

1893 *Oct. 23, 24. <hr style="width: 50px; margin-left: 0;"/> 1894 *May 1. <hr style="width: 50px; margin-left: 0;"/>	HENRY BULMER, THE YOUNGER } (CLAIMANT) }	APPELLANT ;
AND		
1894 *May 1. <hr style="width: 50px; margin-left: 0;"/>	HER MAJESTY THE QUEEN (RES- } PONDENT..... }	RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown domain—Disputed territory—License to cut timber—Implied warranty of title—Breach of contract—Damages—Cross appeal—Supreme Court rules, 62 and 63.

The claimant applied to the Government of Canada for licenses to cut timber on ten timber berths situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground-rents and bonuses and make surveys and build a mill. The claimant knew of the dispute which was at the time open and public. He paid the rents and bonuses, made the surveys and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada at the time six leases or licenses were current, and consequently the Government could not renew them. The leases were granted under sections 49 and 50 of 46 Vic. ch. 17, and the regulations made under the act of 1879 provided that “ the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council.”

In a claim for damages by the licensee.

- Held*, 1. Orders in Council issued pursuant to 46 Vic. ch. 17, secs. 49 and 50 authorizing the Minister of the Interior to grant licenses to cut timber did not constitute contracts between the crown and proposed licensees, such orders in council being revocable by the crown until acted upon by the granting of licenses under them.
2. The right of renewal of the licenses was optional with the crown and the claimant was entitled to recover from the Government only the moneys paid to them for ground rents and bonuses.

*PRESENT :—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and King JJ.

The licenses which were granted and were actually current in 1884 and 1885 conferred upon the licensee "full right, power and license to take and keep exclusive possession of the said lands except as hereinafter mentioned for and during the period of one year from the 31st of December 1883 to the 31st December 1884, and no longer."

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Quære. Though this was in law a lease for one year of the lands comprised in the license, was the crown bound by any implied covenant to be read into the license for good right and title to make the lease and for quiet enjoyment?

A cross appeal will be disregarded by the court when rules 62 and 63 of the Supreme Court Rules have not been complied with.

APPEAL and CROSS APPEAL from the judgment of the Exchequer Court (1) on a claim for damages for the breach of several agreements by which damages to the extent of \$5,070.00 were awarded to the appellant.

The facts and pleadings and licenses and regulations in question issued under the Dominion Lands Act, 1883, as well as the material sections of the act are fully given in the report of the case in the Exchequer Court. (1)

No notice of any cross appeal was given on behalf of the respondent until the 7th of October, 1893, when respondent's solicitors gave notice of the intention of the respondent on the hearing of the appeal to contend by way of cross appeal that the judgment of the Exchequer Court should be set aside in so far as it awards to the appellant \$5,070.18. The time for depositing security by the appellant expired on 15th March, 1893, and security for the appeal was deposited and notice of hearing for the May sittings given on that day. The appeal was inscribed for hearing on the 27th March, 1893. The appeal was adjourned by consent until the October term 1893. Notice of hearing for the October term was given on 16th September last.

(1) 3 Ex. C.R. 184.

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In addition to the cases cited and relied on by counsel in the court below and in the judgment of the Exchequer Court (1). *McCarthy* Q.C. and *Ferguson* Q.C. for the appellant cited *Cooper v. Phibbs* (2); *Rolph v. Crouch* (3); *Foster v. Wheeler* (4); *Godwin v. Francis* (5); *Jenkins v. Jones* (6); *Bunny v. Hopkinson* (7); *Walker v. Moore* (8); *Sikes v. Wild* (9); *Eichholz v. Bannister* (10); *Raphael v. Burt* (11); *Brown v. Cockburn* (12); *McMullen v. Macdonell* (13); *Graham v. Heenan* (14); *Gilmour v. Buck* (15); *McArthur v. The Queen* (16); *Palmer v. Johnson* (17); *Canada Central Railway Co. v. The Queen* (18); *Beaumont v. Cramp* (19); *Kissock v. Jarvis* (20).

Robinson Q.C., and *Hogg* Q.C. for the respondent cited and relied on *Aspdin v. Austin* (21); *Dunn v. Sayles* (22); *Ellis v. Grubb* (23); *Ferguson v. Hill* (24); *Crosby v. Wadsworth* (25); *Carrington v. Roots* (26); *Scorell v. Boxall* (27); *Petch v. Tutin* (28).

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Exchequer Court, by which damages to the extent of \$5,070 were awarded to the appellant,

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| (1) See 3 Ex. C. R. 186 et seq. | (15) 24 U. C. C. P. 187-192. |
| (2) L. R. 2 H. L. 149. | (16) 10 O. R. 191, 194. |
| (3) L. R. 3 Ex. 44. | (17) 12 Q. B. D. 32. |
| (4) 36 Ch. D. 696. | (18) 20 Gr. 273. |
| (5) L. R. 5 C. P. 295, 305. | (19) 45 U. C. Q. B. 355. |
| (6) 9 Q. B. D. 128, 132. | (20) 9 U. C. C. P. 156. |
| (7) 27 Beav. 565. | (21) 5 Q. B. 671, 684. |
| (8) 10 B. & C. 420, 422. | (22) 5 Q. B. 685, 692. |
| (9) 1 B. & S. 587. | (23) 3 U. C. O. S. 611. |
| (10) 17 C. B. N. S. 708, 719. | (24) 11 U. C. Q. B. 530. |
| (11) <i>Cababe & Ellis</i> , 325. | (25) 6 East 610. |
| (12) 37 U. C. Q. B. 592, 597. | (26) 2 M. & W. 248. |
| (13) 27 U. C. Q. B. 36, 38. | (27) 1 Y. & J. 398. |
| (14) 20 U. C. C. P. 340, 342. | (28) 15 M. & W. 110. |

who now by this appeal seeks to have that amount largely increased.

The crown has also instituted a cross appeal insisting that the appellant was not entitled to recover any damages. The cross appeal, however, is not regularly before the court, the notice required by general orders 62 and 63 not having been given in due time, and we must therefore disregard it, and confine our decision to the principal appeal exclusively.

The facts of the case are stated in the judgment of the Exchequer Court which is reported in the 3rd volume of the Exchequer Reports (p. 184) and to the statement I refer.

I am of opinion that the appeal must be dismissed and that upon the ground that the claimant, if entitled to recover any damages, was certainly not entitled to recover more than the judgment he appeals against has given him. The orders in council authorizing the Minister of the Interior to grant the licenses to cut timber on the timber berths in question did not, on any principle which has been established by authority, or which I can discover, constitute contracts between the crown and the proposed licensees. These orders in council, as similar administrative orders in the case of sales of crown lands in the provinces of Ontario and Quebec have always been held to be, were revocable by the crown until acted upon by the granting of licenses under them. They embodied no agreement of which specific performance could be enforced. They were mere authorities by the Governor in Council to the minister upon which the latter was not bound to act, but might act in his discretion. This is apparent from the statutory enactment applicable to these orders in council and the licenses to be issued under them. I refer to sections

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The Governor in Council may, from time to time, order that leases of the right to cut timber on certain timber berths defined in the order shall be offered at public auction at an upset bonus fixed by the order and given to the person bidding in each case the highest bonus therefor, such bonus to be paid in cash at the time of sale. The Governor in Council may also authorize the lease of the right to cut timber on any timber berth to any person who is the sole applicant for it; the bonus to be paid by such applicant to be fixed in the order authorizing the lease to him, and to be paid in cash at the time of its issue.

None of the ten timber berths in respect of which this claim is made were put up to sale by auction, but were granted under the latter part of the section, or under subsection 2 which it is not material to set out. I am at a loss to conceive any language better adapted to indicate that the order of the Governor General in Council was a mere authority which might or might not be acted upon by the minister, and which the Governor General in Council might at any time recall before it was executed by a lease or license, than that in which these clauses are expressed. Upon this ground I must hold that there was no breach of contract in respect of the four berths or limits for which orders in council were issued but for which no leases or licenses were issued. It must, therefore, depend upon the construction and effect of the leases themselves whether there has been any breach of contract.

Upon this head it is contended in the first place that there was a binding legal obligation upon the crown to renew these leases from year to year and that there was a breach of this obligation in refusing to renew for the year 1886 the six leases or licenses which had been granted for the year 1885. I am of opinion that the appellant also fails to make good this

proposition. The leases were granted under section 50 of the act of 1883, which is in the following words:—

Leases of timber berths shall be for a term not exceeding one year, and the lessee of a timber berth shall not be held to have any claim whatever to a renewal of his lease unless such renewal is provided for in the order in council authorizing it, or embodied in the conditions of sale or tender as the case may be under which it was obtained.

There were no conditions of sale referring to any of these leases. The timber berths for which they were granted were not in any case put up to sale by auction. It does not appear that any tender embodying any proposals for a renewal was ever made by the appellant or those through whom he claims title.

No provision relating to renewal is to be found in the leases. These instruments on their faces state that they are issued under the authority of the act of 1883 and of the order of the Governor General in Council. The order in council recommends that the license be granted under the conditions of the regulations approved by order in council of the 8th March, 1883.

Although these regulations were actually not made under the act of 1883, but under the former act of 1879, they may be assumed to have been re-adopted by the Governor General in Council for the purposes of the later act. The only regulation which has any reference to renewal is the third, which provides that:—

When a licensee has fully complied with all the above conditions, and when no portion of the timber berth is required for settlement or other public purpose of which the Minister of the Interior is to be the judge, the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council.

Then, assuming this provision to be incorporated in the order in council and therefore by force of the statute to apply to the leases in question, I see nothing in it making it obligatory on the crown to grant re.

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newals. I construe the 50th clause of the act as meaning that renewals are to be governed by the terms of the orders in council authorizing leases. Then reading this regulation as though it had been embodied in the orders in council in pursuance of which these leases were granted, it confers no absolute right of renewal. It is in terms as clearly facultative and permissive as language could make it. The license it says "may" be renewed, provided the Minister of the Interior shall be satisfied the conditions have been complied with, and in the absence of certain other contingencies but upon such terms as to "annual rental and royalty to be paid therefor as may be fixed by the Governor General in Council." This, therefore, if we are to construe words according to their obvious meaning and not to wrest them from their natural signification in order to reach a construction unfavourable to the crown, means that the right of renewal is to be optional with the crown; to depend on the judgment of the Minister of the Interior in the first place; and the renewal, if there is to be one, is to be on such terms as the Governor General in Council prescribes and therefore necessarily in the discretion of the latter authority. Manifestly the object of this regulation is administrative and departmental only, intended as a guide and authority to the minister and departmental officers, and not for the purpose of creating any obligation on the part of the crown towards the licensee. This disposes of the appellant's claim to a breach of contract in respect of refusals to renew.

Next we have the claim that there was a constructive eviction and failure of title which constituted a breach of certain covenants or stipulations which, though not expressed, are by law to be implied in the licenses which were granted and were actually current in 1884 and 1885. This contention is founded

upon the clause in the license by which the Minister of the Interior confers upon the licensee "full right, power and license to take and keep exclusive possession of the said lands except as hereinafter mentioned for and during the period of one year from the 31st of December, 1883, to the 31st December, 1884, and no longer." This it is said, and no doubt correctly, is in law a lease for one year of the lands comprised in the license. From this it is argued that it follows that the same covenants for good right and title to make the lease and for quiet enjoyment are to be implied as in the case of an ordinary lease of land between subjects in which the operative word "demise" or its equivalent is used. This I at least doubt. No authority either way has been produced by the learned counsel who appeared for the appellant and addressed to the court an argument which indicated very careful preparation; nor have I after a very careful search been able to find any, upon the question whether the same implication of covenants is to be made in a lease by the crown as in that between subjects. In *Robertson v. The Queen* (1) I expressed the opinion that no covenant was implied in the fishery license in that case; that, however, was not a lease of land but a mere grant or license for a right of several fishery, and in the case of a grant of such a right no authority can be found for inferring a covenant. There is indeed a dictum of no less authority than Tindal C. J. the other way (2), who says that such an implication only arises in connection with a lease of land, and it has been decided that in a lease of personal property there is no such implication. In Bacon's abridgement, covenant B., it is said :

But if a man leases certain goods for years by indenture which are evicted within the term yet he shall not have a writ of covenant for the law does not create any covenant upon such personal thing.

(1) 6 Can. S.C.R. 52. (2) See *Hinde v. Gray*, 1 M. & G. at p. 204

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That, however, would not be conclusive here, for undoubtedly this license does contain a lease of the land for a year, though such a lease is of course merely subordinate and incidental to the principal object which the crown and the licensee both had in view, the cutting down and acquisition of the timber. It is, however, well established that all crown grants are to be construed most favourably for the crown, and this doctrine has been adopted in the United States where the same rule of construction is applied in favour of the government to exclude implications of terms not expressed and not involved as a necessary consequence of the words actually used. I refer on this point to the case of the *Mayor of Alleghany v. The Ohio & Pennsylvania Railroad Co.* (1), where it is said, referring to a grant by the commonwealth :

Nothing is to be taken by implication against the public except what necessarily flows from the nature and terms of the grant.

The tendency of modern decisions, moreover, is against the implication of provisions in a deed. I find that in a case decided after *Hart v. Windsor* (2), that of *Messent v. Reynolds* (3), Creswell J. expresses the opinion that these covenants are only to be implied in a lease when the word "demise" is used, but *Hart v. Windsor* (2), was not cited, and I must concede that the latter authorities, especially *Mostyn v. West Mostyn Coal Company* (4) are the other way. On the whole if I were compelled to decide this question of law, I should be inclined to hold that the crown was not bound by any implied covenant to be read into these licenses. It is, however, really not necessary to come to any conclusive opinion upon this point. By not presenting its cross appeal in due time the crown has lost the right to attack the judgment of the Exchequer. That judg-

(1) 26 Penn. 360.

(2) 12 M. & W. 68.

(3) 3 C. B. 203.

(4) 1 C. P. D. 145.

ment must therefore stand for the amount awarded by it to the claimant, and restricting his right to recover damages to the licenses actually existing and in force at the time of the constructive eviction, he would not be entitled to recover more than he actually paid for rentals and bonuses for that current year or for the years 1884 and 1885, an amount which would fall far short of that for which judgment has been rendered. As regards the measure of damages the authorities cited by the learned judge of the Court of Exchequer in his very able judgment demonstrate conclusively that this claimant, who applied for and took his licenses with his eyes open as regard the notorious uncertainty of the title which the Dominion Government claimed, could not recover more than the amount he had actually paid the crown.

I am of opinion that the appeal must be dismissed, and the cross appeal also ; the latter with costs.

The case is one of some hardship and for that reason I am disposed to give no costs to the crown, who, in my judgment ought not to have granted the licenses in question.

Appeal dismissed without costs.

Cross-appeal dismissed with costs.

Solicitor for appellant: *A. Ferguson.*

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

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