FEGAN V. McLEAN

(1869), 29 U.C.Q.B. 202

Ontario Queen's Bench, Richards C.J., Morrison and Wilson JJ., 1869

Indian land--Right of Indians to sell timber.

Held, that an Indian might sell cordwood cut by him on unsurrendered Indian reserve land, of which he was in occupation as a member of the tribe.

Morrison, J., concurred on the ground only that the wood in this case might, for all that appeared, have been cut by the Indian in clearing the land with a view to its cultivation by him.

SPECIAL CASE stated in a cause removed from the Division Court by *certiorari.*

Trespass for taking the plaintiff's goods at the township of Tuscarora, in the county of Brant.

Pleas.--Not guilty; and that the goods were the goods of the defendant, and not of the plaintiff. Issue.

The case stated that the cordwood, the subject of the action, was cut on Indian lands, part of the Indian Reserve, by one John Peters, an Indian, who occupied the land on which the wood was cut, such occupation by him being as a member of an Indian tribe, and that the cutting was without the license of the Indian Department or of any commissioner thereof.

The wood when made into cordwood was sold by Peters to the plaintiff, and was to have been delivered by Peters off the Indian Reserve, and was at the commencement of this suit still on the reserve.

The Indian Reserve was unsurrendered Indian land, set apart by the Crown for the use of the Six Nations Indians, of which Peter was one.

The cordwood was seized on the reserve by instructions from the Indian Department by the defendant, who was one of the commissioners appointed for the management of Indian affairs, and who was also forest warden over the reserve. The defendant contended the cutting of the cordwood was without lawful authority

This seizure was the trespass complained of.

By order in council, dated 5th May, 1862, made under the 23 Vic. ch. 151, sec. 7, the following sections and sub-sections of ch. 23 of Consol. Stat. C. were made applicable to Indian lands: namely, sec. 1, sub-sec. 2, secs. 2, 3, 4, 5, 6, 7, 8 and sub-sec. 2, secs. 11, 12 and 13.

The questions for the opinion of the court were,

1. Did the plaintiff acquire property in the cordwood under the facts stated?

2. Had the defendant a right, as such forest warden and commissioner, to seize the cordwood ?

If the court were of opinion that the plaintiff did acquire property in the cordwood, or that the defendant had no right to seize it, their judgment was to be given for the plaintiff. But if the court were of opinion that the plaintiff had no property in the cordwood, and that the defendant had a right to seize the same, then judgment was to be given for the defendant.

The case was argued in Michaelmas Term last.

Furlong for the plaintiff. John Peters was the actual and lawful occupant of the land. He had the right to take the timber, and to dispose of it. Unless it plainly appears Peters had no such right, and that the defendant's authority was as extensive as he asserts it to have been, the plaintiff must recover. Even if the defendant had the power to seize the cordwood, he did not lawfully pursue his authority. The 8th section of Consol. Stat. C. ch. 23 required an affidavit to be first made before a justice of the peace that the wood had been cut without authority on reserve land, to justify the defendant in seizing it as agent for the Crown. He referred to 12 Vic. chaps. 9 and 30; *Vanvleck* v. *Stewart*, 19 U. C. R. 489; *Doe Jackson* v. *Wilkes*, 4 O.S. 142; *Miller* v. *Clark*, 10 U.C.R. 9; *Bown* v. *West*, 1 E. & A. 118; *Bank of Montreal* v. *McWhirter*, 17 C. P. 506.

J. Martin, contra. Indians on reserve lands have no interest in the soil. They have the right of occupation and cultivation, and of clearing the land for cultivation, and of taking their necessary firewood for use upon the premises; they have not the right of cutting and selling the timber without regard to cultivation: *Weller* v. *Burnham*, 11 U.

C.R. 91; *Doe Sheldon* v. *Ramsay*, 9 U.C.R. 119; *Mutch- more* v. *Davis*, 14 Grant, 357; Consol. Stat. C. ch. 9. The timber having been cut without license, the commissioner had authority to seize it without an affidavit having been first made: Consol. Stat. U. C. ch. 81, secs. 12, 30; Dominion Act, 31 Vic. ch. 42, secs 22, 37. He commented on the cases referred to for the plaintiff.

WILSON, J.,--The land in question is admitted to be unsurrendered land, set apart and reserved for the use of the Indians. The land either belongs to or is held by the Crown in trust for the Indians. The Crown has a right to proceed against persons taking possession of or doing trespass on such lands. The Indians for whom these lands are reserved, or by whom such lands have not been surrendered, are entitled to the use and occupancy of them: 3 *Kent's* Com. 466 to 492. That they cannot surrender of sell them to any private person, without the license of the Crown, is a general principle of law. Consol. Stat. U.C. ch. 81, sec. 21 and the Consol. Stat. C. ch. 9, making special provisions with respect to lands which are allotted to enfranchised Indians, confirm this principle. The Consol, Stat. U.C. ch. 81, also makes it a penal offence, without the license of the Crown, to purchase or lease, or contract for the purchase or lease of, any land or any interest therein from the Indians, or from any of them.

There is nothing in the statutes referred to, nor in the tenure and interest which the Indians have in such unsurrendered or reserved lands, which prevents the Indian occupant from cutting more cordwood than he requires for his own use upon and from the land he occupies. He cannot be prosecuted or punished in any way for doing so. Having cut this cordwood, what is there to prevent his selling it and passing the property in it to the purchaser? I see nothing by way of enactment or of rule of law to prohibit such sale. If any one trespassed on land occupied by an

Indian, he might most likely be proceeded against under sec. 30 of the Consol. Stat. U.C. ch. 81, and the Dominion Act 31 Vic. ch. 42, sec. 22, at the instance of the Crown or its authorized officers, notwithstanding the actual occupation by the Indian. But when the alleged act of trespass was done by the consent of the occupant, he himself having the right to do the very act *licensed* if he chose, I do not see that the act so done can be a trespass. In this case the plaintiff committed no actual trespass on the land, and all he did do was with the occupant's consent.

If the trees or standing timber are to be considered an interest in land, then by the plain terms of the statute a contract relating to the purchase of them is absolutely void. Here, however, the purchase was not of an interest in land but of mere chattels of cordwood made and ready for delivery.

The case of *Vanvleck* v. *Stewart*, 19 U.C.R. 489, so far as it is a decision, is in support of the view I take. It may be that the Indians should be prohibited from cutting cordwood, or timber, or logs, for the purpose of sale, or selling it, without leave so to do, but that is a subject for legislation. I do not see that they are restricted at the present time from doing so, and I must therefore state what the law is in my opinion.

I think the plaintiff did acquire the property in the cordwood in question by reason of his purchase from John Peters, and that the defendant had no right to seize it.

The judgment should be for the plaintiff.

MORRISON, J.--I concur in thinking that under the circumstances appearing in this case our judgment should be for the plaintiff. I rest my opinion entirely on the ground that it does not appear that the cordwood in question was not cut by the Indian in clearing land with a view to its lawful occupancy by him, for if it was cut in so clearing the land, I think the Indian might dispose of it as he thought proper. I perfectly agree with the defendant's counsel, that it would be a great injustice to these Indians if any one or more of their number could, without any regard to the occupancy or use of the land for agricultural purposes, cut down the trees and valuable timber, and convert them into cordwood, disposing of it much below its value to any evil disposed person who may prompt and induce an Indian so to destroy the property belonging, to the whole tribe.

The consideration of this case discloses that the rights and interests of the Indians require to be further protected by such regulations as would in future prevent the reserves being liable to be injured and destroyed, in the manner in which, as contended on the part of the defendant (the forest warden), was done in this case.

RICHARDS, C. J., concurred.

Judgment for plaintiff.