.

(1) Atherley's ed. p. 251.
(2) Vol 5, p. 53.
(3) 1 Leon. 30.
(4) Noy 29.
(5) Rule 23.
(6) 10 Moo. P. C. 502.
(7) 12 Co. Rep. 86.
(8) 19 Gr. 348.

As to the contention that the subsidy Act of 1897 being a ratification by Parliament of the order in council upon which the suppliants rely, I submit that where section 5 of chapter 23 speaks of orders in council made, it is not intended to approve any existing order in council, but to authorize the Government to make orders in council in the future in respect of this matter. He cites *Pearce* v. *Watts* (1); *Re Burnitt and Burland's Contract* (2); *United States* v. *King* (3); *United States* v. *Delespine* (4); *United States* v. *Forbes* (5); *Buyck* v. *United States* (6); *United States* v. *Miranda* (7); *Shackleford* v. *Bailey* (8); *Chitty's Prerogatives* (9).

As to the point that there is no implied contract to give the lands, the following authorities are cited: *Broom's Legal Maxims* (10); *Chitty's Prerogatives* (11); *The Rebeckah* (12); *Eastern Archipelago Company* v. *The Queen* (13); *Feather* v. *The Queen* (14); *Todd's Parliamentary Government in England* (15); *Churchward* v. *The Queen* (16); *Wood* v *The Queen* (17); *Quebec Skating Club* v. *The Queen* (18); *Smith's Parliamentary Remembrancer* (19); *The Queen* v. *Clark* (20).

As to the court making a declaration of right, when there is no jurisdiction to entertain the claim, see the following authorities: *Langdale* v. *Briggs* (21); *Rooke* v. *Kensington* (22); *Bristowe* v. *Whitmore* (23); *Bell* v. *Cade* (24); *Barraclough* v. *Brown* (25).

(1) L. R. 20 Eq. 492.
(2) [1882] W. N. 152.
(3) 3 How. at p. 786.
(4) 15 Pet. at p. 335.
(5) 15 Pet. at pp. 182, 184.
(6) 15 Pet. 215.
(7) 16 Pet. 153.
(8) 35 Ill. 387; See Plow. p. 243.
(9) Pp. 394-397.
(10) 7th ed. p. 451.
(11) P. 393.
(12) 1 C. Rob. at p. 230.
(13) 2 E. & B. at p 906, 907.
(14) 6 B. & S. 283, 284.
(15) 2nd ed. vol. 1, p. 724.
(16) L. R. 1 Q. B. at pp. 198, 199, 209, 210.
(17) 7 S. C. R. 648.
(18) 3 Ex. C. R. at p. 397.
(19) [1860] p. 75.
(20) 7 Moor. P. C. 77.
(21) 8 DeG. McN. & G. at p. 428.
(22) 2 K. & J. at p. 760.
(23) 4 K. & J. at p. 745.
(24) 2 J. & H. 123.
(25) [1897] A. C. at p. 623.

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Mr. Robinson, K.C. in reply:

If there is no contract between the Government and the suppliants here where would you get one? We have to begin with an order in council making a contract, we have Parliament three days afterwards saying that the Government may contract on the terms mentioned in the order in council, we have a formal contract subsequently made giving these suppliants a large sum of money. To say that we have no contract is simply to say that the Crown can never be held to have made a valid contract. He cites *Mowat* v. *McFee* (1); *Labrador Company* v. *The Queen* (2); *Winona & St. Peter Railway Co.* v. *Barney* (3); *Wisconsin Central Railroad Co.* v. *Forsythe* (4); *United States* v. *Denver &c. Railway Co.* (5); *Lord* v. *Commissioners of Sydney* (6); *Elliott on Railroads* (7); *Hyatt* v. *Mills* (8); *The Queen* v. *Mayor of Wellington* (9); *Earl of Warwick* v. *Duchess Dowager of Clarence* (10); *Clode on Petition of Right* (11); *Peterson* v. *The Queen* (12); *Clarke* v. *The Queen* (13); *Attorney General* v. *Ettershank* (14)

THE JUDGE OF THE EXCHEQUER COURT now (April 2nd, 1901) delivered judgment.

The suppliants bring their petition for relief in respect of a land grant that the Parliament of Canada authorized the Governor-in-council to make in aid of the railway mentioned in their petition; and the matter has, by an arrangement between counsel, come on for hearing on a presentation of the case that leaves untouched the substantial controversy between the

(1) 5 S. C. R. 66.
(2) [1893] A. C. 104.
(3) 113 U. S. 618.
(4) 159 U. S. 46.
(5) 150 U. S. at p. 14.
(6) 12 Moo. P. C. 473.
(7) Vol. 2, p. 1117.
(8) 20 Ont. R. 351.
(9) 15 N. Zeal. 72.
(10) Y. B. 9 Hen. VI.
(11) P. 112.
(12) 2 Ex. C. R. at p. 77.
(13) 1 Ex. C. R. 182.
(14) L. R. 6 P. C. 354.

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parties. The Crown is, and has been, ready to make good the grant; but there is, and has been, a dispute which the parties have not been able to determine, as to whether or not in the lands set apart to satisfy the grant, there is a sufficient quantity of lands fairly fit for settlement, out of which the grant may be made good. Then there is another question that in the view of the suppliants may arise, in respect of which the parties are not agreed, and that is whether in case it should happen that neither in the lands so set apart, nor in other available lands in the North West Territories, a sufficient quantity of land fairly fit for settlement can be found to satisfy the grant, the Crown must for the deficiency answer in damages. But neither of these questions are to be answered or dealt with at present. The first cannot be considered because the evidence touching the matter is not before the court, and the second will not arise until the first question has been determined.

There being a difference between them on the two questions mentioned, the matter has come before the court and the parties being at arm's length other questions have arisen, a solution of which is desired.

The principal question at present is, it seems to me, as to the jurisdiction of the court; but that of course in its turn depends upon the nature and character of the suppliants' claim; and then if it is found that the suppliants have a claim over which the court has jurisdiction, a third question will arise as to whether or not the Crown is in default.

By an Act of the Parliament of Canada, 46 Victoria, chapter 72, the company suppliant was given authority to construct the railway referred to in the petition of right. By the Acts 48-49 Victoria, chapter 60, and 50-51 Victoria, chapter 23, the Governor-in-Council was given authority to make a grant of Dominion

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lands in aid of the said railway, not to exceed six thousand four hundred acres for each mile of the company's railway. The grant for which provision was made by the Act 48-49 Victoria, chapter 60, has been satisfied, and is not now in question. The Act 50-51 Victoria, chapter 23, was assented to on the 23rd of June, 1887. By an order in council of the 20th of June, 1887, the Governor-in-Council approved of a recommendation made by the Minister of the Interior that the grant mentioned be given to the company on the terms and conditions therein set out. The Act 50-51 Victoria, chapter 23, authorized grants of land to more than one company, and by the 5th section it was provided that "the said grants and each of them "may be so made in aid of the construction of the said "railways respectively in the proportions and upon "the conditions fixed by orders in council made in "respect thereof, each of the enterprises being respectively subject to any modification thereof which may "hereafter be made by the Governor-in-Council." It is objected that the words orders in council made in respect thereof have relation to orders in council to be thereafter made, and does not mean or include an order in council made before the passing of the Act. With that view I do not agree, and it is, I think, convenient to dispose of the objection now. I think the words may be taken—and I take them in this case—to refer to an order in council made before the passing of the Act, and receiving therefrom the approval and sanction of Parliament necessary for its validity.

The company was not, it seems, able to complete the railway with the aid of the land grant above mentioned, and Parliament and the Governor-in-Council gave it further assistance to enable it to do so.

By the Act 52 Victoria, chapter 5, assented to on the 2nd of May, 1889, it was provided as follows:

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"1. In order to enable the Qu'Appelle, Long Lake "and Saskatchewan Railroad and Steamboat Company "to complete their railway from Regina to some point "on the South Saskatchewan River, at or near Saska- "toon, and thence northward to Prince Albert, the "Governor-in-Council may enter into a contract with "such company for the transport of men, supplies, "materials and mails, for twenty years, and may pay "for such services, during the said term, eighty thou- "sand dollars per annum, in manner following, that "is to say: the sum of fifty thousand dollars to be "paid annually on the construction of the railway to "a point at or near Saskatoon, such payment to be "computed from the date of the completion of the "railway to such point; and the remaining thirty "thousand dollars annually on the extension of the "railway to Prince Albert, such payment to be com- "puted from the date of such last mentioned comple- "tion: Provided, that if the second portion of the said "railway is not built and operated to Prince Albert "within two years after the completion of the railway "to the South Saskatchewan as aforesaid, the payment "of fifty thousand dollars shall cease until the whole "railway is finished to Prince Albert."

On the fifth of August, 1889, the contract authorized by this Act was entered into by Her Majesty, represented by the Right Honourable Sir John A. Macdonald, Acting Minister of Railways and Canals of Canada, and by the suppliant company first above mentioned. It provided for the construction of the railway and the payment of the amounts mentioned. That contract or agreement is in full force today, and its validity is not in any way called in question. It deals, primarily, it is true, with the aid to be given to the company by the contract for the transport of men, supplies and mails; but it also

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contains provisions in respect of the land grant which the Governor-in-Council had authority to make under the earlier Acts referred to. Later in November of the same year another agreement was drawn up for the completion of the railway, having more especial reference to the land grant, but it was never completed, and need not be further referred to here. It is the more important, therefore, to go back to the agreement of the 5th of August, 1889, and see what is therein contained in respect of the land grant. First it is therein, among other things, recited that the company has become entitled to the grant mentioned (meaning of course upon completion of the railway according to the terms and conditions agreed upon), and then by the sixth clause of the contract it is provided, that, "by way of indemnity to the Government in case the "amount earned by the company for such service "should not amount to the sum paid by the Govern- "ment in any year, the Government, as the land grant "of the company is earned from year to year, shall "retain one third of the land grant so earned which "shall be held by the Government as a first charge or "lien securing the repayment of any such deficiency, "and shall issue to the company patents for the "remaining two thirds thereof."

The eighth clause of the contract makes provision for the administration of the one third of the land grant to be retained by the Government, but it is not necessary to set it out here, as it does not, so far as relates to the questions now to be determined, carry the matter any further than the sixth clause, in which as to two-thirds of the land grant there is direct agreement by the Crown to issue the patents therefor. This undertaking by the Crown, among other things, clearly

distinguishes this case from *The Hereford Railway Company* v. *The Queen* (1).

In this statement of the facts of the case I have avoided going into details, and I have not mentioned many matters to which counsel attribute more or less importance. There are a number of orders in council relating to the undertaking, to extensions of time for its completion, to the approval of the work when completed and to other matters; but there is no occasion at present, it seems to me, to refer to them more particularly.

Now, first, with regard to the jurisdiction of the court, it is to be observed that it has, among other things, exclusive original jurisdiction in all cases in which a claim arises out of a contract entered into by or on behalf of the Crown (2); or in which there is a claim against the Crown arising under any law of Canada, or any regulation made by the Governor-in-Council (3). Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the Head of the Department in connection with the administration of which the claim arises (4.) Where a claim against the Crown is so referred by the Head of the Department, a statement of claim is filed and served and subsequent pleadings and procedure are regulated by and conform as near as may be to a proceeding by petition of right (5). In matters not otherwise provided for, the practice and procedure at the time in force in similar suits, actions and matters in the High Court of Justice in England are to be followed (6). The form of judgment in a petition of right is that the

(1) 24 S. C. R. 1.
(2) *The Exchequer Court Act*, 50-51 Vict. c. 16, s. 15.
(3) Ib. s. 16 (d).
(4) Ib. s. 23.
(5) Rules of March 7th, 1888, Audette's Practice, Rule 17, p. 229.
(6) 50-51 Vict. c. 16, s. 21; and General Rule 1, Audette's Prac. 217.

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suppliant is not entitled to any portion, or that he is entitled to the whole or to some specified portion of the relief sought by his petition, or to such other relief and upon such terms and conditions, if any, as are just (1). This provision follows in substance the seventh section of *The English Petition of Right Act* (2). By the seventh section of that Act it is in substance provided that so far as the same may be applicable, and not inconsistent with the Act, the practice and course of procedure in the courts of law and equity, respectively, for the time being in reference to suits and personal actions between subject and subject shall, unless the court otherwise orders, apply and extend to such petition of right. But this was not intended to, and did not give the subject any remedy in any case in which before the passing of the Act he had no remedy. In *Clode on Petition of Right* (3) will be found a reference to several cases respecting gales in which a declaration of the suppliant's right was sought; and in which no objection was taken on behalf of the Crown to the suppliant's method of procedure. But as the cases referred to were respectively decided against the suppliants on the merits, they cannot be taken as conclusive of the suppliants' right so to proceed. By Order xxv, Rule 5, of the rules in force in the High Court of Justice in England it is provided that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not. This rule does not apply to proceedings on the Crown side or the revenue side of the Queen's Bench

(1) *The Petition of Right Act*, R. S. C. 136, s. 12.

(2) 23 and 24 Vict. (U. K.) c. 34.

(3) Pp. 75-76.

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Division (1). But a petition of right may be instituted in any division of the High Court, and it is not, I think, a proceeding on the Crown side or on the revenue side of the court, within the meaning of the exception mentioned. In my opinion a petition of right is not open to objection on the ground that a merely declaratory judgment or order is sought thereby. In fact from the nature of the case no other judgment or order can be pronounced against the Crown in a proceeding by petition of right. The important question always is as to whether or not the court has jurisdiction. If there is no jurisdiction no declaration should be made. *Barraclough* v. *Brown* (2). But if there is jurisdiction there can be no possible objection to the judgment or order being in the form prescribed in *The Petition of Right Act*. The case of *Clark* v. *The Queen* (3) does not, I think, decide anything to the contrary, and even if it were thought to do so, the statute of 1887 (4) has greatly enlarged the jurisdiction of the court.

In the present case the suppliants' claim arises, it appears to me, under a law of Canada, that is, in this case, under certain statutes passed by the Parliament of Canada and also out of a contract entered into by and on behalf of the Crown in pursuance of such statutes.

I find that the suppliants are entitled to the grant of land claimed by them; but I also find that in respect of such claim the Crown is not in default, the Crown being ready and willing to make the grant.

There is one other question to which perhaps I should make some reference. The Act of June 23rd, 1887, authorized a grant of Dominion lands. The order in council of June 20th, 1887, provides for a

(1) Order lxviii.
(2) [1897] A. C. at p. 623.
(3) 1 Ex. C. R. 182.
(4) 50-51 Vict. c. 16.

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grant of Dominion lands of a particular description; those "fairly fit for settlement." It is said that the order in council is invalid so far as it goes in that respect beyond the Act. But that, like the questions first mentioned, does not arise at present. The Crown offers land that is said to be fairly fit for settlement, and it is alleged that there are available lands of that description with which to make good the grant. Until that matter is settled the other question will not arise.

Judgment accordingly.

Solicitors for suppliants: *McCarthy, Osler, Hoskin & Creelman.*

Solicitor for respondent: *E. L. Newcombe.*