FAHEY v. ROBERTS

(1916), 51 N.B.R. (2d) 329 (also reported: 134 A.P.R. 329)

New Brunswick Supreme Court, McKeown C.J., 1 December 1916

Summary:

An Indian Reserve was established in Kent County, New Brunswick, in 1824. By 1851 white settlers occupied lots on reserved lands. A descendant of one of the settlers gave a deed to his lot to his wife, the defendant, in 1869, after Confederation and transfer of responsibility for Indians to the federal government. In 1879 the Indian band surrendered the land to the federal government, which in 1914 granted a lot, including part of that occupied by the defendant, to the plaintiff. The defendant claimed entitlement to the land by adverse possession for over 60 years and also attacked the validity of the plaintiff's grant from the federal government. The plaintiff brought an action for damages in trespass.

The New Brunswick Supreme Court, Kings Bench Division, allowed the action. The court held that the federal government validly granted the plaintiff title to the land. The court held that the defendant had no rights, because the Limitation of Actions Act and adverse possession did not run against the Crown. In particular, the court held that non- Indian settlers were prohibited from settling on the Indian Reservation by statute and could not obtain possessory rights in violation of the statute.

CONSTITUTIONAL LAW - TOPIC 6352

Federal jurisdiction - Indians and lands reserved for Indians - What constitute reserved lands - Constitution Act, 1867, s. 91(24) - An Indian band surrendered their reserve to the federal government to be sold and the money received invested for the benefit of the band - The New Brunswick Supreme Court, Kings Bench Division, discussed the respective provincial and federal rights to the surrendered land and, notwithstanding the Province's legal title upon surrender, held that the federal government had the right to convey title to the lands for the benefit of the Indians - See paragraphs 39 to 70.

INDIANS - TOPIC 5463

Lands - Surrender of lands - Status of surrendered lands - The New Brunswick Supreme Court, Kings Bench Division, discussed the status of lands surrendered by an Indian band to the federal government, noting that legal title to surrendered lands reverted to the provincial government - The court held, however, that lands surrendered to the federal government for sale for the benefit of the Indians could be validly conveyed by the federal government - See paragraphs 39 to 70.

INDIANS - TOPIC 6266

Government of Indians - What laws govern - Provincial laws of general application - Indian Act,

s. 88 - The New Brunswick Supreme Court, Kings Bench Division, held that a provincial Limitation of Actions Act was inapplicable to the federal Crown, and in particular was inapplicable to the gaining of title to Indian reserve land by adverse possession - See paragraphs 19 to 38, 62.

REAL PROPERTY - TOPIC 5910

Title - Extinguishment - Limitation of actions - Adverse possession - Crown lands - General - The New Brunswick Supreme Court, Kings Bench Division, held that a provincial Limitation of Actions Act was inapplicable to the federal Crown - See paragraphs 19 to 38, 62.

REAL PROPERTY - TOPIC 5914

Title - Extinguishment - Limitation of actions - Adverse possession - Crown lands - Indian lands - The New Brunswick Supreme Court, Kings Bench Division, held that a provincial Limitation of Actions Act was inapplicable to permit the gaining of possessory title to Indian lands by adverse possession - See paragraphs 19 to 38, 62.

CASES NOTICED:

Phipott v. St. George Hospital, 6 H.L. C. 348, appld. [para. 28].
R. v. McCormack, 18 U.C.Q.B. 131, consd. [para. 32].
St. Catherines Milling Co. v. R., 14 A.C. 46, affirming 13 S.C.R. 577; 13 O.A.R. 148; 10 O.R. 196, appld. [para. 39].
Doedem Burk v. Cormier, 30 N.B.R. 142, consd. [paras. 39, 63].
Ontario Mining Company v. Seybold, 31 O.R. 386; 32 O.R. 301; 32 S.C.R. 1; [19031 A.C. 73, consd. [para. 52].
Attorney-General for Canada v. Giroux, 53 S.C.R. 173, consd. [para. 69].
STATUTES NOTICED:

Constitution Act, 1867, s. 91(24).
Indian Act, S.C. 1868, c. 42, ss. 6 [para. 25]; 17 [paras. 25, 30]; 32 [para. 36].
Indian Act, S.C. 1876, s. 11 [para. 30].
Indian Act, S.C. 1886, s. 21 [pars. 30].
Indian Act, S.C. 1903, s. 33 [para. 30].
Indian Act, R.S.C. 1906, c. 81, ss. 48 [para. 57]; 51, 52 [para. 59].
Limitation of Actions Act (N.B.).
Nullum Tempus Act, 9 Geo. 3, c. 16 [para. 32].

This case was heard at Richibucto, N.B., before McKeown, C.J., of the New Brunswick Supreme Court, Kings Bench Division, who delivered the following judgment on December 1, 1916:

[1] McKeown, C.J.: This cause was tried before me without a jury at the Kent Circuit held last October, and, as a very important question has been raised by the defence, I have thought it right to give the matter consideration and to set out my reasons for judgment. It is an action for trespass of land. Plaintiff claims damages for defendent's alleged trespasses, and also asks for an injunction against repetition thereof. Defendant denies plaintiff's title and alleges that she herself is the owner of the locus in quo. The title upon which plaintiff rests is an interesting one. Its inception is an Order in Council recorded in the Minute Book of the Executive Council of the

Province of New Brunswick under date of the 25th day of February, 1824, which reads as follows:-

> Ordered
>
> that a reserve be made for the use of the Richibucto Indians on the north side of Richibucto River, extending from the upper line of the grant to William Harley, opposite to Paul Island, to the lower line of No. 9 opposite _____ Island, and to include two miles to the rear from the river, saving the re- serves already made for the use of the Crown.

[2] Plaintiff put in evidence a certified copy of a plan on file in the Crown Land Office of this province, which bears the following inscription:-

> Plan of survey made for the Micmac Tribe of Indians on the north side of the River Richbucto in the Parish of Carleton in the County of Northumberland the 10th August, 1824,
>
> Philip Palmer,
>
> Dy. Surveyor.

[3] This plan shows that the lands so reserved lie to the north of the Richibucto River and to the west of William Harley's grant. The starting point appears to be a spruce tree on the north side of the said river, and opposite Paul Island, thence the boundary runs on a course north 10 degrees west, 160 chains to a spruce tree, thence south 80 degrees west 440 chains to a marked hemlock tree; the western boundary of the reserve is a line starting from the junction of Bass River and Richibucto River running thence north 10 degrees west until it meets the hemlock tree aforesaid, and the Richibucto River itself is the southern boundary of the whole reserve which is divided into over fifty lots of varying sizes.

[4] The individual lots are not designated by numbers or otherwise, but in the year 1851 Deputy Surveyor Peter Murzoral appears to have gone over the reserved land, or a part of it, and marked certain of the lots as in the occupation of various parties. At the extreme southwest corner of the whole reserve, where the Bass River flows into the Richibucto, Mr. Murzoral has indicated the corner lot as in occupation of Peter Nerbert, the adjoining lot to the east as then occupied by James Herbert, and the lot to the north and on the Bass River as occupied by George Young. The land now in dispute is a part of the lot then apparently held by James Herbert, as will be explained in more detail a little later.

[5] Now the above is all that seems to have been done by the Province of New Brunswick, but plaintiff next puts in evidence a certified copy of a document bearing date the 29th day of August, 1879, executed by "The Chief and Princi- pal men of the band of Indians owing the Indian reserve lands at Richibucto in the Province of New Brunswick being this day assembled in council". Fourteen signatures are appended to this document, and it sets out that the signatories have agreed to surrender and yield up unto Her Most Gracious Majesty the Queen, Her heirs and successors forever, all the right, claim and title which they (the signers) possess to the land reserved, including the lot occupied by Ephraim Herbert which is the lot herein in dispute" with the object of the land in question being sold and the money received invested for the benefit of our said Band of Indians."

[6] It will be noted that between the date of the Murzoral plan and the execution of the above in part recited surrender, Confederation has intervened, which established "the exclusive Legislative authority of the Parliament of Canada" over and concerning "Indians, and lands reserved for Indians". The original of the deed of Surrender above referred to is on file in the Department of Indian Affairs at Ottawa, in the custody of the Superintendent General of Indian Affairs. Under the direction of the above department, a deputy surveyor, John Stevenson, made another survey of the reserve in 1880, which is now on file in the said department. A certified copy of his plan was put in evidence, and it is sufficient for the purposes of this case to say that the reports these southwest corner lots which lie side by side fronting on the Richibucto River as follows:- "No. 15 Peter Herberts" and "No. 16 Ephraim Herberts" and to the rear of these he marks "No. 13 Owen McAfferty". The disputed land is part of said lot No. 16; a small part of lot No. 15 is also involved in a certain way, while lot No. 13, being in the rear of both 15 and 16, is referred to in connection with the survey.

[7] On the 28th day of May, 1914, the plaintiff, Wm. Fahey, obtained a grant from the Crown which grant recites that "Whereas the lands hereinafter described are part and parcel of those set apart for the use of the Richibucto Band of Indians"; and that "We have thought fit to authorize the sale and disposal of the lands hereinafter mentioned in order that the proceeds may be applied to the benefit, support and advantage of the said Indians, etc."

[8] Thereupon the Crown, acting in that behalf through authority of the Parliament of Canada, granted and conveyed to the said William Fahey, his heirs and assigns a tract of land" lying and being in the Richibucto Indian Reserve in the County of Kent, etc.", containing five acres more or less

> Composed of the north part of lot 16 in the said Indian Reserve and which may be described as follows - commencing where the line between the said lot 16 and lot 13 strikes the water's edge of McAfferty's creek near its entrance into the Richibucto River, thence south eighty five degrees west along the said limit six chains and seventy links to the limit between the said lot 16 and lot 15, thence south 2 degrees west along the said limit 6 chains, thence easterly and parallel to the aforesaid limit between lot 16 and lot 13 10 chains and 50 links more or less to the water's edge of the creek aforesaid; thence north westerly following the water's edge to the point of commencement, as shown on a plan of survey made by Charles Douglass dated Aprll 24, 1914 of record in the Department of Indian Affairs.

[9] A certified copy of Mr. Douglass' plan and field notes was put in evidence and Mr. Douglass himself was a witness at the trial.

[10] The plaintiff also put in evidence another grant from the Crown, as above, conveying to him another portion of the Richibucto Reserve containing one acre more or less, composed of the northeast corner of lot 15, in the said Indian Reserve which may be described as a triangular portion of land bounded as follows:- "On the east by the west limit of the lands deeded to William Fahey, on the north by the north boundary of said lot 15 and on the west by a road allowance which cuts off this corner from the said lot". This last grant is dated the 27th day of July, 1915.

[11] It will be convenient now to make allusion to the opposing title set up by defendant;

although plaintiff does not wholly rest his case upon the Crown grants above detailed. He further claims a title practically through defendant herself, or through her grantor. It will be more satisfactory I think, to refer to this after discussing defendant's claim to the property.

[12] After making this reserve by Order in Council in 1824, the Province Of New Brunswick made no further disposition of the land. The defendant, and those through whom she claims, rest their right and title to the property upon the length of time they have had it in possession. Defendant is the widow of Ephraim Roberts. She says she went to work with him and his mother as a housekeeper 68 years ago, they being then in occupation of the premises, and subsequently married him; and he (her husband) gave her a deed of the property before their marriage, and she has been in possession ever since. Such possession and transfer are the basis of her claim to the property.

[13] The piece of land so occupied by defendant's late husband and herself is said originally to have contained some 35 acres and defendant goes on to say that by word of mouth she and her husband sold or gave to one James Flanagan (defendant's brother-in-law) a portion of the northern part of their holding, such portion she says being about four acres. This four acre lot (if it can be so called) passed from one owner or holder to another until these transfers culminated in plaintiff's possession of it, he having secured it from one Michael Roberts in the year 1910, so that plaintiff puts forward a twofold title viz: - the transfer just referred to as well as the Crown grant.

[14] It was explained by certain of the witnesses, and no exception was taken to it, that the surnames "Roberts" and "Herberts" are interchangeable. Ephraim Herberts is shown on the Stevenson plan as in occupation of lot 16. He is the "Ephraim Roberts" alluded to by defendant as her late husband. It is shown that a Mr. Fred Roberts was one of the intermediate owners or occupiers of this 4 or 5 acre lot now held by the plaintiff, and it seems to be established that during his (Roberts) possession he built a fence as the southern limit of his holding and as a common southern boundary between himself and the defendant.

[15] Now after plaintiff made his purchase from Michael Roberts he made application to the Indian Department at Ottawa for a grant of this very land; he paid the price demanded and received a grant thereof which is hereinbefore referred to as the grant dated 28th day of May, 1914, containing 5 acres of the northern part of lot No. 16.

[16] Prior to the issue of said grant, surveyor Douglass was sent by the Indian Department, at plaintiff's request, to make a survey and lay off the land. He did so, and it transpires that the southern boundary of the lot as located by surveyor Douglass is not identical with the position of the fence put up by Fred Roberts as the southern boundary thereof, and the dispute arises here. Plaintiff claims the Douglass line as his southern boundary and defendant insists upon holding to the Fred Roberts fence.

[17] Both lines run from a highway to the water's edge; they are not parallel - the western terminus of the Douglass line is to the north of the Roberts fence, while the eastern terminus of said line is to the south of said fence, which means that the lines cross. The point of intersection of the two lines (calling the course of the fence a line) is about midway across the lot. In result, the Douglass line if adhered to, gives the defendant more land than the fence line gives her to the west of the point of intersection; while to the east of said point, the Douglass line would leave

her less land than the line of the fence gives her.

[18] Plaintiff put a fence along the Douglass line clear across the lot and defendant tore it down from the said intersection point eastward. Plaintiff re-erected it and defendant tore it down again - hence this action.

[19] Certain facts have, to my mind, been established. I think and find that the Fred Roberts fence was properly and sufficiently established as a line fence between the plaintiff's predecessors in title and the defendant in this suit, and that the fence which defendant destroyed was to the south of this Fred Roberts fence. I think and find the plaintiff's five acres is intended to come wholly off lot No. 16, and does not, and should not, include the jib lot (so called) to the east of the road - concerning which considerable dispute ensued, and which it is unnecessary to detail here, - and it further seems to me that either the Douglass line or the Roberts fence, whichever might be ad- hered to, would give the complement of five acres. I further think and find that defendant's grantor, viz;- her husband - and she herself held possession of and occupied up to the Fred Roberts fence, which would include the land in dispute, for over 60 years, adding the period of the possession of the one to that of the other, and that Ephraim Roberts was actually in possession of the land when he deeded it to defendant. And it is also a fact that defendant's grantor had no title from the Crown or from any other source. It is simply a case of so called squatter's rights; but, of course, against one who has no better title, the defendant is entitled to hold the land in question, no matter for how short a time she had been upon the property.

[20] Now the defendant contends;-

1. That the grant from the Crown through the Dominion of Canada to the plaintiff is invalid.

2. The defendant being in possession of the land could set up her possession against any person not having a legal title. The plaintiff was a mere wrong-doer and possession is good against him.

3. Assuming that the Crown, through the Dominion Government has the right to issue grants of Indian lands, the grant in this case was inoperative inasmuch as the defendant and her predecessors in possession had been in continuous exclusive adverse possession of the locus in quo over 60 years before action brought.

4. That the grant from the Crown was obtained by a misrepresentation of the plaintiff.

[21] I do not think there is any evidence to support the fourth ground.

[22] With reference to ground (3) I have said that defendant and her husband had continuous and actual possession of the locus in quo for over 60 years before action brought. What the effect of such possession is, must be considered.

[23] As to ground (2) so far as it is a general statement of the law involved, I think it is correct.

[24] Before taking up defendant's first ground, it may be convenient to consider the points involved in her second and third contentions.

[25] On the 30th day of August, 1869, Ephraim Roberts by deed conveyed to defendant his rights

in the property in question, and in considering such transfer it is to be remembered that Roberts was upon the land without any title, and that the lands had been duly reserved for Indians by the Order in Councll referred to, and by the provisions of New Brunswick Acts subsequent thereto. It was part of such lands so then in Ephraim Roberts' possession that he affected to convey to the defendant. Now the provisions of the *Dominion Act*, 1868, 31 Vict., c. 42, in force at the time of such transfer, must be considered in connection with this conveyance. Altogether apart from the ownership in the land, and from the important question involved concerning that matter, there is no doubt that the Parliament of Canada has and then had exclusive auth- ority to legislate respecting these lands so reserved for Indians. It exercised such right by the passage of the Act above noted, and among its provisions are found the following-

> S. 6 All lands reserved for Indians, or for any tribe, band or body of Indians or held in trust for their benefit, shall be deemed to be reserved and held for the same purpose as before the passing of this Act, but subject to its provisions, and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purpose of the Act.
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> S. 17 No persons other than Indians and those intermarried with Indians shall settle, reside upon or occupy any land or road or allowance for roads running through any lands be- longing to or occupied by any tribe, band or body of Indians, and all mortgages or hypothecs given or consented to by any Indians or any persons intermarried with Indians, and all leases, contracts and agreements made or purporting to be made by any Indians or any persons intermarried with Indians whereby persons other than Indians are permitted to reside upon such lands, shall be absolutely void.

[26] Further sections of the Act impose penalties for breach of the provisions above quoted, but such penal sections only apply to such lands as the Government by Proclamation published in the Royal Gazette, shall declare; and it was not shown before me that such Proclamation had been made respecting the lands involved in this case.

[27] Both these two sections have to my mind a material bearing on the question of possession relied on by defendant, who takes the ground that her title has been perfected by a possession of over 60 years.

[28] In view of the above provisions of this statute, I do not think such result could follow, because when a thing is prohibited by statute, no benefit can ensure to the party who is doing the prohibited act. The passage of time cannot in my view, operate to assist a wrong- doer, and I think both the possession and transfer relied on are futile and void. In the case of *Phipott v. St. George Hospital*, 6 H.L.C. 348, Lord Cromworth is thus reported:-

> Prohibitory statutes prevent you from doing something which formerly it was lawful for you to do. And whenever you can find that anything done, that is substantially that which is prohibited, I think it is perfectly open to the court to say that that is void, not because it comes within the spirit of the statute, or tends to affect the object which the statute meant to prohibit, but because by reason of the true construction of the statute it is the thing or one of the things, actually prohibited.

[29] The Acts respecting Indians passed by the Dominion Parliament since Confederation have

all prohibited the alien- ation of lands by the Indians themselves, and also by the Crown, until such lands are surrendered by Indians in the manner provided for by such acts.

[30] I think that as between subject and subject, the idea that runs through the statutes of limitations respecting real estate is that at the expiration of the statutory period the title of the true owner is extinguished and it vests in the occupant. It is often remarked that the statute "operates as a statutory conveyance from the true owner to the occupant." Each of the *Indian Acts* passed since Confederation specially provides that the Indians themselves may not alienate. (See *Dominions Acts* 1868, s. 17 - of 1876, s. 11 - of 1886, s. 21 - of 1903, s. 33.)

[31] Such Acts further provide that the Crown itself cannot alienate until the Indians have surrendered their lands, which in this case was not done until 1879.

[32] In the case of *R. v. McCormack*, 18 U.C.Q.B. 131, the court gave consideration to the applicability of the Act, 9 Geo. 3, c. 16 (Nullum Tempus) then in force in Upper Canada, to lands in which the Indian title was not extinguished. The judgment of the learned Chief Justice is to me most instructive when considering the principle of the applicability of statutes of limitations respecting real estate to lands treated by the Crown as Indian lands. At page 136 of the report he goes on to say:-

> This land it is stated in the case has never been assessed, from which it is reasonable to infer that it is not land which has yet been made liable to assessment. For anything that appears this Island may have been regarded and treated by the Crown as Indian land in which the right of the natives had not been extinguished...and in that case or even if it formed part of the waste lands of the Crown to which no tribe of Indians could pretend any claim, but which had never been organized by the Crown, and surveyed and laid out with a view to its being occupied, I do not think the *Nullum Tempus Act* of 9 Geo. 3, could be properly held to apply to it. We could draw no dis- tinction founded upon proximity to settlement or comparative remoteness, but, so far as the application of legal principles is concerned, must look as we should upon any other waste land of the Crown, which had never by any particular Act been reduced into actual possession of the Crown, as land from which rents or profits might be derived. To hold otherwise, would be inconsistent, I think, with the various statutes, which have from time to time been passed for the protection of the waste lands of the Crown, and of what are called Indian lands, from trespassers. The Indians could not have adopted any legal proceedings for dispossessing trespassers, either as holding in a corporate capacity or otherwise, and it would seem unreasonable, on the other hand, that the time should be considered as running so as to bar either the Crown or the Indians, while the Crown could not be held to be acquiescing in any interruption of rents or profits which it had never at any time been receiving, or in a position to receive.

[33] In the above case it appeared that since 1789 the defendant's predecessors in title had been in actual possession and occupation of the land in question, devising and deeding it from one to the other, and that there had been no intermission or interruption in such possession or occupation from the year last aforesaid until the suit was instituted, a period of over 60 years. It was held that the *Nullum Tempus Act* was in force in the Province of Upper Canada, but the unanimous judgment of the court was that the Crown was not barred by such possession, and the reasons given by the learned Chief Justice are, I think, fairly summarized in the extract above

given from the judgment. Also it seems to be his opinion that the government must have had knowledge of the possession on the part of the defendant and his predecessors, for he goes on to say further:-

> I do not doubt when I consider the position of this Island on the southern frontier of Canada, that it must have been known to the government in fact that McKee and McCormack and his family had held the long possession which is admitted. If the government acquiesced in it from a knowledge that land to be theirs, and for that along intended the land to be theirs, and for years to assert a claim, either on account of the Indians or for the Crown, that may be felt perhaps by the government to give a strong claim to the present occupants, to be confirmed in their title, or at least to be left unmolested as they have hitherto been. But that is a consideration to be disposed of by the government, and it is evident, I think, from what is before us, that the defendants are not likely to be unjustly or harshly dealt with. As a court of justice we must be careful not to distort legal principles on account of their operation in particular cases, for what we hold to be law in the present case we should be bound to apply in others, unless there should be a difference in the facts such as would warrant a different decision.

[34] Of course in setting up the statute of limitations the defendant relies on the New Brunswick Acts, namely C.S.N.B., 1903, c. 131, s. 1, which is a reprint from s. 1 of c. 84 of the Consolidation of 1876, and which in its turn is s. 1 of c. 139, Revised Statutes of 1845. No statute of limitations runs against the Crown, acting through the Dominion Government, at least none was pointed out, and I know of none.

[35] It would seem to me to follow that as the Parliament of Canada had admittedly full right to legislate concerning these lands, it should not be in the power of the provincial legislature to ultimately defeat such right by setting a period of occupation at the expiration of which, be it long or short, the right of the Dominion authorities to deal with such lands is ex- tinguished. It seems to me that such occupation ought never to be allowed to be set up against the Crown acting through the Dominion Government.

[36] It is also to be observed that the Dominion *Indian Act* of 1868 deals with the then New Brunswick legislation as follows:-

> s. 32 The 85th chapter of the Revised Statutes of New Brunswick respecting Indian Reserves is hereby repealed, and the Commissioners under the said chapter shall forthwith pay over all monies in their hands, arising from the selling or leasing of Indian lands or otherwise, under the by whom they shall be credited to the Indians of New Brunswick, and all such monies now in the hands of the treasurer of New Brunswick shall be paid over to the Receiver General of Canada to be credited to the said Indians; and all Indian lands and property now vested in the said commissioner or other persons whomsoever for the use of Indians, shall henceforth be vested in the Crown, and shall be under the management of the Secretary of State.

[37] In result therefore, it seems to me that the defence of possession cannot prevail for several reasons. In the first place I think that the occupation of defendant and her predecessors in title was illegal, being in plain contravention of the *Dominion Act* above in part quoted, and for that reason I do not think it can operate to vest a title in anyone.

[38] I further think that as the above statute makes void all conveyances, the deed from Michael Roberts to the defendant given in 1869, and upon which defendant relies for the 60 years possession could not be at all effective to feed her title. And I further think that the provisions of the New Brunswick statutes of limitations are not operative against the Crown, acting through the Dominion Government in its management of those Indian lands. And it is also my view that the Indians themselves being under disabilities and unable to convey, or even to surrender the land, except by the provisions of the statute, no possesion can run against them. If the Dominion Government had fulfilled or should in the future fulfill its com- plete trust in respect to these lands, with reference to the Indians as wards of the Crown, and, the incohate title of the Indians should be extinguished, thereby putting the management of the lands again in the province, it might well be a question between the province and occupiers for 60 years or more, as to whether such possession on the part of the latter was effective or not. But while that question does not arise here, it is the only way in which I see any chance for the New Brunswick statute of limitations to operate at all, in connection with Indian reserved lands. To hold otherwise, would, in my judgment, operate to diminish the control of the Dominion Parliament over these lands to any degree which a provincial legislature might see fit to appoint - a result so at variance with the spirit of the legislation that unless no other holding is open I would hesitate to acquiesce in it.

[39] But the defendant maintains that the grant which plaintiff has secured from the Crown, acting through the Dominion authorities, is invalid, and cites the case of *St. Catherines Milling Co. v. R.*, 14 A.C. 46, and *Doe dem Burk v. Cormier*, 30 N.B.R. 142. Plaintiff claims that the right to issue a grant of the land, previously reserved as in this case, belongs wholly to the province. In considering this contention it is necessary to refer at some length to the cases involved.

[40] In the case of *R. v. St. Catherines Milling Company*, 10 Ontario Reports 196, the action was brought on the information of the Attorney General of Ontario to restrain the defendant company from cutting timber on certain lands within that province, under licence from the Dominion Government to defendant. The defendant pleaded justification under such licence. As a fact the lands in dispute were within the limits of the province, but it seems considerable doubt had existed as to the exact boundaries of the province, which dispute was finally resolved in such a manner as to substantiate the claim of the province over the territory involved. In the meantime, however, (in 1873) and while the Dominion Government was claiming title, it made a treaty with the Indian inhabitants of the land by which the title of the aborigines was extinguished, whereupon the Dominion Government licensed the premises of the defendant company. A subsequent decision of the Privy Council determined that these lands were within the territorial limits of the province, and in consequence of such decision the province attached the defendant's title. The province had never reserved the land in question for the Indians, nor dealt with them in any way.

[41] It was set up on defendant's behalf that the surrender to the Crown on the part of the Indian inhabitants of the territory in question put the full control thereof in the Indian Department of the Dominion Government by virtue of the *British North America Act*, section 91.

[42] The case was first heard before Chancellor Boyd, who held that the Indian title to the lands was extinguished by the Dominion Treaty in 1873, known as the *North West Angle Treaty No. 3*; the extinction of title procured by and for the Dominion ensured to the benefit of the province as constitutional proprietor by title paramount; that it is not possible for the Dominion to preserve

that title or transfer it in such wise as to oust the vested right of the province to the land, as part of the public domain of Ontario. Also that the territorial jurisdiction of the Dominion extends only to lands reserved for Indian; and be- fore the appropriation of "Reserves" the Indians have no proprietory right to the soil, but have merely a right of occupancy in their tribal character, and have no claim except upon the bounty and benevolence of the Crown. After the appropriation they became invested with a legally recognized tenure of defined lands in which they have a present right as to the exclusive and absolute usufruct; and a potential right of becoming individual owners in fee after enfranchisement; and it is "lands reserved" in this sense for the Indians, which form the subject of legislation in the *British North America Act*, i.e., lands upon which, or by means of the proceeds of which, after being surrendered for sale, the tribes are to be trained for civilization under the auspices of the Dominion.

[43] At page 223, of the report the learned Chancellor says:-

> The legislation of Canada since Confederation also reflects very clear light upon what was understood by the Indian reserves; for instance in 1868 it is declared that; All lands re- served for Indians...or held in trust for their benefit, shall be deemed to be reserved and held for the same purpose as before the passing of this Act...and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown. By section 10 no release or surrender of any such lands to any party other than the Crown, shall be valid. Section 15 refers to land appropriated to the use of the Indians in which the Indians are interested. Section 37 provides for protection and management of Indian lands in Canada, whether surrendered for sale or reserved or set apart for the In- dians...And in 1876, 39 Vict., c. 18, s. 3, we find a valuable set of definitions in which occurs for the first time a differentiation in meaning between the theretofore equivalent terms "Indian Reserves" and "Indian lands" (see *Totten v. Watson*, 15 U.C. R. at page 395). By that act, "re- serve" is declared to mean "any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, etc; whereas "Indian lands is to mean any reserve or portion of a reserve which has been surrendered to the Crown... The words 'Lands reserved for Indians' in the *British North America Act* have been the subject of judicial consideration in *Church v. Fenton*, 28 C.P. 384, in which the judgment of the court was delivered by Mr. Justice Gwynne... That decision was in 1878, and the learned judge adopts the definitions given in the Act of 1876, whereby "Indian land" were distinguished as well from "public lands" as from "Indian Reserves". Referring to the 24th item of the 91st section of *Constitutional Act for Canada* "Lands reserved for the Indians", he thus proceeds at page 399 "that as an expression appropriate to the unsurrendered lands reserved for the use of the Indians described in the different Acts of Parliament as "Indian reserves" and not to lands in which as here the Indian title has been wholly extinguished.

[44] In speaking of the *Royal Proclamation* of 1763, which is the charter of Indian rights in the lands there in question, the learned Chancellor says at page 228 -

> There is an essential difference in meaning between the reservation spoken of in the *Royal Proclamation* and the like term in the *B.N.A. Act*. The *Proclamation* views the Indian in their wild state and leaves them there in undisturbed and unlimited possession of all their hunting ranges, whereas the Act though giving jurisdiction to the Dominion

> over all Indians, wild or settled, does not transfer to that government all public or waste lands of the provinces on which they may be found at large. The territorial jurisdiction of the Dominion extends only to lands reserved for them.

and at page 230 -

> Before the appropriation of reserves the Indians have no claim except upon the bounty and benevolence of the Crown. After the appropriation they became invested with a legally recognized tenure of defined lands; in which they have a present right as to the exclusive and absolute usufruct and a potential right of becoming individual owners in fee after enfranchisement. It is "land reserved" in this sense for the Indians which form the subject of legislation in the *B.N.A. Act*, i.e. lands upon which or by means of the proceeds of which, after being surrendered for sale the tribes are to be trained for civilization under the auspices of the Dominion.". It follows that lands un- granted upon which Indians are living at large in their primitive state within any province form part of the public lands, and are held as before Confederation by that province under various sections of the *B.N.A. Act* (see s. 98, item 5, also s. 6, 109, 117). Such a class of public lands are appropriately alluded to in s. 109 as lands belonging to the province in which the Indians have an interest, i.e., their possessory interest. When this interest is dealt with by being extinguished and by way of compensation in part reserves are allocated, then the jurisdiction of the Dominion attaches to these reserves. But the rest of the land in which "the Indian title" so called has not been extin- guished remains with its character unchanged as the public property of the province. The Indian title was in this case extinguished by the Dominion treaty in 1873 during a dispute with the province as to the true western boundary of Ontario.

[45] Now this judgment of the learned Chancellor has been so thoroughly discussed by courts of appellate jurisdiction that it seems almost presumptuous to venture any further comment upon it. It was sustained before every tribunal and all points therein decided are closed to discussion. But it is contended on behalf of the plaintiff now before me that the question he agitates here was not involved in the *St. Catherines Milling* case, because the lands there under consideration had not been "reserved for Indians" as contemplated by section 92 of the *B.N.A. Act*, and the argument of course is that as in that case the court of first instance and all the courts of appeal were dealing with lands which never had been reserved for Indians, therefore the conclusions reached and enunciated by the different courts are not necessarily conclusive in a case which presents to the court the question of the effect of a grant from the Dominion Authorities properly acting as the custodian of such lands which have been actually reserved by the province as contemplated by the *B.N.A. Act*.

[46] No doubt it is abundantly clear from the authority of the *St. Catherines* case expressed in the judgment of every court which gave the matter consideration, that the title to lands reserved for Indians is ultimately within the province which sets up those reserves. It does not seem to me that it is possible to read the judgments in any other way.

[47] On appeal to the judicial committee of the Privy Council, reported at page 46 of the appeal cases, vol. 14, the decision of the courts below was sustained, the committee holding that by virtue of the surrender on the part of the Indians the entire beneficial interest of the lands subject to the privilege was transmitted to the province in the terms of s. 109 of the *British North*

America Act. And the committee also laid it down that the Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the province in said lands. On page 56 of the report, Lord Watson says:-

> The conflicting claims to the ceded territory maintained by the Dominion and the Province of Ontario are wholly dependant upon these statutory provisions. In construing these enactments it must always be kept in view that wherever public land with its incidents is described as "the property or" or as "belonging to" the Dominion or a province, these expressions merely import that the right to its beneficial use or to its proceeds has been appropriated to the Dominion or the province as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

And at page 59,

> In the course of the argument the claim of the Dominion to the ceded territory was rested upon the provisions of s. 91(24), which in express terms confer upon the Parliament of Canada power to make laws for "Indians" and lands reserved for the "Indians". It is urged that the exclusive power of legislation and administration carried with it by necessary implication any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning counsel for Ontario referred us to a series of Provincial Statutes prior in date to the act of 1867 for the purpose of showing that the expression "Indian Reserves" was used in legislative language to designate certain lands in which the Indians had after the *Royal Proclamation of 1763* acquired a special interest by treaty or otherwise, and did not apply to land occupied by them in virtue of the *Proclamation*. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in s. 91(24) and the words actually used are according to their natural meaning sufficient to include all lands reserved upon any terms or conditions for Indian occupation. It appears to be the plain policy of the Act that in order to ensure uniformity of administration all such lands and Indian affairs generally shall be under the legislative control of one central authority...There can be no a priori probability that the British Legislature, in a branch of the statute which professed to deal only with the distribution of legislative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

[48] This is conclusive, but while that is so, it also seems to me to be equally conclusive that every individual court has determined that it is upon the extinquishment of the Indian title that such reversion to the province takes place, or if I read the judgments correctly, that during the period while these lands are burdened with the support of the Indians, it is in the power of the Dominion Government to deal with such lands. That it is within the power of the Dominion Government in so dealing with such lands to lease or to sell them is certainly not in terms negatived by the judgments referred to.

[49] In the judgment of Patterson, J.A., in the Ontario Court of Appeal (13 Ont. App. 148) it

seems to me that he must have had something of this nature in his mind when, after discussing different sections of the *British North America Act* having to do with the ownership of public assets and property he continues on page 171 -

> Therefore to argue that lands re- served for Indians become by force of the *British North America Act* the property of the Dominion as against the provinces, in which the reserves are situated is in my Judgment to at- tribute to section 91 an effect not contemplated or intended by the framers of the Act, and certainly not the necessary result of the language of the section. The question of the ultimate ownership as between the Domin- ion and the provinces of the ordinary Indian reservation may not be too speculative a question for discussion. It would become a practical question in the event of any such land ceasing to be required for the occupation of the tribe, or for application by way of sale or lease for its benefit and falling in as it were for ordinary public uses; and it might become a practical question if it were attempted to dispose of the land or the timber on it for other uses than the benefit of the Indians...It does not strike me as being involved in the circumstance that the administration of the reserves belongs to the Dominion Government. The administrative and legislative functions I take to be made co-extensive by the Act as indicated by inter alia, section 130. Nor is the fact that as part of the administration of Indian Affairs the Dominion Government has made sales or carried out by granting patents sales already made for the benefit of the Indians of portions of the reserves inconsistent with the ultimate ownership of the lands by the provinces. The title is in the Crown and the patent whether issued by the government of the Dominion, or by that of a province, is a grant from the Crown. If the lands should cease to be held for an Indian tribe or band by reason of the tribe or band ceasing to exist, or for any other reason, the question between the Dominion and the provinces may have to be decided.

[50] Sir William J. Ritchie, C.J., in his judgment reported in 13 S.C.R. 577, at page 601 remarks as follows:-

> This case has been so fully and ably dealt with by the learned Chancellor, and I so entirely agree with the con- clusions at which he has arrived that I feel I could add nothing to what has been said by him. Many questions have been suggested during the argument of this case and in some of the judgments of the court below, but I have pur- posely carefully avoided discussing or expressing an opinion on questions not immediately necessary for the decision of this case leaving all such matters to be disposed of when they legitimately arise and become necessary for the determination of a pending controversy.

[51] And Tashereau, J., near the close of his judgment says:-

> As regards the question considered by Mr. Justice Burton, whether or not the Lieutenant-Governor in each province, is as Her Majesty's Representative under the *B.N.A. Act*, the only party who could extinguish the so called Indian title, if any there be, I refrain from expressing any opinion, for the reason that the point does not come up for our determination, and consequently anything I might say about it would be entirely obiter.

[52] In the case of the *Ontario Mining Company v. Seybold*, 31 O.R. 386: 32 O.R. 301; 32 S.C.R. 1; [1903] A.C. 73), re- ported first in 31 O.R. 386, and which afterwards was heard in the

Ontario Court of Appeals and in the Supreme Court of Canada, and before the Judicial Committee of the Privy Council, the matter here in dispute is carried no further. The lands there involved were a portion of the territory under consideration in the *St. Catherines* case, the main difference being that the Dominion Government had set apart a portion of the land as reserves and sold a part of such portion. All the courts decided that the lands in question, never having been set apart by Ontario as reserves, still belonged to that province.

[53] In the judgment of the Judicial Committee of the Privy Council reported in [1903] A.C. page 73, Lord Davey, in expressing the views of that body incorporated in the judgment of the Committee observations made by Street, J.A., of the Divisional Court of Ontario in part as follows:-(p. 81)

> The act of the Dominion officers therefore in purporting to select and set aside out of it certain parts as special reserves for Indians en- titled under the treaty and the Act of the Dominion Government afterwards in founding a right to sell these so called reserves upon the previous acts of their officers both appear to stand upon no legal foundation whatever. The Dominion Government in fact in selling the lands in question was not selling "lands reserved for Indians", but was selling lands belonging to the Province of Ontario.

[54] A reference to the judgment of Street, J.A., above in part quoted, (see 32 Ontario Reports, page 303) shows that he was dealing with plaintiff's argument based upon certain distinctions of fact existing between that case and the *St. Catherines Milling Company* case, which difference is in effect that certain officers of the Dominion Government had affected to set aside the lands in question as an Indian Reserve, and after reciting such difference, the learned judge says:-

> The obvious defect in this argument of course is that we are bound to hold under the judgment of the Privy Coun- cil that upon the surrender of the Indian title effected by the Treaty of 1873 these lands become the property of the government of the Province of Ontario in which they were situate. The surrender was undoubtedly burdened with the obligation imposed by the treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it. But it is equally plain that its ownership of the tract of land covered by the treaty was so complete as to exclude the government of the Dominion from exercising any power or authority over it.

[55] The two cases above referred to are put forward by defendant as conclusive in his favour. The most important difference between them appears to me to be that in the *Seybold* case the Dominion authorities endeavored of its own motion to constitute Indian reserves. It is clearly pointed out in the judgments that in so acting they were really dealing with land belonging to the Province of Ontario, and that such laying off reserves on their part was not what the *B.N.A. Act* contemplated.

[56] Now it will be well, I think, to see just what took place between the Indians of this Richibucto Reserve and the Dominion Government. The document of surrender put in evidence says:-

> That we the chief and principal men of the band of Indians owing the Indian reserve lands at Richibucto, in the Province of New Brunswick, being this day assembled in council, have agreed to surrender and yield up unto Her Most Gracious Majesty the Queen, Her Heirs and Successors forever all the right claim and title which we possess of in and to those certain parcels of land, etc....with the object of the land in question being sold, and the money received invested, for the benefit of our said Band of Indians.

[57] Section 48 of the *Indian Act*, R.S. C, 1906, c. 81, enacts that:-

> except as in this part otherwise pro- vided, no reserve or portion of a re- serve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purpose of this part, etc.

[58] And the next following section indicates the mode of surrender, which apparently has been followed.

[59] Sections 51 and 52 of the said Act, provided that:-

> 51. All Indian lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor-in-Council directs, subject to the conditions of surrender and the provisions of this part.
>
> 52. Every certificate of sale or receipt for money received on the sale of Indian lands granted or made by the Superintendent General or any agent of his, so long as the sale to which such certificate or receipt relates is in force and not rescinded, shall entitle the person to whom the same is granted, or his assignee, by instrument registered under this or any former Act providing for registration in such cases, to take possession of and occupy the land therein comprised, subject to the conditions of such sale, and unless the same has been revoked or cancelled, to maintain thereunder actions and suits against any wrong doer or trespasser, as effectually as he could do under a patent from the Crown; but the same shall have no force against a license to cut timber existing at the time of the granting or making thereof.
>
> 2. Such certificate or receipt shall be *prima facie* evidence of possession by such person, or the assignee under an instrument registered as aforesaid in any such action or suit.

[60] The Indian Department, after the receipt of the above surrender, issued to plaintiff the grant hereinbefore referred to, which is recorded in the department on the 4th day of June, 1914. It cannot be disputed that when this land is disencumbered of the Indian title, it must be dealt with by the province. Before the Indian title is extinct the lands are under the control, and management of the Indian Department of the Dominion Government. Does the exercise of such control and management carry with it the right to make a grant of the property? Some of the observations of learned judges would seem to indicate that they agree with that construction.

[61] What the Indian Government did in the present case was done in furtherance of, and to carry out an express engage- ment with the Indians who had rights in this reserve. They (the Indians) said to the Crown (represented by the Indian Department of the Dominion Government) "We give you our title in this land so that you can sell it and invest the money for our benefit". If the

Department had no power to carry out such trust, I do not think any court would listen favourably to a claim on the part of the province that the land had reverted to it (the province) because of this mistake on the part of the Indians who were dealing with the Crown, which is the same whether represented by the Dominion or Provincial authorities. Otherwise the Crown would be taking advantage of its own wrong, and it therefore seems to me that one could not for a moment hold that this surrender had disencumbered the land of the Indian title, unless it had actually been ef- fective in accomplishing the manifest object which all had in view.

[62] If the provincial authorities had stepped in at this point and given the defendant a grant of this same property, I could then understand how she could be logically heard in dispute of the validity of plaintiff's possession under his grant. But even assuming that the Indian Department has caused to issue to plaintiff a conveyance larger in terms that it should be, wherein has defendant a right to complain? Her occupation is, and always has been, void. The statute bars her from ever obtaining a title to this land by possession, or from acquiring any rights at all in it by the way set up. The Indian Department clearly has control and management of this land. To my mind it has an unquestionable right to put anyone whom it chooses, in possession of this property, in furtherance of the object of its trust. What right has a trespasser to complain even if it be true that the Department has given plaintiff a grant of the property when it should have given him a lease only? And in saying this I do not wish to be understood as at all suggesting that the authority of the Department is confined to the issue of leases under such circumstances. But I do not think anyone would seriously contest the Department's right to lease such premises, and to my mind no one except a grantee under a provincial grant can ever question the right of a grantee such as plaintiff in this case. After the surrender the lands "shall be deemed to be held for the same purpose as heretofore". The Indian Department, I think, has complete right over them; any one who is put in possession by the Department must be considered a lawful occupant -- and when such conclusion is reached it seems to me that his rights as against a party in the position of the defendant in this suit cannot be called in question.

[63] In expressing the above views I do not regard myself as at all in conflict with what was said in the case of *Doe dem Burk v. Cormier*, 30 N.B.R. 142. In that case the defendant and his three sons occupied 100 acres of the Buctouche Indian Reserve, and the father had given a mortgage to the lessor of the plain- tiff, who also (as the plaintiff here) has secured a grant from the Crown through the Dominion authorities. The property was sold under the mortgage and was conveyed to the lessor of the plain- tiff, who brought ejectment against the father and his three sons, all of whom lived upon the land in question, the father and two sons living together in one dwelling, and the third one residing in another house upon the lot. The report of the case says, (page 143) -

> At the trial which took place before His Honour Mr. Justice Tuck at the Kent Circuit in September, 1869, a verdict was entered for the plaintiff by consent, with leave to the defendant to move to enter a nonsuit if the court should be of opinion that the title to the land - the Indian Reserve - was in the Provincial Government; and that the case depended on that question.

[64] It is apparent from the judgments that it was also contended that the three defendant sons had an occupation separate from that of their father, and, it was urged that they were entitled to a non-suit or a new trial.

[65] Tuck, J., in his judgment thus expressed himself, page 145 -

> With my view of this case it is not necessary to consider the question which government has the title to Indian reserve lands in this province. In my opinion the evidence fails to establish that the other three defendants had a separate occupation from that of the other defendant Sylvian Cormier...Any evidence there is shows there was either a Joint tenancy, or that the occupation by the sons was no more than the possession of the father ...I think that a rule to enter a non- suit must be refused, and that the verdict should stand.

[66] Wetmore, J., agreed with the above. The Chief Justice, Sir John C. Allen, was of opinion that there should be a new trial unless the plaintiff was entitled to recover under his grant "which", he said, "I think was the real question reserved". The learned chief justice then discussed that question, and decided that plaintiff's grant was inoperative and conveyed no title. Fraser, J., agreed with him. Palmer and King, JJ., not having heard the argument took no part; so that, in result, the court being equally divided the verdict stood.

[67] It is very apparent that the basis of the learned chief justice's judgment was, that the Indian rights in the reserve had been extinguished. The report does not furnish us with information as to how such extinguishment had taken place, but that such was the case is clear beyond dispute.

[68] In discussing the matter on page 149, the chief justice says:-

> Here, again, it seems to me that the arguments used in favor of the provincial rights are stronger than in the *St. Catherines* case, because, in this province, the estate of the Crown in the land in dispute in this action is not encumbered (so far as appears by the evidence) by any Indian title.

[69] I have dwelt upon the last branch of the case at greater length than perhaps is necessary for a judge of first instance, but I am unwilling to render a judgment which, at first glance, might appear at variance with the views expressed by most learned and able members of the Supreme Court of this province, without indicating, as clearly as I can, the distinctions above referred to, and giving my reasons for such judgment; and I am strengthened in the decision at which I have arrived by the case of the *Attorney-General for Canada v. Giroux*, 53 S.C.R. 173, in which the Supreme Court of Canada held that the *Indian Act* does not prohibit a sale by the Crown to an Indian of public lands, which have, on surrender to the Crown, ceased to be part of an Indian Reserve. The right of the Dominion Government to sell such lands so surrendered was not challenged in the action; it seems to have been taken for granted that the power to sell and convey such lands is vested in the Dominion Authorities.

[70] Having regard to the terms and purpose of the surrender, as well as to the provisions of s. 51 of the *Indian Act*, I am of the opinion that the Indian title to the lands in question has not been extinguished.

[71] I think the plaintiff is entitled to succeed and that he is entitled to possession of the land described in his grant.

[72] A verdict will be entered for him because of defendant's trespasses, with damages which I assess at the sum of Twenty-five Dollars ($25.00).

[73] Plaintiff has also prayed for an injunction against defendant to prevent further trespass. Leave is reserved to plaintiff to more hereafter for such remedy in case it may seem necessary

for him to do so.

[74] Judgment will be entered for plainiff for the sum of Twenty-five Dollars ($25.00), with costs of suit.

Judgment for plaintiff.

Editor: David C.R. Olmstead

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