HIS MAJESTY THE KING................PLAINTIFF:

1927
March 22.
May 20.

v.

NATHAN D. SEAMAN..................DEFENDANT.

Crown—Grant of land—Error—False misrepresentation—Rectification

Held that where a crown grant of land has been issued by error, but without false misrepresentation on the grantee's part, and whereby he obtains more than that to which he was entitled, the Court need not set aside the whole grant, but may declare the same void only in so far as it purported to convey such portion improvidently granted and will order the grant to be delivered up to be rectified.

ACTION by the Crown to set aside a certain grant of land.

The action was tried at Owen Sound by the Honourable Mr. Justice Maclean, President of the Court.

J. C. Moore and *W. J. Scott* for plaintiff.

J. F. P. Birnie for defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT (now this 20th day of May, 1927), delivered judgment.

In January, 1904, John Thede and Valentine Feick became the owners of two adjoining lots of land, known respectively as Sable Mill Plot, and which I shall hereafter refer to as Mill Lot, and lot No. 35, all in Concession D, in the township of Amabel in the county of Bruce in the province of Ontario, and which lots of land had been granted in 1869 to others, by the Department of Indian Affairs of His Majesty's Government. Such grants, however, reserved to His Majesty what is known as the Aux Sable River Road Allowance, one chain wide, bordering on the Aux Sable River. This Road Allowance intervened between the Aux Sable River and the two mentioned lots of land. Lot 34 was owned by one Simmie, and adjoined lot 35, and in this case also the Road Allowance intervened between the lot and the river. In 1904 Thede and Feick, sold to Seaman the defendant lot 35 and the Mill Lot, reserving however a portion of the Mill Lot of about ten acres in area and adjoining the Road Allowance, and also reserving certain privileges and rights. Thede

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subsequently acquired the interest of Feick in the lands, privileges and rights so reserved.

In November, 1908, Seaman and Simmie entered into an agreement with the Municipal Corporation of the township of Amabel in which it was agreed that the corporation should close the Road Allowance along lots Nos. 34 and 35 and the Mill Lot, as far as the Sable Falls; that the corporation should assist Seaman and Simmie in obtaining a grant from the Crown of that portion of the Road Allowance so to be closed, each of the said parties to receive that portion of the Road Allowance adjoining his own lands; that when the Road Allowance was closed and grants were made by the Crown to Seaman and Simmie of such portions of the Road Allowance, then the latter were to grant and convey to the corporation certain of their lands for the purpose of a new road or highway, through the three mentioned lots, and which proposed road would generally run parallel to the Road Allowance along the river, but at a distance further south from the river.

In 1909, the Crown granted to Seaman the Road Allowance in front of lot 35 and the Mill Lot, and to Simmie that part in front of lot No. 34. The Road Allowance thus granted to Seaman in front of the Mill Lot, abutted the land reserved by Thede and Feick in the conveyance to Seaman in 1904. Seaman is still the registered owner of this portion of the Road Allowance. Seaman and Simmie subsequently laid out the new road or highway through the three lots of land, and made a conveyance to the corporation. This conveyance however was apparently not accepted on account of some slight error in the description of the portion agreed to be conveyed by Seaman, but this is not important as Seaman has been and still is willing to give a satisfactory title to the new road to the corporation, and in any event that is a matter for adjustment entirely between the corporation and Seaman. Other points were raised by the plaintiff such as that the corporation did not close up the Road Allowance or pass any effective law to that effect; and that the new road provided by Seaman and Simmie under the agreement was a road already located under a municipal by-law passed many years previously. None of these points it seems to me are rele-

vant to the issue here, and I do not think I need engage in any discussion of them.

The plaintiff's case is that the agreement made between Seaman and Simmie, and the corporation, recited that Seaman was the owner of the Mill Lot, whereas in fact he was not the owner of the ten acre portion of that lot, which was then owned by Thede; that this recital was a misrepresentation of fact on the part of Seaman, and was a fraud upon Thede and all other parties concerned; that the agreement contemplated Seaman receiving a grant only of that portion of the Road Allowance adjoining and contiguous to his lands whereas the grant in fact conveyed a portion of the Road Allowance which was not adjoining or contiguous to lands of Seaman but immediately adjoining and contiguous to the lands of Thede; that the grant to Seaman should be declared to have been issued in fraud or in error, or improvidently, and that the same should be declared wholly null and void, and be cancelled.

The defendant does not contest the plaintiff's action in so far as cancellation of that portion of the grant conveying to Seaman the Road Allowance in front of the ten acre portion of the Mill Lot is concerned or sought, and is content that to that extent, there be decreed cancellation or reformation of the grant. The defendant in his defence pleaded as follows:—

> The defendant states, and the fact is, that prior to the commencement of this action, he has always been ready and willing, and is now, subject to the payment of his costs, ready and willing to convey to the said Thede, all that portion of the said 66-foot reservation immediately adjoining the said parcel of 10 acres reserved by the said Thede in the Grant to Seaman of the Sable Mill Plot, for a nominal consideration; but the relator Thede before action never made any request or demand upon the defendant Seaman for the said portion of the 66-foot reservation.

I have no difficulty whatever in concluding that there should be what in effect would operate as a partial cancellation of the grant in question, so as to exclude therefrom that part of the Road Allowance adjoining the land of Thede. That this should be done is not I think open to question. However, I do not think a case has been made out for anything further than that, and the plaintiff accordingly succeeds only to that extent. It has not been established that Seaman acted fraudulently in securing the grant, and I am quite satisfied that the inclusion of the

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Road Allowance in front of Thede's lot was unintentional or in error. Mr. Moore for the plaintiff, however, firmly contended before me that any decree operating as a partial cancellation of the grant could not in law be made, and that the entire grant should be declared null and void, and cancelled. This is really the principal point now for decision.

Now with reference to the contention of Mr. Moore, for the plaintiff, that the Court cannot make a declaration that the grant should be revoked in part, but must declare that the whole grant is void if a portion of it has been granted through improvidence or fraud, etc. The case of *The Queen* v. *Eastern Archipelago Co.* (1) is most instructive. It is true that the case arose upon a *scire facias* to repeal a charter granted by the Crown under the Great Seal. But proceedings by way of *scire facias* for such a purpose is quite on all fours with a proceeding by Information by the Attorney General, on the relation of a subject aggrieved. In the Exchequer Court the usual remedy is not by *scire facias* in such cases, but by Information. On the facts in the case of *The Queen* v. *Eastern Archipelago Co.* the question arose as to whether a portion of the grant could be revoked and the remaining portions remain intact and legal. In the very able judgments reported will be found enlightenment on this point. In the reasons of Erle J., at page 327, we find the following:—

> The provisions enabling the Crown to declare a forfeiture of a charter are in analogy with provisions for forfeitures between subjects, and are to be construed by the same rules.

In the reasons of Wightman J., at page 331 and 333, we find the following:—

> * * * it was contended by the corporation that, admitting that the Crown might in its own right proceed by *scire facias* for an absolute repeal of the letters patent, it would be utterly destructive of the power of qualified and partial revocation reserved to the Crown by the proviso, if a private prosecutor could be allowed to proceed by *scire facias* in the name of the Queen * * * .
>
> I cannot assume that the Attorney General would give his assent to the prosecution of a *scire facias* to repeal letters patent by a private prosecutor in the name of the Crown, unless he was satisfied that, if the suggestions in the *scire facias* were true, the letters patent ought to be repealed.

(1) (1853) 1 E. & B. 310.

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At page 330,—

It was contended that the Crown itself could not, in the first instance, proceed by *scire facias* to repeal the letters patent, upon a suggestion of non-compliance with some of the conditions, but that there must be a previous revocation or repeal, absolute or qualified, by writing under the great seal * * * . It is difficult to believe that such an unusual and inconvenient course of proceeding could have been intended by the terms of the proviso in the charter.

The opinion of Coleridge J., seems to indicate clearly that it is possible for the court to declare a grant from the Crown revocable in part only. In Lord Campbell's judgment the following observations occur at pages 350 and 351:—

It is laid down, by all writers of authority who have treated this subject, that, if letters patent under the great seal have been granted on any false representation, by which they are void, or if, after the grant, there has been a breach of any condition subsequent whereby they are voidable, the prerogative writ of *scire facias*, to repeal them, may be sued out, either directly by the Crown, or, with the consent of the Crown, on the relation of an individual who may be injured. * * *

After a very attentive consideration of the charter, I am of the opinion that the proviso (in the charter) in no respect limits the power of proceeding by *scire facias* which would otherwise have existed, and that it only gives a cumulative or additional remedy, by enabling the Crown in a summary manner to *revoke the charter or to modify it.*

On the appeal of the *Eastern Archipelago Co.* v. *The Queen* (1), it is clear upon the reasons given by Martin B., that the court may decree a partial revocation. He says at page 870:

Slight deviations from the provisions of a charter would not necessarily be either an abuse or a misuser of it, and would therefore be no ground for its annulment, although it would be competent for the Crown, by apt words, to make the continuance of the charter conditional upon the strict and literal performance of them.

Parke B., at page 894, says:—

If the charter had been obtained by a false suggestion, or a fraudulent concealment, or a fraudulent representation of facts, the Crown would have been deceived, and the charter would have been void at common law; and so it would have been if it had been injurious to the vested interests of other subjects and so improvidently issued.

Pollock C.B., at page 907 says:

The public has so much interest in the correct conduct of those who enjoy any chartered rights, that it may well be contended that the power of the subject to question whether or not the charter be legal, or whether the charter has been forfeited by a breach of the condition, cannot be taken away even by the Crown * * *.

It remains to be said that a grant by the Crown of any property or right or interest is a matter of contract, and

(1) (1853) 2 E. & B. 856.

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so far as a remedy is concerned in the way of reforming the contract it ought to be open to the subject to have his contract reformed without having it annulled. It would be difficult to find any express authority on this point, but once it is conceded that the relation between the Crown and its grantee is one of contract, then it is incumbent upon anyone asserting the rules of law are different in such a case from those appertaining to contracts between subject and subject, to establish his contention by sound authority. Mr. Moore was not able to establish in his argument that the court has no authority to revoke letters patent in part, but must revoke them either in toto or leave them as they stand. On this point the case of *The British American Fish Corporation* v. *The King* (1) affirmed by the Supreme Court of Canada (2) is instructive. In that case the Minister of Marine under the authority of an Order in Council, executed a lease to the suppliant of certain fishing privileges for 21 years. The lease contained a provision that upon complying with certain terms the suppliants would be entitled to have the option of renewing the lease for a .further period of 21 years. Nine years after the date of the execution of the lease, the Deputy Minister notified the suppliants that the lease was *ultra vires* as not being in virtue of any statute of Canada, and as being repugnant to the common law, and that the lease was *ab initio* void. The Exchequer Court held that the provision for the renewal of the lease was void and inoperative and beyond the power of the Minister under Order in Council, but that the clause as to renewal in the lease could be severed from the remainder, and that while that clause was void, the lease itself for the term of 21 years was valid and binding. Looking upon the lease as a matter of contract, this case would seem to support the proposition that the grant in question in this case could be held good in part and invalidated in respect of the remainder.

The defendant has not established that the land in question belonged to the Provincial Government instead of to the Dominion Crown as was suggested. Since the decision of the Judicial Committee of the Privy Council in the case

(1) (1918) 18 Ex. C.R. 230. (2) 59 S.C.R. 651.

of the *St. Catharines Milling Company* v. *The Queen* (1), it is settled law that the Indian lands became available to the province "as a source of revenue whenever the estate of the Crown is relieved of the Indian title." But the defendant, as pointed out, has not established that the land in question belonged to the Provincial Government by reason of a surrender of the Indian title. The burden of establishing such surrender rests upon the defendant in this action, and if he has failed to discharge that burden the Court ought not to infer that such surrender has actually taken place.

It would seem to be a reasonable determination of the case so far as the evidence was made, to treat the property as a whole as having been in the Dominion Crown, and declare that the grant was void so far as it purported to convey the portion of land immediately in front of the ten acre lot. The grant to the defendant should I think be delivered up to be rectified.

Considering the result, and all the circumstances, I think a fair and proper disposition of the matter of costs would be to direct that each party bear their own costs.

Judgment accordingly.