1921
Oct. 11.
1922
Feb. 7.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND THE MINISTER OF LANDS (DEFENDANTS) ..... } APPELLANTS;

AND

BROOKS-BIDLAKE & WHITTALL, LIMITED (PLAINTIFFS) } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA

Constitutional law—License to cut timber—Condition not to employ Chinese or Japanese—Validity—Injunction.

The respondents were the assignees of a timber license issued by the Deputy Minister of Lands of British Columbia, in which was inserted the following provision: "this license is issued and accepted "upon the understanding that no Chinese or Japanese shall be "employed in connection therewith." The respondents applied to the courts for an injunction restraining the appellants from attempting to enforce such a provision, on the ground that the statute enabling the department to insert it in the license was *ultra vires*.

Held that the injunction could not be granted.

Per Davies C. J. and Anglin and Mignault JJ.—The respondents have no ground for complaint; if the condition is good, they have no grievance; if it is bad, the license itself is void and the respondents have therefore no status as licencees.

Per Idington J.—The legislation of the province is *intra vires*.

Per Duff J.—According to section 50 of the "Land Act" and to section 57, s.s. 3*a*, as amended by c. 28, s. 6 of the B.C. Statutes of 1910, the Minister of Lands had no authority to renew the license in February, 1921, unless performance of the condition precedent (above quoted) had been waived; performance of the condition during the year ending in February, 1922, had not been waived; thus the respondents' license had already lapsed or would have lapsed on the 11th of February, 1922, and accordingly the respondents' application must fail.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

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APPEAL *per saltum* from a judgment of the Supreme Court of British Columbia granting a motion for an injunction restraining the appellants from attempting to enforce a provision contained in a timber license issued to respondents.

The respondents are the assignees of a timber license issued on the 11th of February, 1912 and renewed yearly by the deputy minister of Lands of British Columbia, in which was inserted by virtue of a resolution of the oegislature, the following provision; "this "license is issued and accepted upon the understanding "that no Chinese or Japanese shall be employed in "connection therewith". The respondents applied to the Supreme Court of British Columbia for an injunction against the appellants restraining them from taking any steps to cancel the license by reason the non-observance of the above quoted provision.

Judgment was rendered by Murphy J. granting the application, relying upon an opinion expressed by the Court of Appeal for British Columbia (1) on the submission of a question to that court under the "Constitutional Questions Determination Act" of the province. The Court of Appeal had held that such a provision in the liencses was invalid: (a) as contrary to the principle determined in the case of *Union Colliery Company* v. *Bryden* (2); (b) as being in contravention of the "Japanese Treaty Act, 1913".

J. A. Ritchie K.C. for the appellants,

Sir Chas. H. Tupper K.C. and *Charles Wilson K.C.* for the respondents,

E. L. Newcombe K.C. for the Attorney-General for Canada.

(1) [1920] 3 W. W. R. 937. (2) [1899] A. C. 580.

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The Chief Justice.

THE CHIEF JUSTICE.—For the reasons stated by my brother Mignault, I am of the opinion that this appeal should be allowed without costs and also that the respondent's action should be dismissed without costs.

IDINGTON J.—The respondent is the assignee of a special timber license issued by the deputy Minister of Lands on behalf of the Government of British Columbia in the following from:

No. 6138 3957-12

(Coat of Arms)

The Government of The Province of British Columbia Land Act and Amendments.

TIMBER LICENCE.

In consideration of One Hundred and Sixty Dollars, now paid, being one annual renewal fee and the additional fee provided for in subsection (3*a*) of section 57 of the "Land Act" as enacted by section 6 of chapter 28 of 1910, and of other moneys to be paid under the said Acts and subject to the provisions thereof, I, Robert A. Renwick, deputy Minister of Lands, license Melville Tait to cut, fell, and carry away timber upon all that particular tract of land described in original licence No. 1812, Renewed by Nos. 3314, 5025, 6877, 12767, 25200, 420997, 5948, 14351.

The duration of this licence is for one year from the 11th Feb., 1912 renewable from year to year as provided by said subsection (3*a*) of section 57.

The licence does not authorize the entry upon an Indian reserve or settlement, and is issued and accepted subject to such prior rights or other persons as may exist by law and on the understanding that the government shall not be held responsible for or in connection with any conflict which may arise with other claimants of the same ground, and that under no circumstances will licence fees be refunded.

N.B.—This licence is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith.

ROBT. A. RENWICK,
Deputy Minister of Lands."

The lands in question on which the timber to be cut grows, belong to the said province of British Columbia by virtue of section 109 of the B.N.A. Act, 1867, which reads as follows:—

> 109. All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

Such is the result of the steps taken in 1871 by virtue of section 148 of said Act to constitute the union of said province with the other provinces of Canada under said Act.

The province of British Columbia may have had theretofore another title to said lands but whether higher or not need not concern us for the language just quoted seems to me for our present purpose to define as comprehensive and absolute an ownership as necessary to enable those duly empowered to act, and, acting on behalf of the province, to make whatever bargain they may deem proper.

Of course under our system of responsible government that power of bargaining is again limited by the declared will of the legislature of the province.

That legislature declared on the 15th April, 1902, its will by the following resolution:—

> That in all contracts, leases and concessions of whatsoever kind entered into, issued, or made by the government or on behalf of the government, provision be made that no Chinese or Japanese shall be employed in connection therewith.

That was followed in June, 1902, by an order in council which made the declaration that the said

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resolution was applicable to many kinds of contracts enumerated therein and of those, "special timber licences" such as that set forth above were named.

Hence the stipulation, contained in the said licence above quoted and now in question, was adopted by the executive of British Columbia's Government.

Its obligation binding respondent, the licensee, to the due observance thereof formed part of the consideration for the said licence.

The rights in question thereunder in any of the relevant yearly renewals are founded upon the contract of 1912.

Notwithstanding the last mentioned fact or any of those considerations arising out of the ownership of the lands in question and the right of an owner to deal with the lands belonging to him or it, as to such owner may seem fit, the respondent applied to the Supreme Court of British Columbia for an injunction against the appellants restraining them from taking any steps to cancel the said licence by reason of the non-observance of the above quoted provisions in said licence against the employment of Chinese or Japanese, and the same was granted accordingly.

The learned judge granting same seems to have done so, without any argument, and in the course of the opening statement by counsel for respondent, relying upon an opinion expressed by the Court of Appeal for British Columbia on the submission of a question to the said court under the "Constitutional Questions Determination Act" of the province.

In order to get here, on their way to the court above, as speedily as possible the parties concerned consented to an appeal here, direct from the judgment granting said injunction, to this court.

The reliance for said opinion of the Court of Appeal upon the case of *Union Colliery Co.* v. *Bryden* (1), seems to me, with great respect, to be misplaced.

The principle there involved was the right of mine owners to employ aliens or native Chinese or others despite the efforts of the government to regulate or prohibit the doing so. And it was held in said case to be *ultra vires* the powers of a provincial legislature to direct a general discrimination such as attempted and there in question.

This licensing of the right to cut timber on lands belonging to the province is entirely another question and depends on the right of an owner to impose limitations or conditions upon any grant made by virtue of such absolute ownership.

Surely the private owner of lands on which there is timber can, so long as owning it, refuse to employ either Chinese or Japanese or any other class he sees fit, to cut same and also impose the like terms by way of condition of enjoyment on any one claiming under him by way of licence, lease or chopping contract of any kind.

And I cannot see why the duly constituted authorities of a province empowered by the legislature to so act cannot do likewise.

Suppose for safety's sake the legislature directed the exclusion of men in the habit of smoking from being employed in any way relative to the cutting of timber, could said enactment be held *ultra vires?*

The question involved, of the right to do so or as involved herein is in principle much more like that involved in *Cunningham* v. *Tomey Homma* (2), than in the *Bryden Case* (1).

(1) [1899] A. C. 580.

(2) [1903] A. C. 151.

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There the discrimination was made as to the right to vote over which the local legislature had exclusive authority to give or to withold as it saw fit.

I do not think that power was any more sacred than the absolute right over property expressly defined as belonging to the province.

Again I am unable to understand upon what principle an injunction can be maintained to deprive one of the parties to a contract from asserting its rights thereunder, against the other thereby attempting to get rid of its obligation which formed an important part of the consideration inducing the contract.

Surely there can be no doubt that a contract which was founded upon the obligation to execute it by means of a restricted field of labour, cannot be held, economically speaking, to be the same contract, when the field of labour and cheap labour (as is sounded sometimes in our ears, open to receive common knowledge) is introduced to the advantage of the licensee.

That suggests another consideration, if provincial autonomy is to be disregarded, and it is that of the duty to administer its affairs in the most economical way possible and derive the best possible revenue from its timber resources.

That, however, is the business of the people of the province. And to take away from them the benefit thereof and bestow it upon someone else such as respondent does not seem to me a fair and equitable ground upon which to found an injunction such as in question herein.

And none of these considerations are met by the claim that the Act of the Dominion Parliament enforcing the Japanese treaty renders the contract illegal.

Assuming for a moment that it has such effect as contended by respondent, then it renders the consideration for such a contract illegal and hence the whole void.

How can such a contract founded upon an illegal consideration be held good in part and void as to that other?

I cannot think any injunction met by such objections can be maintained.

On the general principles relative to the foundation for such an injunction as granted below, I think there are so many errors, for the foregoing reasons, that it cannot be upheld and should be dissolved.

The decisions in the cases of *St. Catherines Milling Co.* v. *The Queen* (1); *Smylie* v. *The Queen* (2); and *Montreal Street Rly.* v. *City of Montreal* (3), seem to me in point in regard to some of the grounds I have taken.

And as to the enactment pretending to enforce the Japanese treaty, I do not find therein anything which necessarily involves the questions raised herein.

The only section of said treaty which has the slightest resemblance to anything that might bear upon what is herein involved is the third sub-section of Art. I thereof, which is as follows:—

> They shall in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation.

This certainly never was intended to deprive the owners of property, whether private citizens or provinces, of their inherent rights as such, much less to destroy a contract made before the Act in question.

(1) [1888] 14 App. Cas. 46. (2) [1900] 27 Ont. App. R. 172.
(3) [1906] A.C. 100

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Another observation must be made and it is that this injunction professes to deal with the Chinese as if upon the same footing as the Japanese, though the treaty is only one with Japan and does not touch the question of the employment of Chinese specified in the provision of the contract and in the requirements of the injunction.

What right exists to deal with the Chinese in this case? Yet, if the licence has become void or liable to be cancelled on any single ground, why should the appellants be enjoined from proceeding to do so?

I think this appeal should be allowed with costs throughout.

We heard the deputy Minister of Justice on behalf of his department, but, as I understood him, the Minister of Justice did not wish to intervene.

I may be permitted to suggest once more that all the fundamental facts presented herein do not seem to present a case for raising the neat point of how far, if at all, the Dominion Statute of 1913, known as the "Japanese Treaty Act," can be held to invade the rights of a province in its property or of its private citizens; that a provincial enactment similar to that in the R.S. Ont., C. 55, and its counterpart in section 67 of the "Supreme Court Act," could be made applicable to produce more satisfactory results than can be hoped for herein in the way of definite determination of what is desired.

DUFF J.—The respondents are the assignees of a special timber licence issued in the year 1912 under the provisions of the "Crown Lands Act" of British Columbia which, by the terms of it, was on specified conditions renewable from year to year for a period

which, it may be assumed for the purposes of this appeal, has not yet expired. One of the provisions of the licence is in these words:

> This licence is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith.

Admittedly this provision was not complied with and after some correspondence with the Attorney General proceedings were taken by the respondents in the Supreme Court of British Columbia claiming a declaration that they are entitled to employ Chinese and Japanese on the lands held by them under special timber licences; and Murphy J., before whom the proceedings came, held, following a previous judgment of the British Columbia Court of Appeal, that the stipulation was illegal and unenforceable and accordingly gave judgment against the Attorney General.

The general questions raised in the factums and on the argument have been fully discussed in the judgments on the reference in relation to the British Columbia Statute of 1921 (1), and these subjects require little further consideration on the present appeal; but the question now raised differs from that considered on the reference in this, that the Statute of 1921 does not, for the purpose of determining the actual rights of the parties in litigation, that is to say for the purpose of determining the rights of the respondents under their timber licence, come into play at all.

The provision which is the subject of discussion was inserted in the special timber licence in compliance with an order in council passed by the government of British Columbia in June, 1902, pursuant to a resolution of the legislature passed in April of the same year to the following effect:—

(1) 63 Can. S.C.R. 293.

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That in all contracts, leases, and concessions of whatsoever kind entered into, issued, or made by the government, or on behalf of the government, provision be made that no Chinese or Japanese shall be employed in connection therewith.

The order in council declared that the resolution applied to special timber licences granted under section 50 of the "Crown Lands Act," a class to which the respondents' licence admittedly belongs, and provided that a clause conforming to the instructions given by the resolution should be inserted in such instruments.

Section 50 of the Lands Act authorizes the Chief Commissioner of Lands and Works to grant special timber licences subject to

such conditions, regulations and instructions as may from time to time be established by the Lieutenant Governor in Council

and by an amendment adding a sub-section (3a) to section 57 of the Act passed in the year 1910 (sec. 6 of c. 28 of the statutes of that year) it was provided that such licences should be "renewable from year to year" so long as there should be an adequate quantity of merchantable timber upon the land

if the terms and conditions of the licence and provisions * * * and any regulation passed by Order in Council respecting or affecting the same have been complied with.

The licence itself in terms provided

the duration of the licence is for one year from the 11th February, 1912, renewable from year to year as provided by * * * sub.-sec. 3a of sec. 57

of the "Lands Act." The stipulation touching the employment of Chinese and Japanese is one of the terms and conditions of the licence within the meaning of the amendment of 1910 and it is also a provision of

the regulation established by order in council within the meaning of that amendment. The observance of this stipulation is, therefore, by virtue of the provisions of the statute as well as by virtue of the terms of the contract as expressed in the instrument evidencing the licence in any one year, a condition precedent to the right of a licensee to have his licence renewed for the following year.

It follows that the Commissioner of Crown Lands had no authority to renew the licence in February, 1921, unless performance of the condition precedent had been waived and the existence of the authority to waive such a statutory condition precedent may be open to doubt. However that may be, it is quite clear that performance of the condition during the year ending in February, 1922, has not been waived and the declaration claimed by the respondent is one which cannot properly be pronounced.

This requires perhaps a little elucidation. The rule of law is that a grant subject to a condition precedent which is (or becomes before the performance of it) illegal or impossible, conveys no interest, "no state or interest can grow thereupon" Coke on Littleton 206a; Comyn's Digest, Conditions, D3; differing in this respect from a condition subsequent which because the interest passes by the grant and is vested in the grantee is inoperative to devest that interest if it be impossible in fact or in law. The Act of 1913 giving the force of law to the Japanese treaty plainly did not make it an illegal thing to abstain from employing Japanese nor did it, I think, prohibit agreements between private persons to abstain from engaging the services of such persons; and it may, however, be a debatable question whether a provincial government in exacting, in the exercise of its discretion, a stipulation

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such as that under discussion, is doing anything repugnant to the covenants of the treaty which guarantee to Japanese subjects equality with other aliens in the eye of the law.

I shall assume however, conformably to the contention of the respondents, that the order in council of 1912 laying down a general rule amounting to a regulation established by the Lieutenant Governor in Council under section 50 of the "Lands Act" is an ordinance which could not remain in operation consistently with the due observance of the treaty stipulations; and that in this respect the legislation of 1913 operated upon existing as well as upon future grants. It does not follow that the respondents are entitled to the annual renewal of their licence. Even if, as the respondents contend, such is the effect of the legislation of 1913, still, on the principle above mentioned, which, I think, applies, the respondents' licence has already lapsed or must lapse at the end of the current year, that is to say on the 11th February, 1922; and the respondents' claim for a declaration in the terms of the writ must accordingly fail.

In the special circumstances of the case I think there should be no costs.

ANGLIN J.—Although appended as a note or annexed to the plaintiff's lease, the condition against the employment of Orientals I regard as one of its essential terms—as part of the consideration for which it was given.

The lessees sue for an injunction to restrain the lessors from cancelling the lease for non-observance of this condition, on the ground that it was illegal and therefore void.

If the condition was good, the plaintiffs have no grievance; if it was bad, the licence I think fails as a whole, with the result that the plaintiffs have no status as licencees.

On this ground, apart from other considerations, in my opinion this suit brought for an injunction against the Attorney General and the Minister of Lands for British Columbia cannot be maintained.

MIGNAULT J.—This is an appeal *per saltum* by consent from the judgment of the Supreme Court of British Columbia granting an injunction demanded by the respondent. The trial judge felt himself bound by a judgment of the Court of Appeal of that Province on a reference by the Lieutenant Governor in Council deciding that a clause in timber licences prohibiting the employment of Chinese and Japanese was *ultra vires*. It was therefore thought advisable to appeal direct to this court.

By the indorsement on the respondent's writ it is stated that it claims a declaration that it is entitled to employ Chinese and Japanese upon the hereditaments held by it under special timber licences containing this condition:—

> N.B. This licence is issued and accepted upon the understanding that no Chinese or Japanese shall be employed in connection therewith.

The respondent prayed for an injunction restraining the appellants from interfering with it in its enjoyment of its special timber licences upon the ground that, in the course of working its special timber licences, it had employed and was continuing to employ Chinese and Japanese as labourers.

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In my opinion, if the condition of the special timber licence prohibiting the employment of Chinese and Japanese is void as being *ultra vires*, the licence itself, granted on this express condition taken *ex hypothesi* to be bad, is itself void.

I would apply a familiar rule relating to contracts.

> Where there is one promise made upon several considerations, some of which are bad and some good, the promise would seem to be void, for you cannot say whether the legal or illegal portion of the consideration most affected the mind of the promissor and induced his promise.

(Anson, Law of Contract, 15th ed., p. 255).

The timber licence here was issued in consideration of $160.00 and of other monies to be paid under the provisions of the "Land Act," and it contained, undoubtedly as part of the consideration, the condition that I have cited.

If this condition be bad, the license is also bad; if it be valid, the respondent has no ground for complaint. In other words, the government granted and the respondent accepted the license upon the express understanding that no Chinese or Japanese should be employed in connection therewith. To treat this condition at if it had not been inserted in the licence, would be to substitute an unconditional licence for one which the Government granted conditionally. If the condition be bad, the licence itself, and not the mere condition must fail.,

I think that what I have said is supported by the *ratio decidendi* of the Judicial Committee in *Grand Trunk Pacific Ry. Co.* v. *Fort William Land Investment Co.* (1). There the Railway Committee had made an

(1) [1912] A.C. 224.

order subject to a condition which it was without jurisdiction to insert in the order, and their Lordships decided that

the order itself, and not the mere condition, must fail.

Here the demand of the respondent was clearly not maintainable, for, if, as it alleged, the condition of non-employment of Chinese and Japanese was illegal, the timber licence it had obtained was void, and if the condition was a valid one, its action was unfounded. Under these circumstances the constitutional question need not be discussed.

I would allow the appeal without costs and dismiss the respondent's action also without costs.

Appeal allowed without costs.

Solicitor for the appellants: *J. W. Dixie.*

Solicitor for the respondents: *A. Whealler.*