NICHOLAS CONRAD PETERSON.....SUPPLIANT; 1889

Mar. 5.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of Right—Indian Reserve lands—Conditional sale—Waiver.

Suppliant purchased from the Crown a parcel of land, forming part of an Indian Reserve, subject to the condition that unless he erected certain manufacturing works thereon within a given time he would forfeit all rights under the sale. A portion of the purchase money was paid down. Some time after the expiry of the time wherein suppliant was bound to erect the works but had not done so, the Crown, through a duly authorized officer, accepted and received the balance of the purchase money from him,—such officer stating, however, that the sale would not be complete until the condition upon which it was made was complied with. On petition praying for a declaration by the court that suppliant was entitled to letters-patent for said land,—

Held:—(1). That the acceptance of the balance of the purchase money, under the circumstances, constituted a waiver of the condition in respect of the time within which it was to be performed, but not of the condition itself; and that inasmuch as the suppliant had not performed such condition, he was not entitled to the relief prayed for. *Clarke* v. *The Queen* (1 Ex. C. R. 182), *The Canada Central Railway Company* v. *The Queen* (20 Grant 273) referred to.

(2). While the law is that the Crown is not bound by estoppels and no laches can be imputed to it, and there is no reason why it should suffer by the negligence of its officers, yet forfeitures such as accrued in this case may be waived by the acts of Ministers and officers of the Crown. *Attorney-General of Victoria* v. *Ettershank* (L. R. 6 P. C. 354), and *Davenport* v. *The Queen* (3 App. Cas. 115) referred to.

PETITION of right praying for a declaration by the court that the suppliant was entitled to letters-patent for certain lands, being portion of an Indian Reserve

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near the town of Sarnia, in the County of Lambton, Ontario.

The facts of the case, and the points of law raised on the argument, are fully stated in the judgment.

December 18th, 1888.

S. H. Blake, Q.C., and *Adams* for the suppliant;

Nesbitt for the respondent.

BURBIDGE, J. now (March 5th, 1889,) delivered judgment.

This is a petition praying for a declaration that the suppliant is entitled to letters-patent for lots one and two, Riverside, and lots one, two, three and four, range one, and lots one, two, three and four, range two, in the new survey of Indian Lands on the south of the town of Sarnia, in the County of Lambton, Ont.

In November, 1879, the suppliant, a machinist having a foundry and machine shop at Sarnia, by letter, dated the 17th day of that month, made application to the Superintendent-General of Indian Affairs for the lots in question and a number of other lots (the whole containing some ten acres), stating that he wished to secure such lots for immediate use, and for the erection thereon of an iron foundry and machine and boiler works. The Superintendent-General declining to treat for the sale of so large a block of land as that applied for, the suppliant, after considerable correspondence, on May 27th, 1880, accepted the offer made to him through Mr. Watson, the Indian Agent at Sarnia, to purchase the lots in question for the sum of one thousand dollars. His letter of acceptance concluded as follows: "I will also commence as soon as possible, on the above "mentioned grounds, the construction of the necessary "buildings for manufacturing."

At this time the Superintendent-General intended to sell in lots a portion of the Reserve of which those

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sold to Peterson formed a part, and it was thought that the selling price of the former would be enhanced by the construction on the latter of such buildings and works as the suppliant proposed to construct, and it is clear that, but for this consideration, the price demanded for the latter would have been considerably more than it was. This was well understood by both parties to the agreement, and it is not denied that the suppliant's undertaking to put up such buildings formed part of the consideration for the lots purchased by him.

On the 30th of July, 1880, the first instalment of the purchase money was paid, when the following receipt was given to the suppliant :—

INDIAN DEPARTMENT.

$200. A. SARNIA, 30th July, 1880.

No. 389 of Indian Land Sale.

Received from N. C. Peterson the sum of two hundred dollars, being the first instalment of one-fifth on the purchase of lots 1 and 2, Riverside, and lots 1, 2, 3, 4, range No. 1, lots 1, 2, 3, 4, range No. 2, in the new survey of Indian Land on the south of the town of Sarnia, sold to him on the 30th July, 1880, for the sum of one thousand dollars ; the terms of payment being one-fifth down, and the balance in four equal annual instalments with interest on each, from the date of purchase, at the rate of six per cent. per annum. It being expressly provided that the erection of buildings for manufacturing purposes within nine months is one of the conditions of sale.

It is an express condition of the above sale that the purchaser, or his heirs or assigns, shall pay regularly the instalments, together with the interest, as they fall due, till the whole shall be paid, under pain of forfeiture of the land above sold ; and also of all the instalments already paid on account of the same.

(Sgd.) EBENEZER WATSON,
Indian Supt.

Afterwards the suppliant went into possession of the property, and in September, 1880, placed thereon a quantity of bricks to be used in the erection of the proposed buildings ; and though he has since maintained his possession, he has not taken any further

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steps to carry out the condition to erect such buildings. At the time of the purchase it was understood that the proposed works would be constructed on lots 1 and 2, Riverside, at a place then crossed by the highway, which the Superintendent-General proposed to divert, substituting therefor a convenient way along River Street. This necessitated the construction of a bridge, which was not finished until July, 1881; and though thereafter the public could use River Street, the latter did not, apparently, until 1882, when the bridge was raised, afford as convenient a way as that along the river bank. Subsequently, when difference arose between the suppliant and the Superintendent-General, the former urged the delay in affecting the diversion of the highway as an excuse for his not erecting the proposed works. There is some conflict of testimony as to what took place between the suppliant and Watson, the Indian Agent, in respect of this matter; but apparently there was an understanding that the former should not put up his buildings until the bridge was built. I am not, however, wholly satisfied that this was the only, or even the primary, reason for the suppliant's delay. But whether it was or not, is, I think, immaterial in view of what subsequently transpired. For, if in August, 1881, the Crown, as I think it did, by the receipt of the balance of the purchase money, waived any forfeiture which had theretofore been occasioned by the suppliant's non-compliance with the condition mentioned, the reasons for such non-compliance, whatever they may have been, cannot, I think, in any way affect the legal position of the parties hereto.

The circumstances surrounding the payment of this balance on the 1st of August, 1881, are in dispute. Watson testifies that on this occasion he told Peterson that such payment would not complete the purchase until the conditions of sale were fulfilled, and if that were not done soon the latter would be in danger of

losing the sale; and that once or twice afterwards he spoke to him about the same thing, and gave him the same warning. Watson also stated that at the time of the payment he made an entry in his official book, which, being produced, contained opposite to a memorandum of the payment in full on August 1st, 1881, of $800, and $48 interest, this note:

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Mr. Peterson not entitled to patent till buildings for manufacturing purposes are completed. See August, 1881, Ret.

The suppliant denies that any such conversations took place. I find the facts to be as stated by Watson, supported, as I think he is to a certain extent, by the entry in his books.

In November, 1880, the Superintendent-General put up for sale at public auction the lots indicated in the survey of the Indian Reserve south of the town of Sarnia, the auctioneer calling attention, and, in his opinion, with good effect, to the sale to the suppliant and his agreement to erect the buildings mentioned. At this time about one-third of the lots were sold, and the remainder were again offered for sale at public auction in January, 1882, and January, 1883, on neither of which occasions was there any reference to the suppliant's undertaking.

After the payment in August, 1881, of the balance of the purchase money no one appears, for some five years, to have taken any interest in the transaction out of which this case arises. In September, 1886, however, the suppliant having become a party to an arbitration with the Erie and Huron Railway company, which had taken for its roadway lots 1 and 2, Riverside, his solicitor, Mr. Adams, on the 9th of that month, applied to the Superintendent-General for letters-patent for all the lots purchased. The correspondence of which this application was the commencement was continued until the 28th June, 1888.

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The position taken by the suppliant in such correspondence is, briefly, that the delay in the diversion of the highway prevented him from erecting his buildings within the time agreed upon, that the condition was waived, and that he is entitled to letters-patent for the lots. On the other hand for the Indian Department it is contended that the suppliant is not so entitled as he has not fulfilled the condition on which he purchased the property, and that the Superintendent-General has been and is in a position to cancel the sale to him and to sell to whom he sees fit. It was also pointed out that no advantage could, after the sale of the lots in the Reserve, accrue to the Indians by the erection of the works which suppliant had agreed to erect.

In May, 1888, the Superintendent-General had the property in question valued by Mr. Watson and Mr. English, another Indian Agent, who concurred in estimating its value at that time at $3,920. For this sum it was offered to the suppliant, he to be credited with the $1,000 already paid. Before considering this offer, the latter wished to know if he would be allowed interest on the $1,000 if he accepted the offer, or whether that sum would be returned to him with interest if he withdrew from the negotiation ? In reply he was told that in neither case would he be allowed interest, to which he had no claim as he had had possession of the property.

The suppliant then asked that the letters-patent should issue to him upon his putting up the buildings in accordance with his agreement of 1880, and asked for one year from July 1st, 1888, in which to erect them. By a letter of June 27th, 1888, this request was refused, and suppliant was notified that unless within two months he paid the sum of $2,920, the sale would be cancelled.

Thereupon the suppliant filed his petition.

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The case was fully and ably argued and my attention directed to a large number of cases, to many of which it will not be necessary to refer.

With reference to the undertaking of the suppliant to erect buildings for manufacturing purposes on the lands in question within nine months from July 30th, 1880, I am of the opinion that the acceptance, under the circumstances to which I have referred, on August 1st, 1881, of the balance of the purchase money constituted a waiver of the condition in respect of the time within which it was to be performed and of the forfeiture theretofore occasioned, but not of the condition itself, and that the suppliant, not having performed such condition, is not entitled to the relief which he seeks.

For the suppliant it was contended that the undertaking to erect buildings contained in the receipt of July 30th, 1880, was so vague as to be void, neither the value nor the character thereof being in any way defined, and that the previous correspondence could not be looked at to ascertain what in this respect was the intention of the parties (1). Now, these are difficulties which would, I think, be much more serious than they are if the Crown were seeking to compel the suppliant to carry out his contract. In such a case it might be that the court would not undertake to give directions as to the description of buildings which should be constructed, and to compel their construction. Similar difficulties, but not, I think, insuperable, might have arisen if the suppliant had erected buildings, and if, on his application for letters-patent, a controversy had arisen between him and the Crown as to whether or not such buildings were in accordance with his contract. But here the suppliant has done nothing, and I can see no difficulty

(1) *Wood* v. *Silcock* 50 L. T. (N.S.) 251.

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in the way of the court refusing him relief until he has made some effort to comply with the conditions of the contract to which he became a party.

In this connection it was said that even if the suppliant were bound to erect the buildings mentioned he was not bound to maintain them, and *Jessup* v. *The Grand Trunk Railway Company* (1), and a number of other cases, were cited in support of such proposition. The contention may be good, as to that I express no opinion; but it is, I think, altogether outside the question at issue and does not call for any consideration at present.

For the suppliant it was contended that, admitting the condition to build to be a valid condition, it had been waived, and that such waiver could not be limited to the time within which it was to be performed, but must extend to the condition itself, *Davenport* v. *The Queen* (2), *Dumpor's case* (3), being relied upon. Now, while the law is that the King is not bound by estoppels, and that no laches can be imputed to him, and that there is no reason why he should suffer by the negligence of his officers (4), it appears to be well settled that forfeitures such as accrued in this case may be waived by the acts of Ministers and officers of the Crown. But there is nothing, I think, in any of the cases inconsistent with the view which I have taken; that the waiver may in such a case as this affect the matter of time only and not the substance of the condition. On the contrary it appears to be clear that a waiver of the time within which an

(1) 28 Grant 583, 7 Ont. App. Cas. 128.

(2) 3 App. Cas. 115.

(3) 1 Smith's L. Cas. 43-47.

(4) Chitty on Prerogatives, pp. 379, 381; Everest and Strode on Estoppels, p. 8; *Bridges* v. *Longman* 24 Beav. 27; *Attorney-General of Victoria* v. *Ettershank* L. R. 6 P. C. 354; *Davenport* v. *The Queen*, *ut supra*.

act is to be done is not necessarily a waiver of the act itself (1).

It was suggested that the time within which the buildings were to have been erected having been once waived, the Crown could not insist upon their erection within any defined time. But I do not see that such a state of facts presents any greater difficulty than if the contract had been silent as to time, or in case time had not been of the essence of the contract. In such cases as these it is, I think, beyond question that the Crown could have given the suppliant notice that unless the condition were complied with within a given reasonable time the sale would be cancelled (2).

At the conclusion of the argument I was asked by Mr. Blake, in case I came to the conclusion that the suppliant was not entitled to the relief prayed for, to declare that he would be entitled thereto upon performing, within a reasonable time, the condition to erect buildings for manufacturing purposes. It was urged that, owing to the attitude of the Crown, the suppliant could not afford to take the risks and incur the expenses of building before coming to the court for a declaration of his rights.

With that request I ought not, I think, to comply.

Assuming, contrary to the contention of the Crown to which I shall presently refer, that if the suppliant had a claim, that is, a legal claim to letters-patent of the land in question, arising out of the contract referred to, the court could make a declaration to that effect, it does not follow that in a case in which not having done all that on his part he ought to have done he has no such claim, the court has authority to declare, or would be justified in declaring, that if he should do thus and so he would have such a claim.

(1) *Counter* v. *MacPherson* 5 Moo. P. C. 83.

(2) Fry on Specific Performace, 2nd. ed. 471-473, and cases there cited ; *O'Keefe* v. *Taylor*, 2 Grant 95.

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But even if the authority existed, it is doubtful if, in view of the suppliant's delay, it should be exercised in his favor. Neither do I see how any such declaration could materially benefit him, or the refusal of it injuriously affect his rights. There is nothing now, so far as the facts are before the court, as during seven years and more there has been nothing, to prevent him from perfecting his claim to the letters-patent that he desires to have issued to him. He is in the undisturbed possession of the property and cannot be dispossessed until the sale to him has been cancelled. And here it may not be improper for me to add that I do not think the Superintendent-General, since the waiver of the time within which the condition, that has been broken, was to have been performed, can get rid of the contract without a notice to the suppliant that it will be cancelled if he does not perform such condition within a given reasonable time. The Superintendent-General is, I think, in a position to say to the suppliant:—"I will cancel the contract if you do not perform the condition within nine months" (I mention the time originally agreed upon as an instance only, and not as expressing any view as to what would be a reasonable time). But I do not think that he has a right to say to the suppliant:—"I will cancel the contract if you do not pay me more money for the property."

It was here, I think, that the Department of Indian Affairs took up a position that is not tenable. It was, no doubt, a natural position to assume in view of the suppliant's default and the circumstances of the case. It is one, too, that would, if effect could be given to it, be for the benefit of the Indians interested, of whom the Superintendent-General is the guardian, and it may be that it would, if the parties could agree upon the amount to be paid, afford the best solution of the

difficulty. It necessitates, however, the making of a new contract, involving the consent of both parties, and is, except as it may affect the question of costs, outside the range of the present inquiry.

To refer briefly to another question discussed on the argument of this case, it was contended for the Crown that the court has no jurisdiction to make such a declaration as that prayed for, and the case of *Clarke* v. *The Queen*, decided in this court by Sir William J. Ritchie, C. J. (1), was relied upon. In support of the court's jurisdiction Mr. Blake referred to the changes in the statute since the decision in *Clarke's* case, and to the *Canada Central Railway Company* v. *The Queen* (2), decided by Vice-Chancellor Strong. In the same direction, though in view of the differences in the statutes of Canada and of Victoria not, perhaps, conclusive, is the case of the *Attorney-General of Victoria* v. *Ettershank* (3). The question is no doubt an interesting and important one, and not free from difficulty; but this is not, I think, the time to attempt its solution. The view which I have taken of the case renders that task unnecessary, at least for the present.

Petition dismissed, without costs.

Solicitor for suppliant: *J. Adams.*

Solicitors for respondent: *O'Connor & Hogg.*

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(1) 1 Ex. C. R., 182. (2) 20 Grant 273.
(3) L. R. 6 P. C. 354.