DOE D. BURK *v.* CORMIER

(1890), 30 N.B.R. 142

New Brunswick Supreme Court, Allen C.J., Tuck, Wetmore and Fraser JJ., 31 October 1890

Indian Reserve -- Title to -- British North America Act, secs. 91, 92 – Ejectment -- Tenants in common -- Father and sons in occupation -- Presumption of possession.

The title to land in this Province reserved for the Indians is in the Provincial Government, and not in the Dominion Government. (Per ALLEN, C.J., and FRASER, J.C. and his three sons (being of age) lived in a lot of land, two of them with their father, and the other in a house by himself. They all worked in the land without any division. C. mortgaged the land to the lessor of the plaintiff. In ejectment against C. and the sons, they appeared jointly and entered into the common consent rule, and a verdict was given for the plaintiff against all defendants.. On a motion for a new trial:

***Held* per ALLEN, C.J., and FRASER J., that in the absence of any evidence of a separate occupation by the sons, it might be presumed that C. alone was in the occupation of the land, and that it was not a joint occupation of him and his sons.**

***Held* also, that though C. was estopped by his mortgage from disputing the title of the lessor of the plaintiff, his sons were not estopped; and that the lessor of the plaintiff, having proved no title except the mortgage, there should be a new trial.**

Per WETMORE and TUCK, JJ., That the sons of C., not having shewn any title to the land, the possession would be presumed to be in C., and that the verdict should stand.

This was an action of ejectment for one hundred acres of land in the County of Kent, being part of the Buctouche Indian Reserve.

In order to make out his title, the lessor of the plaintiff gave in evidence a mortgage to himself of the land in dispute from Sylvain U. Cormier, one of the defendants, dated the 19th February, 1878, for the payment of $79 in two years from the date. This mortgage contained a power of sale in case default was made in payment of the money.

Default having been made, the property was sold under the power and purchased by one Gallant, to whom it was conveyed by the lessor of the plaintiff on the 9th February, 1889, and on the 15th of the same month Gallant reconveyed it to the lessor of the plaintiff.

The lessor of the plaintiff also gave in evidence a grant of the land dispute from the Crown to himself under the great seal of Canada, dated the 11th Aug., 1882, in which the land was described as being part of the Buctouche Indian Reserve in the County of Kent, in New Brunswick, set apart for the use of the Buctouche Indians. This grant was executed with all the formalities required by the 45th section of "The Indian Act," (Rev. Stat. Can., cap. 43).

The defendants, Sylvian U. Cormier, the mortgagor, and Oliver S. Cormier, Thaddy S. Cormier and Joseph Lucien Cormier, the sons of Sylvian, entered into the common consent rule to confess lease, entry and ouster, and that they were in possession of the land described at the time of the service of the declaration in the action.

They all lived on the 100 acres in dispute, on which there were two houses, in one of which the defendant, Oliver, lived, and Sylvian and the other defendants in the other house. At the time the mortgage was given, the three sons of Sylvian were all of mature age, varying from 25 to 40 years. There was no evidence of any separate occupation of the land by either of them, beyond the fact that they resided in different houses.

This was all the evidence given by the plaintiff, and the defendants gave no evidence. They were not shewn to have been in any way connected with the mortgage, or to have recognized it in any way.

At the trial, which took place before His Honor Mr. Justice Tuck, at the Kent Circuit in September, 1889, a verdict was entered for the plaintiff by consent, with leave to the defendants 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. The Court also to be at liberty to draw inferences of fact from the evidence.

June 14, 1890. *Geo. F. Gregory* moved pursuant to leave for a nonsuit, or, failing that, for a new trial. The plaintiff can not get any benefit from the Dominion grant of the land in dispute. The case of *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1) 1 App.Cas.46., places the matter beyond doubt, that the title to the Indian reserves in this Province, vests in the Provincial Government. If, therefore, the plaintiff is entitled to hold his verdict, it must be through the mortgage from Sylvian U. Cormier, the father of the other defendants. Admitting that Sylvian is estopped by his mortgage from disputing the plaintiff's title, the other defendants are not so estopped. The evidence shews that the defendants lived in separate houses upon the land, and that they were not in joint possession of the land. Where several defendants appear and enter into the consent rule and plead jointly, the plaintiff must prove joint possession of all. Adams on Ejectment, p. 328. This he has failed to do. It is also sufficient in an action of ejectment to prove title out of the lessor of the plaintiff. *Doe dem. McGowan* v. *McColgan* (1) 1 Han. 542.

Rainsford, contra. Sylvian is estopped by his mortgage from disputing title in the plaintiff. The other defendants were his sons, and there was sufficient evidence to go to the jury that they were living with their father and occupying the land jointly with him. It will be presumed from the fact that the father was in possession, that the sons were living with him, unless there is evidence to the contrary. By the agreement at the trial, this Court are to draw inference of fact: if therefore there was sufficient evidence of joint possession to be submitted to the jury, the Court must now sustain the verdict. It is also submitted that all the defendants having joined in the consent rule, they are now estopped from claiming that they held separately. As to the grant to the plaintiff from the Dominion government:--the Indian Reserves in this Province are in a different position from this in Ontario, and the case of *St. Catherine's Milling and Lumber Co.* v. *The Queen* does not apply. The fact that the rights of the Indians in the Ontario lands had been surrendered to the Government of the Dominion, entered into the decision of that case. The moment the Indians gave up their rights, the lands vested in the Crown, and became part of the Crown lands of Ontario. The Indian lands in this Province were reserved to them at the time of Confederation, and under sec. 91, sub-sec. 24 of The British North America Act, the Dominion Government has absolute control of the lands.

Gregory, in reply.

Cur. Adv. Vult.

The following judgments were now delivered:

TUCK, J. The plaintiff gave evidence that before action brought he had demanded possession of the property from the defendants, and they had refused to give it up to him. He said also that all the defendants lived and worked on the land; that Oliver lived in one house and the old man loved in the other with the other boys. Sylvian is the father of the other defendants. Burk could not say that the defendants farmed on the land together; they are not farmers; that they live principally by day's laboring outside. He said he first found out it was Indian land when the government of Canada made it known, that those working on Indian land had to apply to the government to get grants, and that was eight or nine years before. In answer to the question, "So you know that that land is Indian land?" He said: "Was Indian land at that time--Indian reserve. But I had understood at the time of the grant, that old man Cormier had bought this land form the Indians the same as other had done."

The defendants moved for a nonsuit, on the ground that the grant from the government of Canada gave no title to Burk, as the crown lands of the Province, including lands called Indian reserve, were in the separate Provinces, under the British North America Act, relying upon *St. Catherine's Milling & Lumber Co.* v. *The Queen* (1) 13 Can. S.C.R. 577: 14 App. Cas 26.

The defendants' counsel also took the ground, that if old Sylvian Cormier had no title he could confer none, and if it should be contended that he was estopped by the mortgage, still he could convey away the rights of the other co-tenants. By agreement a verdict was entered for the plaintiff with leave to the defendants to move to enter a nonsuit, the Court to draw inferences of fact from the evidence.

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 defendant Sylvian Cormier, and he is estopped from setting up title in another by the mortgage which he gave to the plaintiff. Even if the beneficial interest in this land passed to the Province under section 109 of the British North America Act, yet the defendants ought not to derive any benefit from that fact in this action.

Any evidence there is shows that there was either a joint tenancy, or that the occupation by the sons was no more than the possession of the father. Sylvian alone gave a mortgage of the whole property to Burk, and it does nor appear that either of the sons ever set up a claim to a separate occupation of any part of the land. If either of them had any right, it was open to him to have shewn what it was at the trial. The very fact that neither of the defendants gave evidence, goes far to shew that they did not think they had any legal claim. The plaintiff says that they all worked in the 100 acres of land; that there were two houses on it; that Oliver lived in one, and the old man lived in the other, with the other boys. Now, to my mind, that is quite consistent with a joint occupation, or with the other view that the whole possession was that of the father, and the sons were there by his permission.

I think that a rule to enter a nonsuit must be refused, and that the verdict should stand.

WETMORE, J. I agree with my brother TUCK.

SIR JOHN C. ALLEN, C.J., after stating the facts as given above, continued:--So far as Sylvian Cormier is concerned, there is no doubt that he is estopped by the mortgage from disputing the plaintiff's title. I am also inclined to think that the Court would be justified under the evidence, in presuming that the occupation of the land by the defendants was as tenants in common, and that the lessor of the plaintiff, having the legal title of Sylvian by the mortgage, would be a tenant in

common with the other defendants, and that a special consent rule should properly have been entered into, according to the practice. See Earle's Rules, 113; Adams' Eject. 263.

But as this point was not raises at the trial, and if it had been, the consent rule would probably have been amended, if necessary, I do not think the defendants (except Sylvian) should be precluded by it now, but that there should be a new trial unless the plaintiff is entitled to recover under his grant; which, I think, was the real question reserved.

I think the question of the plaintiff's title under his grant is concluded by the case of *The St. Catherine's Milling & Lumber Co.* v. *Reg.* (1) 13 Can S.C.R. 577; 14 App. Cas.46.

The question there was whether certain lands which had been ceded to the Crown by a treaty with several Indian tribes, in the year 1873, belonged to the Dominion Government, or to the Province of Ontario, in which the lands were situated; and it was held that they belonged to the latter under the terms of The British North America Act, 1867.

The portions of the British North America Act bearing on this question are: section 91, sub-sec, 24; sec. 92, sub-sec. 5; and sec. 109.

Section 91, relating to the Legislative power of the Dominion, declares that is shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons to make laws in relation to all matters not coming within the classes of subjects assigned by the Act exclusively to the Provincial Legislatures; but for greater certainty it was declared that the exclusive legislative authority of the Parliament of Canada extended to all matters coming within certain enumerated classes mentioned; among which are—

24--"Indians, and Lands reserved for the Indians."

Section 92 deals with the exclusive powers of Provincial Legislatures; and declares that in each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects thereinafter enumerated.

Among the subjects so assigned exclusively to the Provincial Legislature, is the following: 5--"The management and sale of the public lands belonging to the Province, and of the timber and wood thereon."

Under the title "Revenues, Debts, Assets, Taxation," section 109 declares that "All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums due or payable for such lands, etc., shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that in the same."

It will be observed that the exclusive power given to the Dominion Parliament by the 24th sub-sec. of sec. 91, is to legislate on the subject of the "Indians and lands reserved for the Indians;" and Parliament did so legislate by "The Indian Act" (Rev. Stat. Can. cap. 43); but that chapter has no bearing on the present question--the title to the lands reserved for the use of the Indians.

In the case of the *St. Catherine's Milling & Lumber Co.* (1) 13 Can S.C.R. 577., Ritchie, C.J., said: "I am of opinion that all ungranted lands in the Province of Ontario belong to the Crown as part of the public domain, subject to the Indian right of occupancy in cases in which the same has not been lawfully extinguished; and when such right of occupancy has been lawfully extinguished, absolutely to the Crown, and, as a consequence, to the Province of Ontario."

These observations will apply with equal, if not greater, force to the Indian Reserve lands in this Province, which would not be affected by the Royal Proclamation of 1763, which recognized the right of possession of several tribes of Indians to lands in old Canada and elsewhere; nor to the treaty of 1873, by which the Indians within the limits of the Province of Ontario surrendered their right of possession to the Government of Canada, reserving certain privileges of hunting, etc.

It was one of the contentions before the Privy Council, in the *St. Catherine's Milling and Lumber Co. Case* (2) 14 App. Cas. 46., that the grant to the Dominion Parliament, by sec. 91 of the British North America Act, of the legislative power over lands reserved for the Indians, carried with it by implication a grant of the proprietary right, and any interest which the Crown might have had in the reserved lands. But Lord Watson, delivering the opinion of the Judicial Committee, said on this subject: "Their lordships are unable to assent to the argument for the Dominion, founded on sec. 92 (24). There can be no *a priori* probability that the British Legislature, in a branch of the statute which professes 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 (sec. 109). 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."

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

Referring to sec. 109 of the British North America Act, Lord Watson says: "The enactments of sec. 109 are, in the opinion of their lordships, sufficient to give to each Province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under sec. 108, or might assume for the purposes specified in sec. 117. (Fortifications or defence.) Its legal effect is to exclude from the 'duties and revenues' appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the Provinces."

There never has been any doubt in this Province, that the title to the land in the Province reserved for the use of the Indians, remained--like all the other ungranted lands--in the Crown, the Indians having, at most, a right of occupancy. The Act 7 Vic. Cap. 47, passed with a suspending clause, and confirmed by the Queen in 1844, fully recognized this. That Act was continued by the Revised Statutes of the Province, cap. 85, enacted in 1854. That chapter, of course, ceased to have any operation when the Dominion Parliament legislated on the subject; but the right of the Crown, as represented by the Government of this Province, to manage and sell the lands
Recovered for the use of the Indians, remained in the Executive Government of this Province, under sub-section 5 of section 92 of the British North America Act.

I therefore think that the grant under which the plaintiff claimed was inoperative, and conveyed no title; and that there should be a new trial, as there was no evidence to sustain the verdict against the defendants, Oliver, Thaddy and Joseph Lucien Cormier.

FRASER, J. I agree with the learned Chief Justice.

PALMER and KING, JJ., not having heard the argument, took no part.

The Court being equally divided,
the verdict stood.