

1926
March 17.

HIS MAJESTY THE KING.....PLAINTIFF;
AND
LADY ELLA V. McMASTER ET AL.....DEFENDANTS.

*Crown—Indian lands—Lease by Indians—Royal Proclamation, 1763—
Tenant-at-will*

Held, that as by the Royal Proclamation of 1763, which has the force of a statute, and the several Indian Acts since passed, lands forming part of Indian Reserves could not be alienated or otherwise dealt with by the Indians, a contract of lease made in 1817 by certain chiefs of the Indian tribe then in occupancy thereof, of a certain island (part of the St. Regis Indian Reserve) for 99 years with right of renewal, was null and void. That the Indians never had such an interest in lands reserved for their occupancy that they could alienate by lease or sale. That the Crown could not itself lease or ratify a lease made by the Indians of such land at any time save upon a surrender of the same by the Indians to the Crown.

2. That the right of the Crown to recover possession of the lands in question, improperly in possession of the defendants, is one incident to the control and management of such lands, given it by the British North America Act, and is not to be confused with a claim on the part of the Crown asserting title thereto either in right of the Dominion or of a province. (*Mowat, Attorney General v. Casgrain, Attorney General* (1897) Q.O.R. 6 Q.B. 12 referred to.
3. That the lease being void, the tenancy acquired by the defendant, from those charged with the control and management of Indian lands, under the Indian Act, was that of a tenancy-at-will, or that of a yearly tenant, which could be terminated by notice to quit and to deliver up possession.

INFORMATION by the Attorney General of Canada to recover possession of certain lands now in the occupancy of defendants, part of an Indian Reserve.

Ottawa, October 15 and November 6, 1925.

Action now tried before the Honourable the President.

W. C. McCarthy and *A. S. Williams* for plaintiff.

George A. Campbell, K.C., for the defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 17th March, 1926, delivered judgment.

This is an action brought by His Majesty the King, on the information of the Attorney General of Canada, wherein the plaintiff claims possession of certain lands, now in possession of the defendants, and being a portion of the St. Regis Indian Reserve located in the eastern part of the province of Ontario.

Certain historical and constitutional facts in connection with the cession of Canada to Great Britain by France,

under the Treaty of Paris, 1763, and the issuance of the Royal Proclamation of October 7, 1763, are of importance here, but as the same are to be found comprehensively outlined in *St. Catherine Milling and Lumber Company v. The Queen* (1). I need hardly repeat them here. In the case just mentioned, there had been a surrender by treaty to the Crown, by the Indians, of the lands involved in that litigation, whereas in this case there has never been any such surrender, and the Crown is not I understand, asserting ownership or title to the lands here in question in the right of the Dominion, and these are the particular facts distinguishing the cases.

1926
 THE KING
 v.
 LADY
 McMASTER.
 Maclean J.

The property in question, known under several names, but generally as Thompson's Island, was in Indian occupation from the date of the proclamation of 1763, and doubtless prior to that date, until 1817, when the same was leased in writing, to one David Thompson, by certain chiefs of the Indian tribe then in occupancy of the same, and which constituted a part of what was known as the St. Regis Indian Reserve. The lease was for a period of 99 years and contained a covenant for renewal in the following terms:—

For themselves and their heirs, executors, administrators, assigns, and successors, do hereby covenant, grant and agree to and with the said David Thompson his heirs and assigns under the penalty of five thousand pounds sterling, that they the said party of the first part their heirs or successors at the expiration of the said term of ninety-nine years shall and will renew, make, sign, seal and deliver to the said David Thompson his heirs, executors, administrators or assigns a legal or lawful lease for a further period or term of ninety-nine years under the same terms and yielding the same rents as is hereby covenanted and agreed by the said David Thompson to be given and paid for the premises hereby demised and leased to him as aforesaid or intended so to be. And it is hereby further covenanted, granted and agreed by and between the parties aforesaid their and each of their heirs, executors, administrators, assigns or successors that if no owner or proprietor shall be forthcoming or can be found to give a further lease of the said premises for a further period of ninety-nine years, then and in such case that these presents and the term of years hereby granted and leased shall be and continue in force for and during and unto the full end and term of nine hundred and ninety-nine years thence next ensuing and it is hereby declared and agreed that in such case the said David Thompson his heirs, assigns or successors shall and may occupy, possess and enjoy all and singular the said premises hereby leased with the appurtenances for and during and unto the full end and term of nine hundred and ninety-nine years thence next ensuing as aforesaid, without the let trouble, hindrance, molestation, interruption, eviction or denial of any person or persons whatever.

(1) [1889] 14 A.C. 46; 13 S.C.R. 577; 13 O.A.R. 148.

1926
 THE KING
 v.
 LADY
 McMASTER.
 Maclean J.

Any rights acquired under this lease in the subsequent years, passed down from one party to another, and in 1862, the title to the lease stood in the name of one Donald McDonald or his heirs. From 1817 down to 1862 the annual rental stipulated in the lease was apparently paid, and to some person or persons acting on behalf of the Indians or in their interests. When the defendant Sir Donald McMaster desired to acquire the lease, or the property covered by the lease, the same was being administered or controlled by the Department of Indian Affairs of the Government of Canada, on behalf of the Indians, and as by statute authorized. With that department this defendant commenced, in 1872, negotiations for the recognition of the lease which he proposed to acquire, and the negotiations extended over a number of years. At this time there was an arrearage of rentals due under the lease, covering a period of about 23 years, and altogether amounting to the sum of \$237.50. In the end, this sum was paid to the Department of Indian Affairs in January, 1884, by the defendant Sir Donald McMaster, and he entered upon the property in question under the lease. It might be convenient, however, to mention in greater detail some of the facts disclosed during the negotiations between the Department of Indian Affairs and this defendant. When, hereafter, I refer to the defendant, I shall mean the original defendant Sir Donald McMaster.

As already stated in 1862 Thompson's Island was in the possession of one Donald McDonald or his heirs, the lease having been acquired by McDonald by assignment. At this date, however, and prior thereto the defendant's father occupied the island apparently under an agreement of sale and purchase of the lease, made with McDonald, but it appears he never procured in his lifetime a formal assignment of the lease. In June, 1872, the defendant, then being desirous of obtaining an assignment of the lease from the heirs of McDonald, commenced making inquiries of the Department of Indian Affairs as to the validity of the lease granted by the Indians in 1817 of Thompson's Island, and he was advised that though in previous years, Indians had made leases of land reserved for their benefit, the same was done without adequate authority. Fearing some infirmity in the title under the lease, the defendant inquired if the

department would recognize the title to the lease if the same were assigned by the heirs of McDonald, to him, if he the defendant would pay the past due rentals which had been accumulating since 1862. In this correspondence the defendant refers to the land in question as part of an Indian Reserve. The correspondence was protracted, but in 1881 the defendant was advised by the Deputy Superintendent General of Indian Affairs, that the old lease had become void through non-fulfilment of its conditions, but that the department would endeavour to lease it again on conditions advantageous to the Indians, and in that year the defendant was advised by the same official that if he could get an assignment from the representatives of McDonald deceased, in whom such title as the original lessee had seemed to be vested, and would pay the rental arrearages, his title under the lease would be recognized as far as it could legally be done. This did not appear quite satisfactory to the defendant, as he did not care for a lease that was liable to attack, and he replied that if the department would give him a lease for the original term of 99 years, with covenants for renewals, he would willingly arrange with the McDonald heirs and pay the rental arrearages, but he was insisting upon a recognition of the validity of the tenure of the McDonald heirs under the lease before carrying out such terms. On July 11, 1882, he was informed that if he could establish a legal assignment from the representatives of McDonald to himself, his title as assignee would be recognized. He was informed, however, in the same letter, that he could not obtain a new title in his own name because the Island never having been surrendered by the Indians to the Crown it could not be sold or leased, but as the original lease had long been recognized, the department would recognize him as assignee upon payment of the past due rentals. To this he replied that recognition of the existing lease would satisfy him. On November 3, 1883, the defendant was definitely advised that upon the payment of the arrears of rent his tenancy would be recognized. In the end the unpaid rentals amounting to \$237.50, was remitted by the defendant on December 22, 1883, to the Department of Indian Affairs. In a letter from the department dated January 9, 1884, acknowledging receipt of this amount, there appears a review of the title from the

1926
 THE KING
 v.
 LADY
 McMASTER.
 Maclean J.

1926
 THE KING
 v.
 LADY
 McMASTER.
 1926

original lessee down to the assignment to Donald McDonald, and the defendant was therein informed that admitting the right of the Indian Chiefs to lease the Island, the law of Ontario would give him title by possession as against any one but the Crown, and that if McDonald's possession and that of his legal representatives were established since 1844, the department stated, it would be justified in recognizing the defendant as assignee of the lease. On May 20, 1884, the department wrote the defendant that the various documents referring to the title to the lease had been referred to the Department of Justice for an opinion as to whether they were sufficient to admit of the lease of the Island being renewed in his favour, and on June 5, he was advised by the department that he had shewn sufficient title to be considered as the holder of the lease originally granted to Thompson, and that his possessory title as against anyone but the Crown was admitted.

In 1887 the Indians commenced to assert right of occupancy to the Island and threatened to take possession of it, but nothing came of this largely through the intervention of officers of the Department of Indian Affairs, who induced the Indians to abandon such intentions. On August 5, 1915, the defendant made formal application to the department for a renewal of the lease, as the first 99-year period was expiring the following year. He was advised on September 7 following that no assurance had been given him as to a renewal of the lease, but only that his rights under the lease would be recognized as far as the same could be done legally. He was later advised that favourable consideration could not be given to his request for a renewal, and the department disclaimed liability for payment of the penalty provided in the original lease for non-renewal of the same. To this view the department adhered and the defendant never received a renewal, and in due course he was given notice to quit the property, and later the present action was commenced against the defendant.

The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed. The proclamation enacted that no private person shall make any purchase from the Indians of lands reserved to them,

and that all purchases must be on behalf of the Crown, etc. Throughout the subsequent years all legislation in the form of Indian Acts continued the letter and spirit of the proclamation in respect of the inalienability of Indian reserves by the Indians. As was said by Lord Watson in the *St. Catherine Milling and Lumber Company* case, since the date of the proclamation Indian affairs had been administered successively by the Crown, by the provincial governments, and since the passing of the British North America Act, 1867, by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty, and as determined in the *St. Catherine Milling and Lumber Company case*. There can be no doubt but that the property in question was part of an Indian Reserve covered by the proclamation. For these reasons I am clearly of the opinion that the lease to Thompson in 1817 was void, and that the Indians never had such an interest in the lands reserved for their occupancy, that they could alienate the same by lease or sale. The Crown could not itself lease, or ratify any lease, made by the Indians of such lands at any time since the proclamation, save upon a surrender of the same by the Indians to the Crown. If the lease was void anything that the Department of Indian Affairs or any other authorized body or person administering Indian affairs did, or could do in the way of adoption or ratification of the same, would be contrary to the enactment of the proclamation and of the subsequent statutes relating to Indian affairs, and which in this respect were declaratory of the provisions of the proclamation and not binding on the Crown. I am unable also to concur in the defendant's contention that the Quebec Act, which enlarged the limits of the province of Quebec, destroyed the rights of the In-

1926
 THE KING
 v.
 LADY
 McMASTER.
 Maclean J.

1926
 THE KING
 v.
 LADY
 McMASTER.
 Maclean J.

dians in the lands reserved under the proclamation. This I think has been authoritatively settled.

The defendants also rely on title acquired by prescription. This contention is I think wholly without force. Rental was apparently paid during the whole period since the date of the lease, although for a time it remained unpaid as I have already explained. Even if this were not clearly proven in respect of the whole period of 99 years, still, admittedly, the defendant paid to the appropriate authority the annual rental mentioned in the lease during his occupancy, and for more than twenty years prior thereto when the rentals became in arrears by his predecessors in occupancy under the lease. A title by prescription cannot be asserted concurrently with such an acknowledgment of title in another or others.

One of the defendant's most formidable contentions is, that if the legal title to the property in question is in the Crown, it must be in the Crown in the right of the province of Ontario, and that the Crown in the right of the Dominion has no status to claim the land as owner, and they rely upon the authorities of *St. Catherines Milling & Lumber Company v. The Queen* (1), and *Attorney General for Quebec v. Attorney General for Canada* (2). I do not think this position is tenable. In the two authorities cited the lands had been surrendered by the Indians to the Crown, and the substantial point in issue in both cases was whether in virtue of secs. 109 and 117 of the British North America Act such lands had passed to the Crown in the right of the province interested. Here there has been no surrender, and the legal title is in the Crown where it always was, subject to what was termed in the *St. Catherine Milling & Lumber Company* case, the burden of the Indian title. What is asserted or claimed in this action, it seems to me is that the right to repossess is in the Crown, not that the title to the property is in the Crown in the right of the Dominion. The fact that the Attorney General for Canada prosecutes for the Crown does not show that a Dominion title is necessarily claimed. *The Attorney General v. Harris* (3). The Parliament of Canada, in virtue of sec. 91 (24) B.N.A. Act has exclusive legislative authority over

(1) [1889] 14 A.C. 46.

(2) [1921] 1 A.C. 401 at p. 407.

(3) [1872] 33 U.C.Q.B.R. 94.

“Indians and lands reserved for Indians,” and there never having been any surrender of the lands in question to the Crown, and the control, direction and management of lands reserved for Indians being in the Dominion, I think the Crown is entitled to seek possession of the property in question from the defendants for the benefit of the Indians. The power of the Crown to manage and legislate in respect of Indian lands, surely implies the right to bring action to recover or protect any interest of the Indians in such lands. The Indian Act, chap. 81, R.S.C., 1906, sec. 4, states that the Minister of the Interior shall be Superintendent General of Indian Affairs and shall have the control and management of the land and property of the Indians in Canada. The corresponding legislation, in force at the time the defendant went into possession of Thompson’s Island, contained a similar provision. To seek recovery of possession of the lands in question, believed to be improperly in the defendants, is incident to the control and management of such lands, and is not I think to be confused with a claim on the part of the Crown asserting title to such lands either in the right of the Dominion or of a province. *Mowatt, Attorney General v. Casgrain, Attorney General* (1).

1926
 THE KING
 v.
 LADY
 McMASTER.
 Maclean, J.

The plaintiff’s statement of claim is a bare claim for the possession of the lands in question. It is not pleaded that the lands are a portion of any tract or tracts of land, set apart by treaty or otherwise, for the use or benefit of the Indians, or that the same is under the control and management of the Minister of the Interior representing the Crown. On the other hand it is not claimed that the title to the said land is in the Crown in the right of the Dominion. The cause was tried upon the footing that the lands in question were Indian lands, and that the control and management of the same was in the person designated by the Indian Act, and who is a Minister of the Crown, and that in virtue of such duty and power so vested in him this action was brought. I shall consider the pleadings as amended so as to properly set forth the nature and quality of the interest of the plaintiff in the lands here in question.

(1) [1897] Q.O.R. 6 Q.B. 12.

1926
 THE KING
 v.
 LADY
 McMASTER.
 Maclean J.

If the lease was always void, it remains to be considered what was the nature of the tenancy acquired by the defendant from those charged with the control and management of Indian lands, under the Indian Act, in accepting annual rentals from the defendant during the period of his occupancy. As contended by plaintiff's counsel, I am of the opinion that his highest position was that of a yearly tenant, and that the tenancy was terminated by the notice to quit and deliver up possession. If the view I take that the lease is and always was void, and that the same has not and could not since have been ratified by the Crown, then the defendant could not be more than a tenant-at-will, or a yearly tenant, and which here it matters not.

The defendants claim that in the event of the plaintiff succeeding in this action for the recovery of possession of the lands covered by the lease, they are entitled to compensation for improvements and expenditures made upon the property by the defendant Sir Donald McMaster in reliance upon the security of his rights under the lease, and particularly his right of renewal of the same at the end of the 99-year period. No evidence was given at the trial as to the liability of the plaintiff for compensation, or the amount if any, and accordingly I reserve the right to hear counsel and evidence, or to direct a reference upon this point when and if necessary. This, I understand, to be agreed upon by counsel. If the view I take of the case ultimately prevails, I should hope that this might be amicably arranged between the parties.

I am therefore of the opinion that the plaintiff is entitled to judgment, and a declaration that he is entitled to the possession of the lands described in the statement of claim. No evidence was given by the plaintiff as to the claim for issues and profits, and accordingly I need say nothing as to this part of the plaintiff's claim. The circumstances of the case warrant me in directing that there be no order as to costs.

Judgment accordingly.