

THE HARDY LUMBER COMPANY } APPELLANT ;
 (PLAINTIFF)..... }

AND

THE PICKEREL RIVER IMPROVE- } RESPONDENT.
 MENT COMPANY (DEFENDANT).... }

1896
 *May 17.
 *Dec. 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Incorporated company—Action against—Forfeiture of charter—Estoppel—
 Compliance with statute—Res judicata.*

In an action against a River Improvement Company for repayment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, etc., for which tolls were claimed were not placed on the properties mentioned in the letters patent of the company ; that the company did not comply with the statutory requirement that the works should be completed within two years from the date of incorporation whereby the corporate powers were forfeited ; that false returns were made to the Commissioner of Crown Lands upon which the schedule of tolls was fixed ; that the company by its works and improvements obstructed navigable waters contrary to the provisions of the Timber Slide Companies Act, and could not exact toll in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands whose report was to be accepted in place of that provided for by the Timber Slide Companies Act, and to be acted upon by the commissioner in fixing the schedule of tolls.

Held, affirming the judgment of the Court of Appeal for Ontario, that the above grounds of impeachment were covered by the consent judgment and were *res judicata*.

Held further, that the plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited.

*PRESENT :—Sir Henry Strong C.J. and Taschereau, Sedgewick,
 King and Girouard JJ.

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By R. S. O. [1887] ch. 160, sec. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation it should forfeit all its corporate and other powers "unless further time is granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the Commissioner of Public Works."

Sembla. The non-completion of the work within two years would not, *ipso facto*, forfeit the charter, but only afford grounds for proceeding by the Attorney General to have a forfeiture declared.

Another ground of objection to the imposition of tolls was that the commissioner, in acting on the report of the valuator appointed under the consent judgment erroneously based the schedule of tolls upon the report as to expenditure instead of as to actual value and the statement of claim asked that the schedule be set aside and a scale of tolls fixed.

Held, that under the statute the schedule could only be allowed or varied by the commissioner and the court could not interfere, especially as no application for relief had been made to the commissioner.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of Meredith C.J. in favour of the defendant.

The material facts and questions raised for decision are sufficiently set out in the above head-note and in the judgment of the court.

Kappelle and Bicknell for the appellant.

Walter Cassells Q.C. for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed.

Mr. Justice Moss in delivering the judgment of the Court of Appeal states the objections of the appellants to the judgment of Chief Justice Meredith as follows:

Upon the argument of this appeal five main grounds of objection to the defendant's right to impose and collect tolls, as against the plaintiffs, were presented for consideration by their counsel:—(1) That the dam, slides, booms, etc., in respect of which the claim of tolls is made, are not built or placed on properties mentioned in the letters

patent, or upon the streams or waters mentioned therein ; (2) that the defendants did not within two years from their incorporation complete the works for the completion whereof they were incorporated, and so forfeited their corporate and other powers and authorities ; (3) that the defendants made false reports or returns to the Commissioner of Crown Lands, upon which the schedule of tolls was from time to time fixed ; (4) that under a consent judgment in a prior action between the same parties, the report of a valuator appointed by the Commissioner of Crown Lands was to be accepted in place of the report or return provided for by the Timber Slide Co's-Act, and to be acted upon by the Commissioner in fixing the schedule of tolls, and the Commissioner erroneously adopted the report as to expenditure, instead of as to actual value, in fixing such schedule, and also improperly treated the company as one, the duration of whose existence was only ten years, and included in the tolls an amount computed to ensure a return of the capital of the company at the end of that period and ; (5) that the defendants are by these works and improvements obstructing navigable waters contrary to the provisions of the Timber Slide Co's Act, and are not entitled to exact tolls in respect of such obstructions.

To one or the other of these heads all the objections raised by the appellants in argument in this court and in their factum may be referred.

I entirely agree with the judgments delivered in both the courts below regarding the effect of the consent judgment in the former action between the present parties. I am of opinion that it is conclusive against the appellants as regards the first, second, third and fifth grounds of impeachment before enumerated. It is impossible now in the face of that decree, and after the acquiescence and consent of the appellants on which it was founded, that the appellants can be permitted to insist that the respondents are not entitled to collect tolls for the use of their improvements by the appellants either for the reason that statutory requirements have not been complied with, or for the reason that the schedules of tolls in force anterior to the former action were improperly based

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upon false reports or returns to the Commissioner of Crown Lands.

As regards the first, second, third and fifth objections, these are all covered by the former consent judgment and are *res judicata*. In addition to this estoppel, the objection that the respondents' corporate powers were forfeited by reason of their failure to complete the construction of their works within two years from the 9th of May, 1893, the date of their incorporation, it seems clear that the appellants who have all along treated the respondents as a corporation, using their works and paying tolls fixed by the commissioner under the statute, and who now in the present action sue the respondents as a corporation, are precluded from insisting in this same action that the respondents do not constitute a corporation, and that therefore their own action is brought against a body having no legal personality. By suing in the way they have they have precluded themselves from impugning the legal existence of the body they sue.

Further, it appears to me that there is great weight in the suggestion to be found in both the judgments delivered in the courts below that notwithstanding the strong words of the statute R. S. O. 1887, ch. 160, sec. 54, (which was the enactment in force at the date of the issue of the letters patent,) the non-completion of the works within two years would not have worked a forfeiture of the respondents' franchise *ipso jure*, but would only have constituted grounds for proceedings by the Attorney General on behalf of the Crown to have a forfeiture declared.

This enactment is as follows:

Every such company shall, within two years from the day of their becoming incorporated, complete each and every work undertaken by them and mentioned in the report required prior to the incorporation of the company, and for the completion whereof they may be incorporated, in default whereof they shall forfeit all the corporate and other

powers and authority which they have in the meantime acquired, and all their corporate powers shall thenceforth cease and determine unless further time is granted by a by-law of the county or counties, district or districts in or adjoining which the work is situate, or by the Commissioner of Public Works, and if any company formed under this Act for the space of one year abandons any works completed by them, so that the same are not in sufficient repair and cannot be used for the purpose proposed in the instrument of incorporation of the company, then the corporate powers of the company shall cease and determine.

Now it will be observed that the provision shows in plain unmistakable terms that forfeiture by lapse of time may be covered by an extension of time granted either by a public body, the county or district council of the adjoining municipality, acting of course in the public interest, or by a high and responsible officer of the Crown. This shows that the lapse of the corporate powers provided for in the section quoted was entirely in the interest of the Crown and public. Whatever effect might otherwise have been given to the words used I cannot bring myself to think that more was intended than to authorize a proceeding by the Attorney General on behalf of the Crown to have a forfeiture judicially declared, and that it was not competent to a private person indirectly to insist on the cesser of the corporate powers of the respondents under the circumstances alleged. However, I do not insist upon this as a ground for upholding the judgments appealed against as the reasons already stated for holding the appellants precluded from taking the objection to the legal existence of the corporation are sufficient for the purpose. There are still further reasons for not readily assenting to the contention of the appellants on this head. The act of the Commissioner of Crown Lands by exercising his statutory powers in prescribing the tolls to be taken by the respondents is a plain recognition of the respondents as a corporation, and therefore from it alone might

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will be implied his assent to an enlargement of the time for completion of works as well as a waiver on the part of the Crown to any objection on the ground of the locality of the works as not being authorized by the charter. Again the supplementary letters patent issued on the 21st February, 1896, are a clear recognition of the respondents as a subsisting corporation and therefore a waiver of any right to forfeiture by reason of effluxion of the statutory term before completion, and also a virtual extension of the time which the Crown by its officer the Commissioner had power to grant.

Further, this objection to the respondents as a corporation *de jure* is not only answered in the way already suggested but, even if there had been an absolute forfeiture and the respondents had therefore ceased to be a corporation *de jure*, it would be difficult to establish that they had ceased to be a corporation *de facto*.

This last head is entirely distinct from the principle of estoppel which I think is here amply sufficient to preclude the appellants from taking the objection they insist upon.

The third objection mentioned by Mr. Justice Moss, viz., that the respondents made false reports to the Commissioner of Crown Lands from time to time upon which the schedule of tolls were fixed, is a plain case "of harking back" as Mr. Justice Moss well says, to the complaints which were raised in the former action, and intended to be concluded by the consent decree in that cause. Since that judgment was entered there has been no schedule of tolls except one made under the judgment and based upon the report of an expert according to the terms agreed upon by the parties and embodied in the judgment.

The fourth objection which is the only one remaining to be considered has reference to the schedule of tolls fixed under the consent decree upon the report of the valuator agreed upon. This schedule of tolls is impeached upon the ground that the Commissioner fell into an error in settling it having made the mistake of basing it on the expenditure found to have been made instead of upon actual value. The court is therefore asked (see paragraph 7 of the claim for relief), for this alleged error of the commissioner, to set aside the schedule of tolls and to fix a new scale of tolls itself. The plain answer to this is that the court is here asked to do what the statute expressly delegates to the Commissioner who has express power conferred upon him by section 41 in a case in which tolls fixed by him are objected to as not having been fixed in accordance with the Act "to alter or vary the schedule of tolls so as to make them correspond with the true meaning of the Act." The interference of the court is therefore invoked to do that which the Commissioner alone has jurisdiction to do and that in the absence of any allegation or suggestion of an unsuccessful or any application to the Commissioner for relief.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Laidlaw, Kappelle & Bicknell.*

Solicitors for the respondent: *Blake, Lash & Cassels.*

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