THE QUEEN V. STRONG

(1850), 1 Gr. 392
Upper Canada Court of Chancery, Blake C., Jameson and Esten V.C., 1850

Statement - Indian lands - Statutes 2nd Vic., ch. 15, s. 1., and 12 Vic., ch. 9, s. 1., construction of - Evidence.

Under the statute of 2nd Victoria, chapter 15, section 1, parol testimony by one witness deposing, to the best of his belief only, to the appropriation of the lands in question to the residence of Indian tribes, and to the non-cession of such lands to her Majesty, is sufficient *prima facie* evidence of those facts.

In regard to lands in the occupation of the Indians, it is unnecessary, in the proceedings Of the commissioners, under the statures 2 Victoria, ch. 15 and 12 Victoria, ch. 9, or by express evidence to negative the exceptions specified in the latter of those statutes.

The finding of the commissioners under those statutes, is not bad for not adjudging that possession should be relinquished by the trespasser.

This was one of several appeals from the judgment of commissioners under the statutes 2 Victoria, chapter 15, and 12 Victoria, ch. 9.

The petition filed in this matter stated that the petitioner was by a summons served in October, 1849, called upon by *David Thorburn* and *Charles Bain,* Esquires, to appear before them on the 26th of the same month, to answer to a charge contained in such summons, a copy of which was set forth, and was as follows: --

"Province of Canada, Gore District: to wit. To James Strong, presently residing on the Indian Reservation in the Township of Tuscarora, in the said district, yeoman.

"Whereas you have this day been charged before us, *David Thorburn* and *Charles Bain,* Esquires, two of the commissioners appointed to carry into effect the provisions of the statute of Upper Canada, 2nd Victoria, chapter 15, intituled 'An act for the protection of the lands of the Crown in this province from trespass and injury,' and also an act of the provincial parliament of Canada, passed in the 12th year of her Majesty's reign, chapter 9, intituled 'An Act to explain and amend an act of the parliament of the late province of Upper Canada, passed in the 2nd year of Her Majesty's reign, intituled "An act for the protection of the lands of the Crown in this province from trespass, and injury, and to make further provision for that purpose;' on the oath of one credible witness that you, the said *James Strong,* have unlawfully entered upon and possessed yourself of a portion of the Indian lands, being the south half of lot No. 35, in the 3rd concession in the said township of Tuscarora and district aforesaid, and still continue unlawfully to occupy the same, these lands being a part of the reserved lands of, and belonging to, the Six Nations of Indians in the township and district aforesaid, and reserved for their especial use and benefit, such possession being illegal and contrary to the provisions of the aforesaid statute for the protection of such Indian lands. These are therefore to require you, by the authority vested in us as commissioners, to appear before us at Newport in the township of Brantford, in said district, on Friday, the 26th day of October, at the hour of eleven o'clock, a.m., of the same day, within the inn of Matthias Wilson, to answer the said charge, and to be dealt with according to law. Herein fail you not.

"Given under our hands and seals the twenty-third day of October, in the thirteenth day of Her Majesty's reign, and in the year of our Lord, 1849."

That the petitioner duly appeared to such summons on the day named, when Messrs. Thorburn, Bain and Clench, (the commissioners,) after hearing the evidence, in the judgment or conviction of the commissioners set forth, decided and adjudged, that the petitioner was illegally occupying, or in possession of, the south half of lot No. 35, in the 3rd concession of the township of Tuscarora, in the district of Gore; and in pursuance of such decision, the said commissioners afterwards drew up a judgment or conviction in the words following:--

"Province of Canada--Gore District, to wit--Be it remembered that on the 23rd day of October, 1849, at Newport, in the township of Brantford, in the district of Gore, *Peter Smith,* of the township of Onondaga, in the said district, Indian interpreter, personally came before us, *David Thorburn* and *Charles Bain,* Esquires, two of the commissioners under and by virtue of that certain statute of that part of the province of Canada formerly called Upper Canada, passed in the second year of the reign of Her Majesty Queen Victoria, intituled 'An Act for the protection of the lands of the Crown in this province from trespass and injury,' and also a certain other statute of the province of Canada, passed in the twelfth year of the reign of Her said Majesty, intituled 'an act to explain and amend an act of the parliament of the late province of Upper Canada, passed in the second year of Her Majesty's reign, intituled

'An act for the protection of the lands of the Crown in this province from trespass and injury, and to make further provision for that purpose;' and informed us that *James Strong* of the township of Tuscarora, in the said district of Gore, in the said province, not being one of the tribes of Indians hereinafter mentioned, had possessed himself of, and was at the time of the said information still

occupying and in possession of that certain piece or parcel of land, being the south half of lot No. 35, in the 3rd concession of the said township of Tuscarora, in the said district of Gore, the same being part of a parcel or tract of land appropriated for the residence of certain Indian tribes in that part of this province heretofore constituting the province of Upper Canada,--that is to say, the Six Nations Indians, and for the cession of which to Her Majesty no agreement had been made with tribes occupying the same; and that he, the said *James Strong,* refused to remove from the occupation thereof, whereupon the said *James Strong,* after being duly summoned to answer the said information and complaint duly appeared before us pursuant to the said summons, and having heard the matters in the said information, declared he was not guilty of the said matters. Whereupon we, the said commissioners, did proceed to enquire into the truth of the matter in the said information contained, and then, on the day and at the place in the said summons mentioned, that is to say on the 26th day of October , A.D. 1849, at Newport, in the township of Brantford, in the said district, one credible witness, to wit, *Peter Smith* aforesaid, upon his oath deposeth and saith in the presence of the said *James Strong* is not one of the Indian tribes aforesaid, and that he the said *James Strong,* as the deponent verily believes, at and before the time of making the said complaint, was in the possession and occupation of the same parcel of land from that time to and until the examination of this deponent; he, the said *James Strong,* as this defendant verily believes, having no right or title whatever to the said land or to occupy or possess the same, the said land being a part of the parcel or tract of land aforesaid, as he, this deponent, verily believes, and appropriated for the residence of the said Indian tribes, and that the said tract was and is in the occupation of the same tract to Her Majesty hath, as this deponent verily believes, been made with the tribes occupying the same; and that the said *James Strong,* being called upon, admits that he was then on the said south half of lot No. 35, in the 3rd concession of the said township of Tuscarora, and stated that he would continue to work upon the same, and that he would continue to work upon the same, and that he was working the said land for his father; and one *Frederick John Cheshire* having been called as a witness, by and on behalf of the said *James Strong*, the said *Frederick John Cheshire* upon his oath deposeth, and saith that the said *James Strong* requested him, this deponent, to produce a letter from the civil secretary, of date Oct. 1845, which this deponent hath not now at the time of his examination in his possession; that deponent will have to hunt for the same among his papers; that there are other papers bearing upon this case which deponent cannot particularise, and which he cannot at present produce. Therefore it manifestly appearing to us, commissioners as aforesaid, that the said south half of lot No. 35, in the 3rd concession of the said township of Tuscarora, was and is land appropriated for the residence of the said Indian tribes, and for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same; and that the said *James Strong*, not being one of the Indian tribes as aforesaid, before the making of the said information as above stated, and from thence-forward continually to and until this time, has illegally possessed himself of and is in unlawful possession and unlawful occupation of the same land, contrary to the form of the statutes aforesaid; we do hereby find and determine that the said *James Strong* did illegally possess himself as aforesaid of the land aforesaid, and that he hath continued from thence hitherto, and still is in the unlawful possession and occupation of the same land contrary to the form of the statutes aforesaid. Given under our hands and seals the 26th day of October, A.D. 1849."

That after the 26th October, and before the service of the notice of appeal thereinafter mentioned, the petitioner was served with a notice of such judgment or conviction, signed by the said three commissioners, in the words and figures following, that is to say:

"*Province of Canada, Gore District, to wit.* To *James Strong,* residing in the township of Tuscarora, in said district: you are hereby required to take notice that we have, on the evidence produced before us this day, found and determined that you are illegally occupying, or otherwise in illegal possession of, the south half of lot No. 35, in the 3rd concession of the township of Tuscarora, in the district of Gore, in the said Province, the same being and forming a part or portion of the lands appropriated for the residence of certain Indian tribes in that part of this province heretofore constituting the province of Upper Canada--that is to say, the Six Nations Indians--and for the cession of which to Her Majesty no agreement had been made with the tribes occupying the same: we, *David Thorburn, Joseph B. Clench,* and *Charles Bain,* Esquires, three of the commissioners appointed in pursuance and under the provisions contained in a certain act of the provincial parliament of that part of this province heretofore constituting the province of Upper Canada, made and passed in the second year of the reign of her present Majesty, intituled 'An act for the protection of the lands of the Crown in this province from trespass and injury,' and also an act of the provincial parliament of Canada, passed in the 12th year of Her Majesty's reign, chapter 9, intituled 'An act to explain and amend an act of the parliament of the late province of Upper Canada, passed in the 2nd year of Her Majesty's reign, intituled

'An act for the protection of the lands of the Crown in this province from trespass and injury, and to make further provision for that purpose,' do hereby require you to remove from the occupation or possession of the above mentioned land, within the space of thirty days from the day of the service of this notice. Given under our hands, this twenty-sixth day of October, in the year of our Lord, 1849."

That the said notice was the only notice of such conviction or judgment which the petitioner received until after the service of the notice of appeal, but after the service of such notice, the said conviction or judgment in the form hereinbefore set forth, was by the said commissioners placed on the files of this honourable court.

That the petitioner, on the twenty-second day of November, 1849, served the said commissioners with a notice of appeal from the said judgment, decision and conviction, to this court pursuant to the said statutes in the said summons, conviction and notice mentioned.

That the petitioner was advised that the said judgment and conviction of the said commissioners were erroneous, and appealed therefrom to this court: for the following reasons:--

1. Because the evidence adduced before the said commissioners, as appears by the said judgment or conviction hereinbefore set forth, was and is insufficient to sustain the said judgment or conviction, and in particular the alleged trespass was not proved against the petitioner by legal evidence, and also it was not proved by any legal or sufficient evidence that the said premises formed a part or portion of the lands appropriated for the residence of certain Indian tribes in that part of the province heretofore constituting the province of Upper Canada; that is to say, the Six Nations Indians, and for the cession of which to her Majesty no agreement hath been made with the tribes occupying the same, as stated in the said notice of the 26th of October, 1849.
2. Because in fact the said land has long ago ceded and surrendered by the Six Nations Indians to the government of this province, as will appear if this honourable court will cause the fact to be enquired into, under, and by virtue of the said act of 2nd Vic., ch. 15; but the evidence of such surrender your petitioner did not, and could not adduce before the said commissioners, the same being in possession of the said court themselves or the Indian department, or some public department office of the government of this province.
3. Because it was not proved on the occasion aforesaid that no grant, lease, ticket of location, or purchase or letter or license of occupation had been issued for the said premises, so as to give the said commissioners power to act in the said matter under and according to the said first section of the said act of 12 Vic., ch. 9.
4. Because the said conviction is bad; for that the said premises are not described, either in the said summons, notice, or judgment, or conviction, as land for which no grant, lease, ticket, either of location or purchase, or letter or license of occupation hath been issued, and form all that appears from the said summons, notice, and judgment or conviction, some such lease, ticket or letter of license may have issued.
5. That in fact the petitioner, and those under whom he claims, have held and occupied the said premises under license and permission of the government of this province, and so it would appear if this honourable court would cause an enquiry to be made into the matter, and permit evidence thereof to be given, but the petitioner was unable to prove such fact before the said commissioners, because all the documents relating to the said premises and other lands in the same township were long ago given up by the settlers on the said lands to the commissioners at their request, with a view to a settlement and adjustment of the claims of the said settlers to the said lands, and the question of their title thereto, but which settlement or adjustment has never taken place.
6. That the said summons and conviction are bad in form, for following and being according to the words of the first section of the said act of 2 Vic., ch. 15, which section is in part repealed, and not according to the words of the first section of the said act of 12 Vic., ch.9.
7. That the said summons, notice, and conviction, purport to be made in pursuance of both the said acts of parliament, but do not shew that the said commissioners had, or if so, how they professed of have any jurisdiction in the matter under the said act of 12 Vic., chap. 9, and are for that reason bad in form, and because the said summons, notice and conviction, are for many other good and sufficient reasons bad in form.
8. Because the evidence of the said *Peter Smith* in the said judgment or conviction mentioned, does not establish that there was no agreement to cede any part of the said lands in Tuscarora to Her Majesty, but he the said *Peter Smith* states on his belief only, that there was no agreement to cede the whole of the said lands; and, therefore, upon the said deposition of the said *Peter Smith* the said commissioners were not warranted in determining that there was no agreement to cede the land in question in this matter to Her Majesty.
9. Because for any thing that appears in the said judgment or conviction of the said commissioners, the said land in question may have been ceded or agreed to be ceded to the Crown before the commencement of the reign of Her present Majesty.
10. Because the said commissioners have not found or determined that there were or are any tribes of Indians occupying the said lands and claiming title thereto, and because occupancy alone by such tribe or tribes, without any claim of title, is not sufficient to give the said commissioners jurisdiction under the said statutes or either of them.
11. Because there is no time stated in the said judgment or conviction, as the time when the petitioner did take or was in such alleged illegal possession of the said premises.
12. Because there is no sufficient evidence to bring the said case within the jurisdiction of the said commissioners or either of them, and because there was no sufficient evidence to sustain the

said judgment and conviction.

13. Because the proceedings of the said commissioners are otherwise illegal, informal and incorrect.

The prayer of the petition was, that this court might annul the said decision of the said commissioners, or order such further enquiry to be made, or direct such issue at law to be tried, as to the court might seem meet, and that the said commissioners might be ordered to pay the costs of the petition in the matter aforesaid, and in the matter of the appeal, or make such order and direction in respect of the said costs as to the courts might seem meet.

Mr. *Cameron,* Q.C., and Mr. R. *Cooper* for the appellant.

The act of 2nd Victoria, chapter 15, empowers the commissioners to receive information, &c., as tot he lands, for the cession of which to Her Majesty no agreement has been made; and the 12th Victoria, chapter 9, extends the jurisdiction to all lands for which no grant, letter or license of occupation, &c., has been issued, repealing for that purpose the provisions of the former statute. So much of the former statute as restricts that jurisdiction is repealed by the latter, and the two acts must be taken together--indeed the commissioners profess to have acted under both.*

*By sec. 1, of 2nd Vic., chap.15, after reciting that the lands appropriated for the residence of certain Indian tribes in this province, as well as the unsurveyed lands, and lands of the Crown ungranted, and not under location or sold, or held by virtue of any lease of occupation, have, from time to time unlawfully entered upon, and the timber, trees, stone and soil, removed therefrom, and other injuries have been committed thereon; and that it is necessary to provide by law for the summary removal of persons unlawfully occupying the said lands, as also to the protect the same from future trespass and injury; it is enacted, "That it shall and may be lawful for the Lieutenant Governor of the province, from time to time, as he shall deem necessary, to appoint two or more commissioners under the great seal of this province, to receive information, and to enquire into any complaint that may be made to them or any of them against any person, for illegally possessing himself of any of the aforesaid lands, for the cession of which to Her Majesty no agreement has been made with the tribes occupying the same, and who may claim title thereto, and also to enquire into any complaint that may be made to them or any one of them, against any person for having unlawfully cut down or removed any timber, trees, stone, or soil, on such land, or having done any other wilful and unlawful injury thereon."

The 1st section of 12th Vic., chap. 9, after reciting that it is expedient to explain and amend the 2nd Victoria, chap. 15, enacts, "that so much of the first section of the said act as doth or may in anywise limit or restrain the provisions thereof, or the jurisdiction of the commissioners appointed, or to be appointed, under the authority of the same, to land, for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto, shall be, and the same is hereby repealed, and that the said act and all the provisions thereof shall extend, and shall be construed to extend to all lands in that part of this province called Upper Canada, whether such lands be surveyed or unsurveyed, for which no grant, lease, ticket, either of location or purchase, or letter or licence of occupation hath been, or shall have issued, either under the great seal or by or from the proper department of the provincial government to which the issuing of the same at the time belonged, and whether such lands be part of those usually known as crown reserves, clergy reserves, school lands or Indian lands, or by, or under any other denomination whatsoever, and whether the same be held in trust, or in the nature of a trust for the use of the Indians, or of any other parties whomsoever."

The convictions should have used the words of the recent act, whereas they speak of lands which have not been ceded; but say nothing of the lands being lands for which no grant location ticket, &c., have been issued. The exception of the clause which is in part repealed, is negatived, but the exception of the recent act--the law now in force--is not negatived. A conviction under a statute must negative the exceptions contained in it. [(a)] It was also necessary to use the words of the statute as to the claim of title. The lands are spoken of in the statutes as lands occupied by tribes who *claim title thereto,* but the conviction speaks of occupancy only.

Another exception, which it was equally necessary for the conviction to negative, is that respecting the cession to the Crown. The lands are to be those for which no agreement for cession has been made on the part of the Crown with the tribes occupying them. The conviction says there has been no agreement with Her Majesty; but for all that, they may have been ceded to any of Her Majesty's predecessors. The act itself shows the necessity for negativing this exception, for the form given for the writ of removal, the words. "our predecessors," are inserted, and the same words are used in the form B, for the writ of *fieri facias.* The recitals in these forms describe the land as "not ceded to us or our predecessors." But in the conviction it is not stated but that the lands have been ceded to Her Majesty's predecessors, and it seems in fact that they have.

But the evidence on which the convictions purport to be made is clearly insufficient. It is the mere information and belief of one witness. He believes the fact for not reason that he gives us; and his information he may have got any where; it is no evidence on which a court should proceed to evict settlers from their homes. The evidence on which to found such a conviction should be, as in all other like cases, the best evidence, and the documentary evidence as to the title to these lands, the officers of the Crown could produce, but the settlers could not.

The statute is a penal one, for it empowers the commissioners to issue warrants, not only for the ejectment of the parties convicted, but also to commit them to gaol; it enables them also to

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[(a)] The King v. Jukes, 8 Term Reports 542.

impose a fine, not exceeding $20. Under such an act it is clear that the utmost strictness should be observed in the framing of the summons and convictions, and that no conviction should be made except on the best and on conclusive evidence. The onus of proof is purely on the accuser, not on the accused. Here this witness calls the land in question part of a certain tract, &c., and says the whole of that tract has not been ceded. How do we know then, but that part of it has been ceded, and that the part ceded is the very land now in question? Were only one acre ceded, it should appear which it is; so that we may all see whether the part in question is or is not ceded, which is left quite undetermined by this evidence. Another defect in the conviction is, that it does not state what punishment is ordered by the commissioners. They are to impose a fine, and in the conviction they should state that they had done so, and its amount.

There cannot be a conviction on the ground that the lands were never ceded; because, although no evidence was given of it, yet it is a well known historical fact that they have been ceded. They were ceded by the Mississagua Indians in 1792, and again by the Six Nations on the 18th day of January, 1841. True, this last was a surrender in trust for sale, but still a surrender, and sufficient to take the case out of 2 Vic., chap.15. but, admitting that the settlers did not (not having the documents) prove their titles, there could be no proper conviction without evidence to support it. An accused party cannot be legally convicted, merely because he cannot prove his innocence.

It is said on the other side that this is not a penal statute. Now "a penal act is one whereby a forfeiture is inflicted for transgressing the provisions therein contained." This act creates a crime and inflicts various penalties. An act which does this must receive the very strictest construction in favour of the accused. (a) "No man incurs a penalty unless the act which subjects him to it is clearly both within the spirit and the letter of the statute, imposing such penalty."--Dwarris 763. The danger arising from the violation of those rules is, that then, as was said by Chief Justice *Best*, in *Fletcher v.* Lord *Sondes:* (a') "The fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws."

The evidence of *Smith* is clearly insufficient, if for no other reason, because it is not such as, if false, would support an indictment for perjury. For that purpose the oath must be positive and absolute. If one only swears as he believes, thinks or remembers, he cannot be convicted of perjury, except in a case where he must have known that the fact was contrary to what he stated to be his belief; (b)and *Smith* is safe enough in that view, for he perhaps knew nothing about the matter, one way or the other. There is a failure then of proof of a material fact, and the accused must have the benefit of the doubt. (c) There is no precedent for prosecuting a man for trespass against the Crown, and convicting him merely because he cannot prove his own innocence. For these reasons, therefore, they submitted the conviction was bad, and should be quashed. Amongst the authorities cited, were--*Rex v. Lloyd;* (d) *The King v. Thompson; (e) The King v. Benwell; (f) The King v. Clarke; (g) The King v. Lammas; (h) The King v. Harris. (I)*

Mr. *Wilson* and Mr. *L.W. Smith* for the Crown.--The second act only extends the jurisdiction, which the former one gives only extends the jurisdiction, which the former one gives to the commissioners--it does not repeal it, and a conviction may be founded upon the first one alone. It need not negative the exceptions not contained in both acts.

It is quite clear that the parties were in possession. It is also evident enough that these are lands over which the statutes give the commissioners jurisdiction. This is sufficiently proved by *Smith.* If the appellant had any right, or relied upon any facts which were a sufficient answer to the complaint, he should have produced and proved them before the commissioners. The commissioners are to find whether the party is a trespasser, and they state that they have so found. *Smith* proves, and we contend sufficiently, that the appellant has no title. If this evidence be untrue there was an opportunity to contradict it by other evidence; but it does not seem that this was attempted. It is alleged, that there have in fact been cessions and surrenders of these lands; but if so, why was not evidence of this given, so as to rebut the testimony of *Smith?* Under the evidence which was given, the commissioners have come to the only conclusion which they properly could arrive at.

The words in the conviction "for the cession of which to Her Majesty,: &c., are sufficiently within the meaning of the statute. It is not necessary in the convictions to use the precise words of the statutes; we find, that the lands are the lands of the Indians; that they are in the occupation of the Indians, and that no cession of them has been made. Of course, then, the Indians must be "claiming title" to the lands, but that need not be stated in so many words. If they are still Indian

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(a) 3 Bing, 580
(b) Hawk, P.C. 433.
(c) Best on Ev. 92, 93, 99; 1 Stark. Ev. 500.
(d) Strange, 996.
(e) 2 T.R. 18.
(f) 6 T.R. 75.
(g) 8 T.R. 18.
(h) Skinner, 562.
(i) 7 T.R. 238.

lands unceded, who can be claiming title to them properly but the Indians?

The jurisdiction under these acts was intended to be summary, and it would be injurious to permit appeals on such grounds as are here advanced. The conviction is in fact regular enough; it states all that it is necessary to show that the power of the commissioners was properly exercised. The cases referred to were--*Tarry v. Newman;* [(a)] *The Queen v. Stock; (b) Lee v. Clarke. (c)*

The judgment of the court was delivered by--

THE CHANCELLOR.--This is one of several appeals from the decision of certain commissioners, appointed under a statute of the parliament of Upper Canada, passed in the 2nd Year of Her Majesty's reign. The grounds of appeal, stated in the petition, are very numerous; but upon the argument, the learned counsel for the appellant rested his case upon the following points: first, that the evidence is insufficient to support the "conviction," (as judgment of the commissioners was termed throughout the argument.) Secondly, it was argued that the conviction is bad, for the following defects: first, because it does not negative the exceptions contained in the first section of the 12th Vic., ch. 9; secondly, because the allegation in the conviction is, that the entire tract named in the township of Tuscarora had not been ceded to Her Majesty, whereas it should have been; that the particular parcel on which the trespass is said to have been committed had not been ceded; thirdly, because the allegation is, that the tract had not been ceded to Her Majesty; whereas a cession to any of Her Majesty's predecessors should have been negatived; fourthly, because it is not alleged that the Indian tribes claimed title to the land in question; and lastly, it was argued that the conviction is defective, in not having adjudged that the appellant should relinquish possession.

As regards the evidence, I am of opinion that no case has been made requiring our interference. *Smith* was no doubt a competent witness. His evidence satisfied the commissioners. And I am of opinion that it is *prima facie* sufficient to warrant their judgment. So far as that evidence is affirmative, establishing the fact of trespass upon lands appropriated for the residence of Indian tribes, I am unable to perceive why the testimony of this witness not be regarded as affording sufficient ground of the commissioners to proceed upon. So far as the evidence is of a negative character, the complainant must, from the nature of the thing, be permitted to proceed in the first instance upon a *prima facie* case. It is obvious that conclusive proof could not have been adduced of those negative allegations; and had all the officers of government been summoned to give evidence upon the hearing of the complaint, still the evidence would have been open to the same sort of objection as is made to the testimony of *Smith.* On the contrary, had the *prima facie* case, made by the complainant, been unfounded, it was open to the appellant to have established the affirmative by positive proof; but neither before the commissioners, nor in this court, has any such evidence been adduced. I am of opinion, therefore, that the evidence below was sufficient to warrant the judgment; and that no case has been made in this court to justify us in disturbing it.

But on proceeding to consider the other grounds of objection to this judgment, I must observe, that I cannot concur in the principles upon which this case has been argued. Throughout the discussion the judgment was treated as a conviction--properly so called; and the argument used, and the cases cited, were such as would have been used and cited, had this been a proceeding to quash such conviction. But it is obvious that his judgment cannot be regarded in the same light as a conviction; and the petition of appeal is in no respect analogous to a proceeding to quash a conviction. The 11th section of the 2nd Victoria gives an appeal to this court, and empowers the Vice-Chancellor to "revise, alter, affirm, and annul the decision, and to make such orders as to costs and otherwise, as to him may seem meet." The bare recital of the jurisdiction conferred upon us, is sufficient to establish the inapplicability of the decisions which were cited. Possibly the clearest refutation of many, if not all the arguments adduced, would be found in a careful perusal of the clause granting the appeal. One thing is apparent; that the legislature did not intend that the judgments of them commissioners should be annulled or reversed on merely technical grounds. We are authorized to alter and amend.

But considering the case in the light in which it was viewed upon the hearing of the petition, I am of opinion that the arguments addressed to us, were based upon an erroneous view of the statutes. It was contended in the first place, that the 12th Victoria, chapter 9, had repealed altogether the first section of the 2nd Victoria, ch. 15; inasmuch as the latter act, it was argued, repeals so much of the first clause of the former as restricts the powers of the commissioners to lands, for the cession of which to Her Majesty no agreement as that clause is exclusively conversant about such lands, therefore the clause must be treated as entirely repealed. I do not feel the force of this argument. The former statute recites in the preamble the different circumstances under which the public lands had been subjected to trespasses of various kinds, and in regard to which it would be expedient to arm commissioners with summary jurisdiction. Of the lands thus enumerated, the first class consists of lands appropriated for the residence of

certain Indian tribes; and this class is treated throughout as a distinct denomination. The enacting clause, however, after authorising the appointment of commissioners, and empowering them to enquire respecting trespasses to "any of the aforesaid lands," (not confining it to Indian lands,) adds this curious qualification--"for the cession of which to Her majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto." It is not easy to conjecture the object with which such a qualification was introduced. It would seem in effect almost to nullify the statute. But it is quite obvious, that the qualification is by no means exclusively applicable to the first class of land (those appropriated for the residence of Indian tribes) as was argued, but affects equally all the denominations mentioned in the preamble. The 15th chapter of the 2nd Victoria, therefore, was not confined in its operation to "lands appropriated for the residence of Indians," in the sense in which those terms are used in the preamble, but extended to all unceded lands; and when the 12th Victoria, chapter 9, repealed so much of the former act, as limited the operation thereof to "lands, for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto," (using the very terms employed in the former act,) the effect of that provision was, to leave the former act applicable to all the lands enumerated in the preamble without qualification, and amongst the number, to lands appropriated for the residence of certain Indian tribes. If this be the proper construction of the acts, then upon the grounds on which the case was argued, and assuming the restrictions in the latter act to extend to all the denominations of land enumerated in the former, it would still seem that the exceptions in the latter act cannot have any *greater* effect than if they had been contained in a subsequent clause of the former act; in which case it would not have been necessary to have negatived them even in a conviction. I am inclined to think, however, that upon the true construction of both acts the legislature must be intended to have meant the exceptions contained in the latter act to apply to those denominations of land only which are enumerated after the first class, (namely, the lands appropriated for the residence of Indians,) treating that class as sufficiently distinct, requiring no exception; as indeed it would seem to be. For land appropriated for the residence of Indians, cannot, while so appropriated, fall within any of the enumerated exceptions; the moment it becomes the subject of either grant, lease, or letter of license, it ceases to be land appropriated for the residence of Indians; the affirmation that it is land so appropriated, involves in it the negative of all the exceptions, and to negative them expressly would be useless tautology. If this construction be sound, all the objections must fail; because there is no exception to be negatived. But whether this be the true construction or not, it seems to me that the objections most relied on, as well as to the evidence as to the form of the judgment, cannot be sustained. If that portion of the former act which restricted the jurisdiction of the commissioners to lands for the cession of which no agreement had been made, has been repealed, then both the allegations and proof upon that subject were superfluous; the precise effect of the statements in the judgment in relation to that matter, whether sufficiently certain, or open to the objections taken to them, need not be determined; and the silence of the judgment as to the Indian tribes claiming title to the lands is immaterial.

Upon this view the 2nd, 3rd, and 4th objection entirely fail; and the arguments as to the deficiency of the evidence lose much of their weight. But it was urged in the last place that the finding of the commissioners is defective, in not having adjudged that the appellant should relinquish possession within the time allowed by the law. Here, however, as in the other branches of the case, the learned counsel seem to have been misled by the analogy supposed to exist between judgments under these acts and convictions. I remarked before, that no analogy exists, and if the observation were at all doubtful, this objection would furnish the strongest confirmation. For, however decisive the cases cited may be as regards convictions, they have clearly no bearing upon the question before us; and the express provisions of the statutes in question demonstrate that the objection is untenable. This judgment determines all that is required, namely, that the appellant was unlawfully in possession of land appropriated for the residence of Indians. The warrant of removal is in the nature of an execution upon this judgment; it may or may not be required according to circumstances; the power to issue such warrant, as well as the period at which it shall be issued, are left with the commissioners, only they are required in the first instance to issue a notice, as provided by the second section of the former act; all this is utterly inconsistent with the notion that the decision of the commissioners must adjudge the trespasser to relinquish possession within any definite period.

Upon the whole I am of opinion that no case has been made requiring us either to vary, reverse, or annul the decision, and that the appeal must be dismissed with costs.