BETWEEN

1922
January 14.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA ..... PLAINTIFF;

AND

THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND AND THE PARTS ADJACENT IN AMERICA, COMMONLY CALLED THE NEW ENGLAND COMPANY; AND EDMUND SWEET, TRUSTEE UNDER THE LAST WILL OF THE REVEREND ABRAHAM NELLES, DECEASED ..... DEFENDANTS.

Crown lands—License of occupation—12 Vict. (Prov. Can.) c. 9, sec. 1—16 Vict. (Prov. Can.) c. 159, sec. 6—Interpretation—Powers of commissioner of Crown lands exercised by Governor General—Validity.

By 12 Vict. (Prov. Can.) c. 9, sec. 1 and 16 Vict. (Prov. Can.) c. 159, sec. 6, the Commissioner of Crown Lands was empowered to issue, under his hand and seal, a license of occupation to any person wishing to purchase and become a settler on any public land, such settler upon the fulfilment of the terms and conditions of the license to be entitled to a deed in fee of the land. By sec. 15 of the last mentioned Act the Governor in Council was authorized to extend the provisions of this Act to the Indian lands under the management of the Chief Superintendent of Indian Affairs and when such lands were so declared to be under the operation of the Act, the Chief Superintendent was entitled to exercise the same

1922

THE KING v. THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND AND THE PARTS ADJACENT IN AMERICA, COMMONLY CALLED THE NEW ENGLAND COMPANY AND SWEET.

powers as the Commissioner of Crown lands had in respect of the Crown lands. The Governor General, on the 7th April, 1859, purported to grant a license of occupation in respect of certain Crown lands to N. "for and on behalf of" the defendant company, under his hand and seal at arms.

Held, that inasmuch as the license in question was granted by the Governor General under his hand and seal at arms instead of by the Commissioner of Crown lands, such license did not comply with the provisions of the statutes in that behalf, and was therefore invalid and conveyed no legal right or interest in the lands to the defendant company.

INFORMATION of Intrusion exhibited by the Attorney-General of Canada seeking to recover possession of lands granted to the defendants under License of Occupation.

December 20th, 1921.

Case now heard before the Honourable Mr. Justice Audette, at Ottawa.

R. V. Sinclair K.C. and *A. G. Chisholm, K.C.*, for plaintiff.

W. S. Brewster, K.C., for The New England Company.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 14th January, 1922) delivered judgment.

This is an Information of Intrusion exhibited by the Attorney-General of Canada, whereby the Crown, *inter alia*, seeks to recover possession of the lands mentioned in the said information, and which have been in the possession of the defendants for upwards of sixty years, under the *license of occupation* hereinafter referred to.

Counsel at bar waived and abandoned the claim of $10,000 for issues and profits from the 7th April, 1859, and further declared and expressed their willingness that the defendants be at liberty to remove, at their expense, all buildings erected upon the said premises.

In consideration of the yeoman services rendered to Great Britain by the Six Nations Indians during the war of the Revolution, the British Crown felt, when the war was over and when these Indians had thereby been thus deprived of the lands of their habitat—in what is now the United States—that these loyalists (so to speak) Indians should be given some lands within the Canadian territory and six miles on each side of the Grand River was granted them, after having obtained a surrender of the same by the Mississagua Indians.

On the question of title it suffices to say that the origin of the same goes as far back as 1784 and 1792 and that the title—the *license of occupation*—of part of the lands above mentioned upon which the whole case turns, bears date the 7th April, 1859—long before Confederation.

The whole case rests upon the validity of this *License of Occupation*, and it is found unnecessary to go beyond the date of the same for the disposal of the present issues under controversy and as set out in the pleadings—and if I were—a consideration which would carry us far afield—I would again be led to find in favour of the plaintiff under the titles produced and filed.

This license reads as follows, namely:

"Province of Canada.

"By His Excellency the Right Honourable Sir Edmund Walker Head, Baronet, one of Her Majesty's Most Honourable Privy Council, Governor of British North America and Captain General and Governor

1922

THE KING v. THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND AND THE PARTS ADJACENT IN AMERICA, COMMONLY CALLED THE NEW ENGLAND COMPANY AND SWEET.

Reasons for Judgment.

Audette J.

in Chief in and over the Provinces of Canada, Nova Scotia, New Brunswick, and the Island of Prince Edward and Vice Admiral of the same, etc., etc., etc.

"To all to whom the presents shall come. Greeting.

"Know ye that I have granted and do hereby grant unto the Reverend Abraham Nelles, of the town of Brantford in the County of Brant, for and on behalf of the New England Company for all that parcel of land . . ." Here comes the description of the premises and then the habendum clause which reads as follows:

"The said license of occupation being granted on the express condition that the New England Company shall hold possession of the same so long as they keep up Manual Labour School for the use of the Six Nations Indians, and no longer.

"Given under my hand and seal at arms at Toronto, this seventh day of April, in the year of Our Lord one thousand eight hundred and fifty-nine and in the twenty-second year of Her Majesty's Reign."

By Command.

(Sgd.) Edmund Head.

(Sgd.) C. Alleyn.

Secretary.

The defendant Sweet, trustee under the last will of the Reverend Abraham Nelles—in the said license mentioned—having filed no defence to the Information, judgment by default was entered against him on the 15th March, 1921.

Under the provisions 12 Vict., ch. 9, sec. 1 (1849) and 16 Vict. ch. 159, ss. 6, 15 (1853) (1) it is, among

(1) *Reporter's Note:*—By sec. 15 of the last mentioned Act the Governor in Council was authorized to extend the provisions of the Act to the Indian lands under the management of the Chief Superintendent of Indian Affairs; and when such lands were so declared to be under the operation of the Act the Chief Superintendent was entitled to exercise the same powers as the Commissioner of Crown Lands had in respect of the Crown lands.

other things, enacted that a license of occupation shall be issued by the Commissioner of Crown lands. Therefore, the issue of a license by the Governor General "under his hand and seal at arms" is in direct contravention to the statute and it must therefore be found that the license was *ab initio* invalid and that nothing passed thereunder. This license of occupation, which the Governor General assumed to issue under his seal at arms could not, in violation of the statute, constitute a legal and binding document. *Doe ex Dem. Jackson* v. *Wilkes* (1); *Doe Dem. Sheldon* v. *Ramsay et al* (2); *The Queen* v. *Clarke* (3).

By this license of occupation the lands in question, as was contended at bar, became practically tied up in perpetuity and it being found to be detrimental to the Indians, the present information of intrusion has been resorted to with the object of using these lands to a better advantage for the Indians. *The Queen* v. *Hughes* (4).

On the other hand during the whole period that the defendants have been in occupation, that is for over 60 years, there is not a tittle of evidence establishing they ever failed to discharge their part of the obligation arising out of the license.

Have not, however, the Indians the right to represent to their trustees that their land could be used to better advantage to them? Should a trustee be allowed to tie up lands for an indefinite period to the detriment of the *cestui que trust* when the law would afford a remedy to cure such detriment?

It would seem that land vested in the Crown can only be dealt with either by a patent under Great seal or under statutory authority.

(1) 4 Up. C.Q.B. 142, 149, 150.
(2) 9 Up. C.Q.B. 105.
(3) 7 Moore P.C. 77.
(4) L.R. 1 P.C. 81.

1922

THE KING v. THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND AND THE PARTS ADJACENT IN AMERICA, COMMONLY CALLED THE NEW ENGLAND COMPANY AND SWEET.

Reasons for Judgment.

Audette J.

There will be judgment ordering and adjudging that nothing passed under the said license of occupation and that the plaintiff recover possession of the lands in question.

No costs are asked by the prayer of this information and this is, however, a case where there should be no costs to either party.

It having appeared at trial that some of the lands covered by the license of occupation had been since its issue, about 63 years ago, disposed of and sold under expropriation for railway purposes or otherwise, the judgment will apply only to such part now in the hands of the defendants. If the parties fail to agree as to the metes and bounds of the said lands, leave is hereby reserved to either party to apply, upon notice, for further direction in respect of the same.

The judgment by default obtained against the trustee Sweet will go no further than the condemnation against the defendant company.

The defendants are furthermore at liberty, at their expense, to remove from the premises in question all buildings thereon erected.

Solicitor for plaintiff: *A. G. Chisholm, K.C.*

Solicitors for defendant, The New England Company: *Brewster & Heyd.*