THE QUEEN V. JOHNSON

(1850), 1 Gr. 409

Upper Canada Court of Chancery, Blake C., Jameson and Esten V.C., 1850

This was also a case of appeal from the judgment of the commissioners appointed under the stature 2 Vic., ch. 15. The petition raised the same objections as are set forth in the last case, and came on for argument at the same time.

ESTEN, V.C., delivered the judgment of the court.

This is an appeal under the acts 2 Victoria, chapter 15, and 12 Victoria, chapter 9. The land in question is the north half of lot No. 6, in the 4th concession of the township of Oneida. An information was laid before the commissioners appointed under these acts, on the 17th November, 1849, by one *Peter Smith,* who is called an Indian interpreter; in pursuance of which the appellant was summoned to appear before the commissioners on the 11th of December then next ensuing, to answer to the charge made against him by such information, of illegally occupying the land in question, contrary to the provisions of the acts before mentioned. The appellant did not appear in compliance with such summons; whereupon at the time and place appointed, the commissioners proceeded to investigate the charge, and upon the evidence of one witness- namely, the before-named *Peter Smith*- found the appellant guilty, and issued a notice calling upon him to remove from the land in question within thirty days. From this judgment of the commissioners, the present appeal is brought; and after looking at all the authorities which were cited in the course of the argument, and which I have been able to find, and after due consideration of the arguments, which were urged with much force and ingenuity by the learned counsel for the appellant, I am of opinion that the judgment must be upheld. I shall first notice the objections made to the judgment by the petition of appeal, in the order in which they are there stated, and then proceed to advert to some other points which were raised in the course of the argument.

The first objection impeaches the evidence upon which the judgment was founded, as illegal and insufficient. The only witness examined by the commissioners was, as before mentioned, *Peter Smith.* I suppose that the evidence of one witness is sufficient for the purposes of these acts, if it appears credible and established all the facts necessary to warrant the judgment. Neither the competency nor the credit of this witness has been in any way impugned, and I am not aware of any ground upon which his evidence can be considered illegal. He proves that the appellant was not one (that is, a member) of any of the tribes of Indians occupying the land in question; that he had not, to the best of his belief, he continued in the occupation of it from that time to the time of his examination. This evidence, uncontradicted, is, I thick, sufficient to prove the alleged trespass, supposing the lands to be of the description specified in the acts. Upon this point, his evidence is as follows, namely:- that the land in question was, as he believed, part of the parcel or tract of land mentioned in his information; that it was then appropriated to the residence of the Six Nations Indians; that such tract was in the occupation of those tribes; and that no agreement for the cession of the tract to her Majesty had, as he believed, been made with the tribes occupying it. The facts deposed to by this witness, of appropriation, occupation, and non-cession, were, I thick, capable of being known to an individual. He swears to these facts to the best of his belief, and I think that such evidence, uncontradicted and unimpeached, was sufficient for the purpose for which it was adduced. The witness states that to the best of his belief the land in question was, at the time of giving his evidence, appropriated to the residence of these Indian tribes. If at this time he had been aware, or had any reason to believe, that any agreement for the cession of it had been made with her Majesty or any of her predecessors, which was in force and had been carried into effect, he would have been guilty of perjury in asserting upon his belief that it was then appropriated to the use of the Indians.

The second objection asserts that the land in question had been actually ceded to the government by the Six Nations Indians a long time ago, and demands enquiry into that fact. Supposing such to have been the case, it appears nevertheless, that the tract in question is in the occupation of these tribes- and we must suppose with the knowledge and consent of the government, and the contrary is no where pretended, and the government cannot be ignorant of the fact of such occupation. If, then, this tract of land is in the occupation of the Six Nations Indians with the consent of the government, it is, I think, land appropriated for their residence, and not ceded within the meaning of the acts of parliament in question, which, in this respect, I agree with Mr. Wilson, are remedial, and must receive a liberal construction. The acts are intended to embrace all Crown lands whatsoever, whether in the occupation of Indians or not, provided, in the latter case, they are not under lease, purchase, location, or license or occupation. These lands, if in the occupation of the Indians with the consent of the government, are precisely the lands intended to be protected by these acts; the object of which would be in a great measure defeated if they were excluded from their operation. In short, it appears to me that if lands are in the occupation of the Indians with the consent of the government, they are not withdrawn from the operation of the acts in question by an old cession not apparently acted upon, and which for this

purpose must be considered as abandoned or suspended. I think, therefore, that the enquiry which is asked for would be useless if made, and ought not to be directed.

The third objection points to the exception specified in the act of 12 Victoria, chapter 9, and asserts that they ought to have been negatived by the conviction. These exceptions, however, apply to a totally different class of lands from the present, namely, lands not in the occupation of the Indian tribes. The acts in question were intended to embrace lands in the occupation of the Indian tribes, and lands not so occupied, or, in other words, all other Crown lands, provided they were vacant- that is to say, not under lease, purchase, location, or license of occupation. But these qualifications apply only to lands not occupied by the Indian tribes; and if it is shewn that lands are in the occupation of the Indian tribes, it is not necessary to negative the exceptions referred to, which have no application to them. These remarks disposes likewise of the fourth objection, which stands on the same ground with the third. Lands in the occupation of the Indian tribes by the permission of the government, cannot be intended to be under grant, lease, location, or license of occupation.

The fifth objection I pass for the present.

The sixth objection, which asserts that the 1st section of the 2nd Victoria, chapter 15, is repealed, is unfounded in fact. The 1st section of the 2nd Victoria, chapter 15, is not repealed, but extended. The restriction which limits its operation is repealed, and the clause itself includes not only the lands originally comprised in it, but other lands also. When the proceeding concerns lands in the occupation of the Indian tribes, it is strictly correct to found it upon the clause in question, which retains the same force that it ever had, and is only extended, not repealed, by the 12th Victoria, chapter 9.

With regard to the 7th objection, which impugns the judgment for founding itself on both acts, whereas it stands only upon one, it does not appear to be very material. The two acts constitute but one law; and of a proceeding which purports to be under both acts is sufficiently sustained by one, the reference to the other is mere surplusage, which does not vitiate.

The eight objection suggests that the evidence of Peter Smith, who, as already mentioned, was the only witness examined in this matter, does not negative the cession of the particular piece of lands in question, but only of the entire tract of which it forms a part. I take a different view of this evidence, which appears to me sufficiently to negative any cession of the lands in question wither to her Majesty or any of her predecessors, within the meaning of the acts.

With regard to the tenth objection, which insists that the judgment does not find that the lands in question are occupies by any tribe of Indians, or by any tribe of Indians claiming title to them, I think that the purport of the judgment in this respect is misrepresented. It appears to me that the commissioners adjudge that the lands in question is in the occupation of the Six Nations Indians, under an appropriation to their use, and that they have or claim title to it under such appropriation. The objection, therefore, is without foundation.

The eleventh objection says that the judgment fixes no time for the commission of the offence to which it refers. It appears, however, that the commissioners determine that the appellant was, before the preferring of the information, the date of which appears, and thenceforward to the time of pronouncing the judgment, in the unlawful occupation of the land; and this, I think, is quite sufficient, and obviates all just objections on this ground.

The twelfth and thirteenth objection impugn generally the sufficiency of the evidence and the regularity of the proceedings. I confess that for the reasons already detailed I think the evidence sufficient, and I have been unable to discover any material irregularity in the proceedings, and am therefore of opinion that there two last objections must be overruled also.

The cases which have been cited establish that summary convictions under a statute must negative all exceptions, and everything which if true, would constitute a defence, and must be self sufficient or exhibit on their face enough to sustain them- must contain a precise adjudication or determination- must state the whole evidence on both sides, and not merely the conclusion from it- and must shew that it was given in the presence of the defendant, or that, being duly summoned, he neglected to attend- and must shew that the defendant was guilty of the offence respecting which jurisdiction is given. These rules are founded in reason and common sense, and probably apply to convictions or judgments under the ants in question; but I think that they have all been observed and complied with in this instance. For the illegal occupation of lands comprised in the acts, the commissioners are not authorized to inflict any punishment; they are simply empowered, by means of a notice, to order a removal, which has been done in the present case, in accordance with the provisions of the acts.

The fifth objection insists that the appellant actually has a license of occupation for the piece of land in question. I should be disposed, if he should desire it, upon affidavit of the fact, to direct an enquiry upon this point- at the peril, however, of costs, if he should fail in establishing the fact alleged; otherwise, I think this appeal should be dismissed, with costs.