WESTBROOKE V. THE ATTORNEY-GENERAL

(1865), 11 Gr. 330
Upper Canada Court of Chancery, Mowat V.C., 1865

Grant from the Crown -Setting aside- False representations made to Government

A bill was filed alleging that by an act of the legislature the Grand River Navigation Company were empowered to take such land as might be necessary for the purposes of the act, subject to payment; and in case of dispute arbitrators were named to determine the amount; and compensation was in the same manner to be made for any Indian lands required for the undertaking. The bill alleged that the company having claimed, as being necessary for the purposes of the work, a tract of land, containing about ninety-one acres, and forming part of the village of Cayuga, which was then occupied and improved by several parties, an arbitration was had in respect thereof on the 30th of October, 1847, when an award was made directing the payment of £159 5s., for the right of the Indians therein, but that no notice was given to the occupiers of the land, now was anything further done in the matter until January, 1864, when the assignees of the company applied to the government for the absolute purchase of the land, untruly representing, as the bill alleged, that the company had gone into possession under the award, and were then in peaceable possession; that the only improvements made on the land were so made by squatters with knowledge of the company's right; and the applicants were thereupon allowed to purchase for the sum awarded, and interest, although in reality the land, by the improvements of the occupiers, was then worth ten times the amount. The bill prayed to set aside the patent as having been issued through fraud, error, improvidence and mistake: a demurrer by the patentees for want of equity was overruled.

Whether, although a person may have been entitled to a grant from the Crown, yet if, on his applying therefor, he knowingly makes grossly false representations to the government, the patent may not be set aside. -***Quaere***.

On the delivery of the judgment, as reported ante p. 264, upon the question of misjoinder, counsel for all parties desired that the court should treat the bill as if amended so as to remove that objection, and that judgment might be pronounced upon the demurrer for want of equity.

Mr. *Blake*, Q.C., for plaintiff.

Mr. *Roaf,* Q.C., contra.

MOWAT, V.C.- After I had given my opinion on the demurrers for misjoinder, the plaintiff's counsel asked leave to amend the bill so as to remove the objection for misjoinder; and, in anticipation of such amendment, both parties have expressed a desire that I should, without a new argument, give judgment on the other objections to the bill. This, therefore, I now proceed to do.

The bill states, in substance, (amongst other things,) that Her Majesty was and is seized of the lands in question, in fee, in trust for the benefit of the Six Nations Indians; that the defendants, *The Grand River Navigation Company,* were by Statute 2 William IV., chapter 22, empowered to take such land as might be necessary for the purposes of the act, and to contract with the owners and occupiers either for the absolute purchase of the land, or in respect of the claims to which such owners and occupiers should be entitled in consequence of the construction of the Company's works; that, in case of disagreement, arbitrators appointed by the act Were to determine disputes; that if any part of the navigable channel to be made by the Company should pass through the lands of the Indians, compensation should be made therefor to the Indians, in the same manner as in the case of other individuals; and that no land should be taken possession of until the purchase money was paid.

The bill further alleges that the Company claimed, or pretended to require, for the purpose of the navigation the land now in question; that on the 30th of October, 1847, it was pretended to be arbitrated upon, and an award was made directing the Company to pay to the Indian Department £159 5s., for the right of the Indians in ninety-one acres, and £16 for their right in the remaining eight acres, of such land; that the ninety-one acres embraced the larger portion of the village of Cayuga; that the plaintiffs, or those under whom they claim, had then considerable improvements on this property; that no notice of the arbitration was given to any of them, and that no account was taken by the arbitrators of their improvements; that it had theretofore been, and still is, the invariable law, usage, and custom of the Crown, in respect of lands held as these were, to give to

such settlers as the plaintiffs the pre-emptive right to the land so settled; and, in the event of the settlers refusing to purchase at the required price, to give them the reasonable value of their improvements, to be paid for by the person to whom the Crown should sell the land; that nothing was ever done by the Company towards adopting the award; that they did not pay the money awarded, or take possession of the property; that the land in question was unnecessary for the purposes contemplated by the act; that it rises almost precipitously to a very considerable height from the margin of the Grand River; that forty acres of it are covered with houses, gardens, and other improvements; that the value of the land as now improved is $16,000, and upwards; and that the plaintiffs, until very recently, were in ignorance that there had been an award, and had, in such ignorance, paid large pieces for the pre-emptive right to portions of the land, in reliance on the invariable usage of the Crown already mentioned.

The bill further alleges that the Company claimed, or pretended to require, for the purpose of the navigation the land now in question; that on the 30th of October, 1847, it was pretended to be arbitrated upon, and an award was made directing the Company to pay to the Indian Department £1595s., for the right of the Indian in ninety-one acres, and £16 for their right in the remaining eight acres, of such land; that the ninety-one acres embraced the larger portion of the village of Cayuga; that the plaintiffs, or those under whom they claim, had then considerable improvements on this property; that no notice of the arbitration was given to any of them, and that no account was taken by the arbitrators of their improvements; that it had theretofore been, and still is, the invariable law, usage, and custom of the Crown, in respect of lands held as these were, to give to such settlers as the plaintiffs the pre-emptive right to the land so settled; and, in the event of the settlers refusing to purchase at the required price, to give them the reasonable value of their improvements, to be paid for by the person to whom the Crown should sell the land; that nothing was ever done by the Company towards adopting the award; that they did not pay the money awarded, or take possession of the property; that the land in question was unnecessary for the purposes contemplated by the act; that it rises almost precipitously to a very considerable height from the margin of the Grand River; that forty acres of it are covered with houses, gardens, and other improvements; that the value of the land as now improved is $16,000, and upwards; and that the plaintiffs, until very recently, were in ignorance that there had been as award, and had, in such ignorance, paid large prices for the pre-emptive right to portions of the land, in reliance on the invariable usage of the Crown already mentioned.

The bill further alleges that the defendants, *The Corporation of Brantford*, claimed the land, as assignees of the same and of all the other property of the Company, by means of transactions which it is not material for me to detail; but the bill states, that the Corporation of the town, at the time such claim accrued, had full knowledge of all the circumstances I have mentioned.

The bill further alleges that having such knowledge, the Corporation of the town, as the representatives of the Company, applied to the Crown on the 13th of January, 1864, for the absolute purchase of the land, and offered to pay the amount which had been awarded by the arbitrators seventeen years before, with interest; that, on this application, the Corporation of the Town falsely represented that the Company had gone into possession of the property under the award, and were then in peaceable possession of it; falsely represented that the award was binding, and had always been complied with and treated as binding; falsely stated that the land was required for the purposes of the Company, and was such as the company was authorized to take and arbitrate on; and falsely represented that the only improvements on the property were made by some squatters who had entered after the making of the award, and with knowledge of the Company's title thereunder: that by means of these misrepresentation s the application of the Corporation was successful, and the Corporation was allowed to purchase at $1373.78, or about one-eleventh of the present improved value of the property; and that, had the facts been known to the Crown, the patent would not have been issued.

The bill prays that the patent may be cancelled or rescinded, as having been issued through fraud, error, improvidence, and mistake.

This is the substance of the bill, omitting such only of its statements as it is not material to repeat for the disposal of the demurrer.

Mr. *Roaf*, for the demurrer, argued that the Company had a statutory right to the patent, and that the case, therefore, essentially differed from these cases which had been litigated hitherto, and in which the Crown had a discretion to grant a patent or not. This argument would apply in answer to an information by the Attorney-General, as well as to a bill by any of the present plaintiffs.

Did any such statutory right to the patent exist?

I can discover no ground for affirming the existence of such a right.

There is certainly no ground for doing so in those portions of the Company's act which are set forth in the bill; nor, I think, is there any such ground in any of the enactments which the bill does not set forth.

The statute, in fact, contains no provisions whatever for the Company's obtaining either a patent for Indian lands, or a conveyance of the lands of private proprietors; and the powers which statutes of this kind give must be construed strictly. *Everfield* v. *Mid Sussex Railway. (a)* The Company were empowered to set out and ascertain the lands they required; to arbitrate in respect of their value, and to take possession of them and use them after they had been paid for. So far as related to the use of such lands for the purposes of the Company, no patents and no deeds see, to have been necessary. *Bruce* v. *Willis. (b)* After payment the lands were the Company's for the purposes of the act. Before payment, I think the Company was in the position of a purchaser who had not completed his purchase. If, on payment, this Company had a right to a conveyance from the owners, then, in the case of lands theretofore granted by the Crown to individuals, that right would have been enforcible in this court; and I think a delay of seventeen years after an award would, under the circumstances, be a complete bar to a suit for the purpose. It is out of the question to suppose that this company, or any company with like powers, could lie by for seventeen years after taking the steps necessary to ascertain the amount to be paid; could find it quite practicable to do without the land all that time; and could, after the land had enormously increased in value by improvements and otherwise, demand a conveyance of it, as a matter of course, at the original price, with simple interest. I think such a case would not be arguable in a court of equity.

If this court would refuse to enforce such a claim in the case of a private owner, I think it clear that in the case of Indian land the Crown was at perfect liberty to refuse an application for a patent, assuming the facts to be as stated in the bill.

Indeed, not only was the Crown at liberty to refuse such an application; not only would the refusal be the violation of no legal right of the Company; but, were the facts known to be as the bill alleges, the Crown would probably have considered it a plain and obvious duty to take that course in the interest of the Indians-not to speak of the interest of those persons whom, according to the bill, the company had allowed for seventeen years to remain in possession of the property, improving it, and dealing with it, in ignorance of the award and of the Company's claim, and in reliance on what is alleged to be an invariable custom of the Crown, securing to persons, situated as they were, the value of their improvements, and the option of buying the property whenever it should be put into the market.

But the Corporation of the Town, in desiring a patent, desired something more than, I think, the statute gave the Company a right to; and this being so, I see no reason to doubt that, even putting aside the lapse of time, the Crown had from the first a perfect right to decline issuing a patent, if the Crown saw that the land was not required for the purposes of he act; or that the price awarded or offered was inadequate; or that persons were in possession who had equitable claims which the Crown had, in all other cases, respected; or that, for any other reason, the application, if acceded to, would work injustice or hardship to others. In short, I see no reason to doubt that the Crown might, with perfect propriety, have declined to move at all, or except on such terms as, under the circumstances, might seem just and reasonable.

I think therefore, that there was a discretion in the Crown to refuse the application; that the case is not distinguishable in that respect from the cases in which the relief prayed for by the bill has been granted by this court; and that, if it is true, as the bill alleges, that the demurring defendants by false representations, prevented the Crown from exercising that discretion, the patent ought to be cancelled by this Court.

To prevent misconception, I ought to add that if these defendants had made out a statutory right to obtain a patent on paying the sum offered, I am not prepared at present to say that they were justified, in point of law, in obtaining their legal right by the aid of false representation to the Crown. I am not prepared to hold that even when a person is really entitled to a grant from the Crown, he may safely make any representations, or commit any frauds, however gross, that may facilitate his obtaining it; and yet, this is what I must hold, if I am to yield to the argument which was addressed to me on the part of the defendants.

The learned counsel for the defendants further urged that the plaintiffs, as occupiers of Indian lands, had not, under the circumstances set forth in the bill, that right to file a bill of this kind,

which the unauthorized occupiers of other Crown lands possess; and that the only remedy is by information in the name of the Attorney-General. But after referring to the enactments which were relied on, and to the allegations of the bill, I have failed to satisfy myself that there is any solid foundation for the distinction contended for.

On the authority, therefore, of *Martin* v. *Kennedy*, (a) and of the other cases which have followed that case, I am of opinion that, assuming the objection for misjoinder to be removed or withdrawn, a demurrer to this bill is not sustainable.