1930
*Nov. 4.
*Dec. 15.

FRANCIS N. EASTERBROOK (DEFENDANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Indian lands—Lease to private person from Indian chiefs—Action by Crown for possession, against occupant claiming under lessee's title—Invalidity of lease—Claim by occupant to compensation for improvements—Claim by Crown to payment for occupation after demand for possession.

By a document dated March 10, 1821, "the British Indian Chiefs of St. Regis," "for themselves and on behalf of their tribe (whom they represent)" purported to lease to C., his heirs and assigns, certain land (part of Crown land reserved for the Indians, and not ceded or surrendered to the Crown by the Indians) on Cornwall Island in the river St. Lawrence, for 99 years, "and at the expiration thereof for another and further like period of 99 years and so on until the full end and term of 999 years shall be fully ended and completed." The Chiefs covenanted "that they are the representatives of the said tribe of St. Regis as well as trustees of their estate and as such that they have a perfect right" to make the lease. The consideration was $100 cash and a yearly rent of $10. C. entered into possession on March 10, 1821, and possession was continued in successive assignees, and it was admitted in this action that defendant was in possession as assignee of whatever rights C. had under the lease. The rent was paid yearly to March 10, 1920, when the Crown refused to accept further rents. From about 1875 the rent was paid to the Department of Indian Affairs, for the benefit of the Indians. The lease was registered at the Department of Indian Affairs in 1875. There was in evidence a letter of February 26, 1875, from an official of the Department to one B., an Indian, (in reply to a letter from B., not produced) in terms apparently recognizing rights of C. under the lease. The Crown notified defendant to give up possession at the expiration (March 10, 1920) of the term of 99 years; and, defendant not complying, it took proceedings to recover possession of the land, as ungranted Crown lands reserved for the Indians.

Held (1) The Crown was entitled to possession. The lease was invalid in law; the chiefs had no power to make it (*St. Catherines Milling & Lumber Co.* v. *The Queen*, 14 App. Cas. 46); and the taking of it violated the Proclamation of 1763 respecting Indians and Indian lands, and subsequent enactments (Reference to Order in Council of Lieutenant-Governor of Upper Canada of November 10, 1802, in evidence; to C.S.U.C., 1859, c. 81, ss. 21 *et seq.*; and to the *Indian Act*, R.S.C., 1886, c. 43, ss. 38-41, and subsequent revisions). The receipt of rent

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Cannon JJ.

at the Department could not serve to validate the lease; nor had anything done created any obligation on the Crown to recognize the right to possession claimed by defendant.

(2) The defendant was not entitled to compensation for improvements. There was no statutory liability on the Crown; and defendant had not established any act or representation for which the Crown was responsible whereby he was misled to believe that he had a title which could be vindicated in competition with that of the Crown, or whereby the Crown had incurred any equitable obligation to recognize a right to compensation; defendant and his predecessors knew that there had been no surrender, and that they had no grant from the Crown; and all the circumstances justified the conclusion that they were not, at any time, in ignorance of the infirmity of their title. (*Ramsden* v. *Dyson*, L.R. 1 E. & I. Ap., 129, at 168, cited).

(3) The finding in the Exchequer Court that the Crown should recover $400 per annum for defendant's use and occupation from March 10, 1920, should, on the evidence as to value, be sustained.

Judgment of the Exchequer Court (Audette J.), [1929] Ex. C.R. 28, affirmed.

APPEAL by the defendant from the judgment of Audette J. in the Exchequer Court of Canada (1) holding: that the lease in question, bearing date March 10, 1821, between the British Indian Chiefs of St. Regis and one Chesley (under which the defendant claimed title) was null and void *ab initio;* that the Crown (plaintiff) was entitled to recover possession forthwith from the defendant of the land in question, with the appurtenances; that the Crown recover from the defendant, for the use and occupation of the land and appurtenances by him, the sum of $400 per annum, to be computed from March 10, 1920, until the delivery of possession by him to the Crown; and that defendant's claim for compensation for improvements made, by him or his predecessors in occupation, upon the land, be dismissed.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

G. I. Gogo K.C. for the appellant.
W. C. McCarthy for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The Attorney-General of Canada, by Information filed in the Exchequer Court of Canada, seeks to recover, as ungranted Crown lands reserved for the In-

(1) [1929] Ex. C.R. 28.

1930

EASTERBROOK v. THE KING.

Newcombe J.

dians, the possession of the lands hereinafter described, situate on Cornwall Island, in the River St. Lawrence, opposite the town of Cornwall. The island is said to be five miles long; to average in width three-quarters of a mile, and to comprise 3,500 acres. There is in proof a report of Mr. Davidson, an Indian Agent, dated 3rd June, 1878, wherein it is stated that this island is exclusively occupied by Indians, except the Chesley farm (the subject of this action), containing about 200 acres, and that there are thirty-seven houses on the island, inhabited by about forty families. It is shewn elsewhere that the farm extends across the island from one side to the other, thus dividing into two sections the lands which remain in the possession of the Indians. The dichotomy is explained by the circumstances in which the claim has its origin.

There is in evidence a document, dated 10th March, 1821, executed at Cornwall

by and between the British Indian Chiefs of St. Regis, in the Province of Lower Canada, of the first part and Solomon Youmans Chesley, of the said Town of Cornwall, gentleman, of the second part;

Whereby the said Indian Chiefs, for themselves and on behalf of their tribe (whom they represent) for and in consideration of the sum of One Hundred Dollars to them in hand paid by the said Soloman Youmans Chesley, before the signing, sealing and delivering of these presents as well as the rents and covenants hereinafter mentioned do by these presents lease, convey and to farm let unto the said Solomon Y. Chesley, his heirs and assigns all and singular that certain parcel of land and premises situated on Cornwall Island in the River St. Lawrence and being composed of that portion of it which lies immediately south and in front of the said Town of Cornwall containing by admeasurement one hundred and ninety-six acres more or less which piece or parcel of land and tenement is butted and bounded as follows, viz:—Commencing at the water's edge on the north side of said Cornwall Island nearly opposite to the Court House in said Town and at the mouth of a ravine or gully immediately below Nett Point where a white ash post is planted and running south ten degrees east fifty-two chains more or less across said Island to the south bank thereof, thence following the water's edge downwards a distance at a right angle from the base line of forty-five chains to a white oak post, thence northward on a line parallel to said base line across said Island to the water's edge on the north side thereof, thence following the water's edge upward or against the current to the place of beginning. To have and to hold the said land and premises with all and singular its appurtenances unto him the said Solomon Y. Chesley, his heirs and assigns for and during the full end and term of ninety-nine years to be fully ended and completed and at the expiration thereof for another and further like period of ninety-nine years and so on until the full end and term of nine hundred and ninety-nine years shall be fully ended and completed. He, the said Solomon Y. Chesley, his heirs and assigns yielding and paying therefor to the said Chiefs of St. Regis and their successors yearly and every year on the tenth day of February, the

sum or rent of ten dollars of lawful money of Canada, and the said Chiefs do hereby covenant with the said Solomon Y. Chesley, his heirs and assigns, that they are the representatives of the said tribe of St. Regis as well as trustees of their estate and as such that they have a perfect right to make, execute and deliver this lease in good faith upon the terms and conditions herein already expressed.

And there are covenants on the part of Mr. Chesley with the Indian Chiefs, expressed as follows:

And the said Solomon Youmans Chesley, for himself, his heirs and assigns doth hereby covenant and agree to and with the said Indian Chiefs of St. Regis and with their successors in manner and form following, that is to say: that he the said Solomon Y. Chesley being put into peaceable and quiet possession of aforesaid described lands and premises shall and will on the tenth day of February, one thousand eight hundred and twenty-two, pay unto the said Indian Chiefs or their successors, the sum or rent of ten dollars, at the Town of Cornwall aforesaid and in like manner, so long as he the said Solomon Y. Chesley, his heirs and assigns shall be kept and assured in peaceable and undisturbed possession of said lands and premises, so long as he, his heirs and assigns continue to pay the said annual sum at rent of ten dollars on the tenth day of February in each succeeding year to the end and term of nine hundred and ninety-nine years.

And further that should he the said Solomon Y. Chesley, his heirs and assigns allow the said rent of ten dollars to remain unpaid by the space of one month after the same shall have been due in any year to come and after the same may have been legally demanded, he and they shall renounce the said land and premises and return the same to the said Indian Chiefs or their successors.

The original document is not produced upon this appeal; but it purports, so it is said, to be executed under seal, on behalf of the parties of the first part, by nine individuals, said to be Indian Chiefs, and by Mr. Chesley, the party of the second part. There is no evidence whatever as to what were the powers or authority of the British Indian Chiefs of St. Regis, but it is admitted that the premises, being Crown Lands, had not been ceded or surrendered to the Crown by the Indians; and, therefore, as a matter of law, the Chiefs could not dispose of the reserve or any part of it, or of any estate therein. *St. Catherines Milling and Lumber Company* v. *The Queen* (1). And there is an additional reason in this case why the alleged lease, in the absence of proof to the contrary, should be regarded as invalid, seeing that the Chiefs, whatever powers they may have possessed during their tenure of office, profess to grant an estate in the land, to commence at a time ninety-nine years after the date of the instrument. It is very carefully stated that the term is to endure for

(1) (1888) 14 App. Cas. 46.

1930

EASTERBROOK v. THE KING.

Newcombe J.

ninety-nine years to be fully ended and completed and at the expiration thereof for another and further like period of ninety-nine years and so on until the full end and term of nine hundred and ninety-nine years shall be ended and completed.

Strong J., who certainly did not speak without information as to the facts, tells us in his dissenting judgment in the *St. Catherines Milling* case (1), that

the control of the Indians and of the lands occupied by the Indians had, until a comparatively recent period, been retained in the hands of the Imperial Government; for some fifteen years after local self government had been accorded to the Province of Canada the management of Indian Affairs remained in the hands of an Imperial officer, subject only to the personal direction of the Governor General, and entirely independent of the local government, and it was only about the year 1855, during the administration of Sir Edmund Head and after the new system of Government had been successfully established, that the direction of Indian affairs was handed over to the Executive authorities of the late Province of Canada.

There is no evidence that either the Imperial Superintendent of Indian Affairs or the local government was, at the time, consulted or became in anywise party to or concerned in, or even informed as to the transaction of 1821 between the Chiefs and Mr. Chesley, which certainly was brought about in breach of the prohibition expressed, and repeated more than once by the proclamation of 1763, as essential to the interest of the British Crown and the security of its colonies. The governors and commanders-in-chief in America are forbidden to grant warrants of survey, or to pass any patents upon any lands whatever which, not having been ceded to or purchased by the Crown, are reserved to the Indians, or any of them; and all British subjects are strictly forbidden, on pain of the royal displeasure, from making any purchases or settlements whatsoever, or taking possession of any of the lands above reserved (which include the lands now in question), without our special leave and licence for that purpose first obtained.

Also, it is provided that:

And We do further strictly enjoin and require all persons whatsoever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

Moreover the policy of the Crown is further emphasized by the following injunction:

And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of Our interests

(1) (1887) 13 Can. S.C.R. 577, at 614.

and to the great dissatisfaction of the said Indians; in order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of Our Justice and determined resolution to remove all reasonable cause of discontent, We do, with the advice of Our Privy Council, strictly enjoin and require that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of Our colonies where We have thought proper to allow settlement; but that, if at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for Us, in Our name, at some public meeting or assembly of the said Indians, to be held for that purpose by the Governor or Commander-in-Chief of Our colony respectively, within which they shall lie.

These provisions have persisted, both under British and Colonial administration; and there is in evidence an Order in Council of the Lieutenant-Governor of Upper Canada, dated 10th November, 1802, and certified for publication, which comes out of the custody of the Dominion Archives, and reads as follows:

His Excellency the Lieutenant-Governor in Council hereby gives notice, to all whom it may concern, That no leases which have been, or shall be Granted, or pretended to be Granted, by or under the authority of any Indian Nation, will be admitted or allowed—And this Public Notice is given in order that No person may pretend ignorance of the same.

See the clauses relating to Indian lands in the Consolidated Statutes of Upper Canada, 1859, chap. 81, secs. 21 *et seq.;* also the *Indian Act* as enacted by the Dominion, R.S.C., 1886, chap. 43, secs. 38-41 inclusive, and in the subsequent revisions.

Looking at the provisions of the lease itself, which have been fully quoted above, it is difficult to avoid a reasonable inference that Mr. Chesley was fully aware of the precarious nature of the estates evidenced by the instrument of 10th March, 1821. It will be perceived that he paid the chiefs $100 in hand; and, beyond that, the consideration on his part for the valuable concession which he stipulated for consists only of the annual rent of $10. It is not suggested that there was any meeting of the band to authorize or approve the grant; and Mr. Chesley's security, *quantum valeat,* consists in the covenant of the chiefs, "that they are the representatives of the said tribe of St. Regis as well as trustees of their estate and as such that they have a perfect right to make, execute and deliver this lease in good faith upon the terms and conditions herein already expressed." Mr. Chesley, upon his part, covenants for payment of the rent to the chiefs at Cornwall "so long as he

1930

EASTERBROOK v. THE KING.

Newcombe J.

the said Solomon Y. Chesley, his heirs and assigns shall be kept and assured in peaceable and undisturbed possession of said lands and premises"; and, finally, it is provided that if he, Mr. Chesley, his heirs and assigns, "allow the said rent of ten dollars to remain unpaid by the space of one month after the same shall have been due in any year to come and after the same may have been legally demanded, he and they shall renounce the said land and premises and return the same to the said Indian Chiefs or their successors."

It would seem not improbable that the lease first came to the knowledge of the Department of Indian Affairs when, on 18th February, 1875, Mitchell Benedict, an Indian of the St. Regis settlement, wrote to the Superintendent General, or the Deputy Superintendent General, presumably making enquiries about the validity of Mr. Chesley's title. Immediately following this letter, on 24th February, 1875, the lease was registered at the Department, as certified by the initials of Mr. Van Koughnet, the Assistant Superintendent General; and a letter was written to Benedict on 26th *idem,* signed, as I infer, by Mr. Van Koughnet, and saying:

> I have to state in reply to your letter of the 18th inst., that the lease to Mr. Chesley of 196 acres of land on Cornwall Island in the St. Lawrence River is dated March 10th, 1821, and is for 99 years, renewable at the end of each such period until the full term of 999 years has expired on payment of the annual rental of $10.00. Mr. Chesley has complied with the terms of his lease, and has a right to sublet the land as he has been in the habit of doing for years.

A memorandum, written by Mr. Chesley, is also introduced by the defendant, which reads as follows:

> In reply to a letter from Mitchell Benedict an Indian of Cornwall Island addressed to the Indian Department under date the 18th February, 1875, enquiring whether the ownership and possession of a farm on Cornwall Island by Solomon Y. Chesley was known to me and recognized by the said Department. A letter was addressed to the said Benedict by direction of Mr. Laird the Superintendent General, under date the 24th February, 1875, stating that Mr. Chesley held a lease for 196 acres of land on Cornwall Island dated 10th March, 1821, to run 999 years from date at a rental of $10 per annum. That Mr. Chesley having fulfilled his engagements under said Lease he had a right to said land and to sublet same as heretofore.
>
> The said lease is registered in the Book of the office of the Indian Department on the 24th February, 1875, as appears indorsed on the back thereof. Certified by the initials of Lawrence Van Koughnet, Asst. Supt. Genl.

But there seems to be some confusion about the minutes relating to this subject, because it is stated by counsel for the defendant, and admitted by counsel for the Crown, that

> the endorsement upon our original lease at Cornwall shows that the late Mr. Van Koughnet made a memorandum on the back of the lease that it was originally in the Department on the 24th September, 1875.

It is admitted, in the following terms, that Mr. Chesley entered into possession on or about 10th March, 1821, and that

> the present defendant is in possession as assignee of whatever rights Solomon Y. Chesley had under that original lease. There is a chain of assignments but they admit that they have been in possession.

Then, immediately following,

> The Crown admits that during that period rents were paid by the occupant and received by the Crown, or the Department of Indian Affairs, for the benefit of the Indians.

And this, as I interpret it, is intended to mean that during the period of the defendant's possession, the rent, instead of being paid directly to the Indian Chiefs, as it was at the beginning, was paid to the Department for the benefit of the Indians, although there is evidence in another place that the first payment of rent to the Department was made in 1877, three years before the defendant was born.

The defendant continued to pay the rent until the expiry of the term of ninety-nine years provided for by the lease; and there are Admissions:

> That all rents provided by the lease in question herein have been paid by the original lessee and successive occupants to 10th March, 1920, since which time the Respondent (the Crown) has refused to accept further rents.
>
> That the Respondent served Appellant with Notice to Quit and demand for possession in due time prior to the expiration of the first 99 year period of the lease in question herein.
>
> That the Appellant has remained in possession of the lands described in said lease since the 10th March, 1920, and is still in possession of same.
>
> That the Appellant is the successor in title to such rights as the original lessee from the Indian Chiefs may have had and has been in continuous possession thereof since on or about the 28th October, 1904.

The facts are not set out or introduced in a very orderly fashion and the reader is left in some perplexity to ascertain precisely the order of events and what the truth is; but nevertheless, it seems to be clear enough that although the lease was ineffective and void at law, by reason of the absence of any authority on the part of the grantors to make it, and for non-compliance with the peremptory requirements of the proclamation, which have the force of

1930

EASTERBROOK v. THE KING.

Newcombe J.

statute, an officer of the Department, constituted after the union of the provinces in 1867 for the administration of Indian Affairs, registered the lease, not earlier than 1875; and, from that time until the expiration in 1920 of the demised term of ninety-nine years, received, for the Indians, the annual rent of $10, as it accrued from year to year. But the Department then ceased to tolerate the defendant's possession and gave notice to quit in a manner which, it is admitted, satisfied the requisites, as in the case of a tenant from year to year; refusing to receive any further rent, or in any manner to recognize a tenancy. And so the case passed to the Attorney-General, who filed his Information on 18th October, 1921; but the defendant remained in possession, and, pending the litigation, has enjoyed the benefit of the use and occupation.

The defendant alleges four grounds of appeal: first, that the alleged lease was not void *ab initio;* secondly, that the learned judge erred in holding " that the appellant was not entitled as of right to compensation for permanent improvements "; thirdly, he denies that the proclamation of 1763 affects the transaction; and, fourthly, he denies that the Crown is entitled to $400 a year for the occupation of the premises after 10th March, 1920.

The learned judge found no difficulty in disposing of the case, and I have no doubt that his conclusions must be maintained. By the formal judgment he declared that the lease of 10th March, 1821, was and is null and void *ab initio,* and that the King was entitled to recover forthwith the possession of the lands described with their appurtenances. He found the value of the defendant's use and occupation, computed from 10th March, 1920, until delivery of the possession, to be at the rate of $400 per annum; and, moreover, he held that the defendant's claim for compensation for improvements made by him or his predecessors should be dismissed.

There is some conflict of opinion as to the annual value of the premises, but the evidence certainly preponderates in favour of an estimate not less than that found by the learned judge; and, therefore, his finding in that particular ought not to be disturbed.

As to the defendant's claim for compensation for the improvements to which he asserts a right, there is no statu-

tory liability upon the Crown; and I agree with the learned judge that the defendant has entirely failed to establish any act or representation, for which the Crown is responsible, whereby he was misled to believe that he had a title which could be vindicated in competition with that of the Crown. There is no claim to recover compensation for the use of the premises during the period of the first term, which, in the words of the instrument, is "fully ended and completed"; and, to that extent, the defendant has profited by the unauthorized and illegal transaction. The learned judge refers to the leading case of *Ramsden* v. *Dyson* (1); and I cannot avoid the conclusion that the defendant and his predecessors were not, at any time, in ignorance of the infirmity of the title which they claim to have derived from the Indians; and, certainly, they knew that there had been no surrender, and that they had no grant from the Crown. The law, as applicable in such cases, is very aptly stated by Lord Wensleydale at page 168, where he says:

> If a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it. If a tenant of mine does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.

The letter from the Indian, Mitchell Benedict, is not produced, and without it one cannot interpret the reply with certainty; moreover the introduction of secondary evidence by Mr. Chesley's memorandum, admitted to be inaccurate in a material particular, does not add to the proof. Whether Mr. Laird or Mr. Van Koughnet was the writer, he was evidently under an utter misapprehension if he intended to assure the Indian of the validity of the Chesley lease, and these gentlemen should have sought the advice of the law officers; but, anyhow, Mr. Chesley was not a party to the correspondence, and it contains no representation by which the Crown is bound to him. If he were looking for an assurance from the Indian Department to strengthen his title, why did he not approach the competent authorities in a straightforward manner? Neither

(1) (1866) L.R. 1 E. & I. Ap. 129.

1930

EASTERBROOK v. THE KING.

Newcombe J.

the Crown, as to its title, nor the Indians, as to their burden upon the lands, are to suffer deprivation by the facts which this incident discloses or suggests.

It is true that, during the latter part of the term of ninety-nine years, the annual rent of $10 was received at the Department of Indian Affairs, and presumably distributed as belonging to the income of the band or the Indians of the reserve; but that circumstance could not serve to validate a lease which was void at law, nor even to create a tenancy from year to year under conditions which the law prohibited. In any event, the defendant and his predecessors have had the full benefit of possession for the term during which the rent was paid; and, for the period which has since elapsed, and for the future, the Crown has not, so far as I can perceive, incurred any obligation, legal or equitable, to recognize the defendant's possession or right to compensation.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *George I. Gogo.*

Solicitor for the respondent: *William C. McCarthy.*