

THE KING V. PHELPS

(1823), 1 Taylor 47

Upper Canada King's Bench, Boulton and Campbell JJ., 1823

Where an inquisition had been found against the defendant under the provincial statute 54 Geo. III., the Court refused to set the same aside on the ground that the lands vested in the Crown by that inquisition had been granted by the Mohawk Indians to the defendant, for a term of 999 years, in trust for the support of his wife (a Mohawk woman) and three children.

An inquisition in this case had been found against Epaphrus L. Phelps in favour of the Crown, under provisions of the provincial statute, 54 Geo. III., for declaring certain persons therein described aliens, and vesting their estates in his Majesty. By a subsequent statute, Esther Phelps had been permitted to traverse the inquisition found against her husband Epaphrus Lord Phelps. The record, which was of Trinity Term, 1821, stated that it had been found by an acquisition indented, &c., at the township of Grimsby in the district of Niagara, on the 28th day of January, in the 58th year, &c., before Abraham Nelles, Esquire, one of the commissioners of the late King, &c., to enquire, &c., by the oath of William Nelles and others, (the jury,) that Epaphrus Lord Phelps in the commission named, on the day of committing the high treason in the said commission specified, to wit, on the 1st day of June, in the 53rd year, &c., and also on the day of the outlawry of the said Epaphrus L. Phelps, was seized of certain parcels or tracts of land, to wit, the unexpired term of a lease for 999 years, made to him by Captain Brant of 100 acres of land, and of other land on the Grand River (in the record and inquisition described) being part of the Indian lands, &c., and that the commissioners, the premises aforesaid, into the hands of the said late Lord the King had taken and caused to be seized, &c., as by the commission was commanded, &c.

That on Saturday, the last day of Trinity Term, by force of an act of the provincial parliament of this province, made and passed in the second year, &c., entitled an act to afford relief to one Samuel Hall and the said Esther Phelps, comes the said Esther Phelps in said act named, wife of the said Epaphrus L. Phelps in said commission named, by her attorney and prays oyer, &c., which being read, &c., she complains that she by colour of the premises is grievously vexed and disquieted, and protesting that the commission and inquisition are not sufficient in law, and to which she has no necessity nor is bound by the law of the land to answer, for plea saith, that on the 25th day of October, in the year 1724, the Grand river, in the said district of Gore, in the said province of Upper Canada, constituted and formed part of the province of Quebec, that the Mohawk Indians, and others of the Six Nations of North American Indians, being on the same day, &c., and long before, the faithful and attached allies of his late gracious Majesty, King George III., and especially in the war then lately before that time carried on between his said late Majesty and the United States of America, by the event and pressure of which was the said Indians were obliged to withdraw from their settlements and possessions within the said states, and his said late gracious Majesty, in consideration of that fidelity and attachment so early manifested to his interest by the said Mohawk Indians, and of the loss of their settlements and possessions which they thereby sustained, was pleased to direct that a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them, the said Mohawks, &c., who had either lost their settlements within the territory of the said American states, or who wished to retire from those states to the British; and Sir Frederick Haldimand, his said late Majesty's Captain-General and Governor-in-Chief of the province of Quebec and the territories depending thereon, &c., having in obedience to such his said late Majesty's directions, and at the desire of many of the said Indians, &c., purchased a tract of land from the Indians, that is to say the aboriginal Indians occupying the same, situate between the lakes Ontario, Erie, and Huron, did afterwards, to wit, on the same day, &c., and while the said province of Upper Canada formed part of the province of Quebec, at the castle of St. Lewis at Quebec, &c., by instrument under his hand and seal at arms, as Captain-General, &c., and in his late Majesty's name, authorise and permit the said Mohawk nation, &c., to take possession of, and settle upon, the banks of the river commonly called the Ouse or Grand river, running into lake Erie, that is to say, the said Grand river, &c., allotting to them for that purpose six miles deep from each of the said rivers, beginning at lake Erie and extending in that proportion to the head of the said river, to them and their posterity for ever, by which said authority, permission and allotment, the said Mohawk nation, &c., afterwards and on the same day, &c., they, the said Six Nations Indians, afterwards, to wit, on the 1st day of May, in the year 1804, at the Grand river, &c., by indenture bearing date the same day and year, &c., and made between them the said Six Nations Indians residing, &c., by Captain Joseph Brant, principal chief and agent for them the said Six Nations Indians, duly authorised, did, in consideration of the rents, covenants, and agreements in the said indenture mentioned, &c., grant, demise, lease, and to farm let unto the said Epaphrus Lord Phelps, his heirs, executors, administrators, and assigns, all that certain tract, &c., (land mentioned in the inquisition,) to hold the same for the term of 999 years, *for providing for one of the women of the said Mohawk nation, and three children born of her the said woman*, by the said Epaphrus, that is to say, in trust for the purpose of providing for

and maintaining the said woman and the said three children according to the custom of the said Six Nations. Averments that the lease mentioned in the inquisition and the indenture last set forth, are one and the same; and that the traverser is the woman mentioned in the in the indenture, and that the land mentioned in the indenture is the same with that mentioned in the inquisition. That the traverser on the 1st day of June, in the 53rd year, &c., and also on the day of the outlawry of the said Epaphrus Lord Phelps, and also at the time of taking the said inquisition, was and still is by virtue of said indenture, possessed of the issues and profits of the parcels and tracts of lands in said inquisition mentioned, to wit, &c., and all and singular which things, &c. The traverse concludes with a prayer for judgment, that the hands of our said Lord the King be thence amoved, and that the traverser to her possession, together with the issues and profits therein in the meantime perceived be restored. The Solicitor-General on the part of the Crown demurred to the traverse generally, as not being sufficient in law to amove the hands of the said Lord the King from the possession of the tenements aforesaid, and prayed judgment, and that the tenements, &c., in the hands and possession of the said Lord the King may remain, &c.

Boulton, Solicitor-General, in support of the demurrer. The traverse in this case is insufficient. It sets out that the traverser is an Indian woman, and that there is a custom among the Indians to bestow lands in the manner stated, and that Brant made such a conveyance for her benefit; but it shews no good title in him or the Indians to do so. By the traverser's own shewing, she is a foreigner, and consequently so more entitled to hold lands than a Frenchman, or any other foreigner; for the Indians are bound by the common law.

Even if the title were good, it only conveyed a chattel interest, which a man cannot hold in trust for his wife.

Should the inquisition have been ill found, yet the lands being once vested by the finding in the Crown, they cannot afterwards be divested, without the traverser shews a better title, as appears in *Dyer*.

Baldwin contra.- Where both parties claim under the same deed neither can impugn it for defects, and therefore defects in title under those deeds (if such there are) cannot be set up by the Crown.

The foundation of the title from General Haldimand is evidently a treaty, and as such must be recognised by the court, for all courts of justice will recognise treaties, as is constantly seen in cases of seizures, &c.

The Indians must be considered as a distinct, though feudatory people; they were transported here by compact; they are not subject to mere positive laws, to statute labour, or militia duty, though perhaps to punishment for crimes against the natural law, or law of nations.

It may be considered as a ridiculous anomaly, but it appears from Vattel (a) that these sort of societies, resident within and circumscribed by another territory, though in some measure independent of it, frequently exist, and that the degree of independence may be infinitely varied; and however barbarous these Indians may be considered, the treaty under which they migrated to and reside in this country is binding.

Phelps had not such an estate as he could forfeit; it is a trust limited to him for providing for the traverser, Esther Phelps and her children, plainly expressed in the words of the deed, and as laid down in *Shepherd's Touchstone*, not forfeitable for his treason, (b) though it perhaps might be by that of the *cestui que trust*. Should the country consider this instrument as a trust deed founded upon sufficient consideration, namely, that expressed in it of supporting Mrs. Phelps, then they will decide in favour of the traverser; and on the other hand, if insufficient, the inquisition will be quashed as nugatory; Phelps having nothing to forfeit, as the trust resulted for the benefit of the grantors. (c)

Boulton, Solicitor-General, contra. -If the title placed in the Crown by this inquisition is at all consistent, it cannot be disturbed, (d) though special circumstances might induce the Crown to re-grant the land. The supposition that the Indians are not subject to the laws of the country is absurd; they are as much so as the French loyalists who settled here after the French revolution, who came to this province from a country perfectly, independent, and of which the independence was never doubted; and supposing them not to be so, confesses the grant from General Haldimand to be (as it was in fact) not warranted by law- as to the pretended consideration of the deed, it is perfectly nugatory; it purports to be made for the support of Phelps; wife and children, whom he was bound to support himself, nor could a husband be a trustee of a chattel interest to the use of his wife- and even supposing her to be a *bona fide cestui que use* she could not dispute

the legal estate of the Crown once vested.

Per Curiam. (*Absente*, POWELL, C.J.)- Judgment in favour of the Crown.