HER MAJESTY THE QUEEN .....APPELLANT;

AND

HARRY S. DEVEREUX .....RESPONDENT.

1965

*Feb. 17, 18
Apr. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Indian lands—Right of Indian Band to possession of Reserve Land—Right of lawful possessee to give by devise possession to non-Indian—Action by Crown for possession on behalf of Band—Indian Act, R.S.C. 1952, c. 149, ss. 20, 82, 31(1), 50.

The Crown claimed, under s. 31(1) of the *Indian Act*, R.S.C. 1952, c. 149, on behalf of the Six Nations Band of Indians possession of a farm which was part of the Band's Reserve Land in Ontario. In 1950, at the request of the defendant, who was not an Indian, and the widow of a member of the Band, who was lawfully in possession of the farm, a lease of the farm was granted by the Crown to the defendant for a term of ten years. Two years before the expiration of that lease, the widow died. By her will she devised her rights in the farm to the defendant who continued in possession for the balance of the term of the lease. The right in the land was then put up for sale, and the Crown, at the request of the purchaser who was a member of the Band, granted the defendant two successive permits for one year each. At the expiration of the second permit, the defendant refused to give up possession and the council of the Band moved to gain possession of the farm. The action by the Crown on behalf of the Band was dismissed by the Exchequer Court. The Crown appealed to this Court.

Held (Cartwright J. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Martland, Judson and Hall JJ.: The rights of the defendant after the expiration of his second permit were governed by s. 50 of the *Indian Act*. Under that section, where a right to possession or occupation of land in a Reserve passes by devise to a person who is not entitled to reside on a Reserve, that right shall be offered for sale to the highest bidder among the persons who are entitled to reside on the Reserve and the proceeds of the sale shall be

*PRESENT: Taschereau C.J. and Cartwright, Martland, Judson and Hall JJ.

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paid to the devisee. The procedure laid down by this section has been followed and the only rights of the defendant were to receive the proceeds of the sale of the right to possession. Section 31 does not require that an action to put a non-Indian off a Reserve can only, in respect of lands allocated to an individual Indian, be brought on behalf of that particular Indian. The action may be brought by the Crown on behalf of the Indian or the Band, depending upon who makes the allegation of wrongful possession or trespass.

An agreement entered into by the defendant and the purchaser which would have enabled the defendant to remain in possession at a rental which would have made it possible for the purchaser to make his instalment payments was void as the Department had not consented to any further lease or permit. The defendant must give up possession.

Per Cartwright, *dissenting:* The action could not succeed. Possession of the land was claimed on behalf of the Band, and on the evidence it was shown that the right to possession of the land in question was vested in an individual Indian and not in the Band. There is nothing in the *Indian Act* to alter the well-settled rule that to entitle a plaintiff to bring an action for the recovery of possession of land he must have a right of entry either legal or equitable.

Couronne—Terre appartenant aux Indiens—Droit de la Bande à la possession—Terre située sur la réserve—Droit du possesseur légal de donner par testament possession à une personne qui n'est pas un Indien—Action prise par la Couronne au nom de la Bande pour possession—Loi sur les Indiens, S.R.C. 1952, c. 149, arts. 20, 28, 31(1), 50.

Se basant sur l'art. 31(1) de la *Loi sur les Indiens,* S.R.C. 1952, c. 149, la Couronne a réclamé au nom de la Bande d'Indiens appelée Six Nations possession d'une ferme qui faisait partie de la Réserve de la Bande en Ontario. En 1950, à la demande du défendeur, qui n'était pas un Indien, et de la veuve d'un membre de la Bande, qui était en possession légale de la ferme, la Couronne a accordé au défendeur un bail de la ferme pour un terme de dix ans. La veuve décéda deux ans avant l'expiration de ce bail. Par son testament elle légua ses droits dans la ferme au défendeur qui continua en possession pour la balance du terme du bail. Le droit à cette terre fut alors offert en vente, et la Couronne, à la demande de l'acheteur qui était un membre de la Bande, accorda au défendeur deux permis successifs d'une année chacun. A l'expiration du second permis, le défendeur refusa d'abandonner la possession et le conseil de la Bande commença des démarches pour obtenir possession de la ferme. L'action par la Couronne au nom de la Bande fut rejetée par la Cour de l'Échiquier. La Couronne en appela devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge Cartwright étant dissident.

Le juge en chef Taschereau et les Juges Martland, Judson et Hall: Les droits du défendeur après l'expiration de son second permis étaient régis par l'art. 50 de la *Loi sur les Indiens.* En vertu de cet article, lorsqu'un droit à la possession ou à l'occupation de terres dans une Réserve passe par legs à une personne non autorisée à y résider, ce droit doit être offert en vente au plus haut enchérisseur entre les personnes habiles à résider dans la Réserve et le produit de la vente doit être versé au légataire. La procédure imposée par cet article

a été suivie et les seuls droits du défendeur étaient de recevoir le produit de la vente du droit à la possession. L'art. 31 ne requiert pas qu'une action, pour faire expulser une personne qui n'est pas un Indien de la Réserve, peut, quant à une terre qui a été allouée à un Indien en particulier, être instituée seulement au nom de cet Indien. L'action peut être instituée par la Couronne au nom de l'Indien ou de la Bande, dépendant qui allègue la possession illégale ou la pénétration sans droit.

Une entente intervenue entre le défendeur et l'acheteur, qui aurait permis au défendeur de demeurer en possession en payant un loyer qui aurait permis à l'acheteur d'échelonner ses paiements, était nulle parce que le Département n'avait pas consenti à un autre bail ou permis. Le défendeur doit abandonner la possession.

Le Juge Cartwright, *dissident:* L'action ne peut pas réussir. La possession de la terre était réclamée au nom de la Bande, et il est en preuve que le droit à la possession de la terre en question appartenait à un Indien en particulier et non pas à la Bande. Il n'y a rien dans la *Loi sur les Indiens* pour changer la règle bien établie que pour permettre à un demandeur de prendre action pour le recouvrement de la possession d'une terre, il doit avoir un droit d'entrée soit légal soit équitable.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier de Canada[1], rejetant une action prise par la Couronne au nom d'une Bande d'Indiens pour réclamer la possession d'une terre. Appel maintenu, le Juge Cartwright étant dissident.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1] dismissing an action by the Crown on behalf of a Band of Indians to recover possession of land. Appeal allowed, Cartwright J. dissenting.

N. A. Chalmers, for the appellant.

P. A. Ballachey, Q.C., for the respondent.

The judgment of Taschereau C. J. and of Martland, Judson and Hall JJ. was delivered by

JUDSON J.:—The judgment of the Exchequer Court[1] from which this appeal is taken rejects the Crown's claim for possession of a farm of 225 acres which is part of the Six Nations Indian Reserve in the County of Brant, Ontario. The action was brought under s. 31(1) of the Indian Act, R.S.C. 1952, c. 149, which reads:

31. (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been

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(a) unlawfully in occupation or possession of,

(b) claiming adversely the right to occupation or possession of, or

(c) trespassing upon

a reserve or part of a reserve, the Attorney General of Canada may exhibit an Information in the Exchequer Court of Canada claiming, on behalf of the Indian or the band, the relief or remedy sought.

The defendant, Harry Devereux, is not an Indian. He has assisted in the working of this farm since 1934, when he entered into a leasing agreement with Rachel Ann Davis, the widow of a member of the Six Nations Band. This private arrangement was void under s. 34(2) of the Indian Act, R.S.C. 1927, c. 98, now R.S.C. 1952, c. 149, s. 28(1), but at the request of Mrs. Davis and the defendant, the Crown granted to the defendant a lease of the farm for a term of ten years commencing December 1, 1950. This lease expired on November 30, 1960. On the expiry of the lease, two successive permits were granted to the defendant under s. 28(2) of the Indian Act, R.S.C. 1952, c. 149, allowing him to use and occupy the lands for agricultural purposes. The second of these permits expired on November 30, 1962. The defendant nevertheless still remains in possession of the lands. He claims his rights by devise under a will of Rachel Ann Davis, dated November 19, 1953, and admitted to probate in the Surrogate Court of the County of Brant on May 30, 1958. Rachel Ann Davis died on April 25, 1958.

In November 1962, the band council notified the defendant to vacate the property at the expiration of his permit, and in January, 1963, the Indian Superintendent at Brantford notified him to vacate on or before January 31, 1963.

On July 4, 1963, the band council passed a resolution alleging that the defendant was still unlawfully in possession of the lands and asking that the Attorney General of Canada bring this action.

It is clear that subsequent to November 30, 1962, the defendant can point to no applicable provision of the *Indian Act* which gives him the right to possess or use the lands in question.

When Mrs. Davis died in 1958, her title was that of locatee under s. 20, subs. (1), of the *Indian Act,* R.S.C. 1952, c. 149. She held a certificate of possession dated February 28, 1954, issued under s. 20, subs. (2) of the Act. The rights of the defendant after the expiry of his permit

on November 30, 1962, which was four years after the death of Mrs. Davis, are governed by s. 50 of the Act:

50. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

(2) Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.

(3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

(4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.

The procedure laid down by this section has been followed and the only rights of the defendant are now to receive the proceeds of the sale. This sale is not a cash transaction. The proceeds will be payable over a period of years.

The Exchequer Court, in dismissing the action, held, in effect, that in respect of land allocated to an individual Indian, an action under s. 31 above quoted would lie only at the instance of the individual Indian locatee and not at the instance of the band. In so holding I think there was error. I do not think that s. 31 requires that an action to put a non-Indian off a reserve can only, in respect of lands allocated to an individual Indian, be brought on behalf of that particular Indian. The terms of the section to me appear to be plain. The action may be brought by the Crown on behalf of the Indian or the band, depending upon who makes the allegation of wrongful possession or trespass.

The judgment under appeal involves a serious modification of the terms of s. 31(1). Instead of reading "Where an Indian or a band" alleges unlawful possession by a non-Indian, it should be understood to read "Where an Indian *in respect of land allocated to him* or a band *in respect of unallocated land*" makes the allegation of unlawful possession. I think that this interpretation is erroneous and that its acceptance would undermine the whole administration of the Act by enabling an Indian to make an unauthorized

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arrangement with a non-Indian and then, by refusing to make an individual complaint, enable the non-Indian to remain indefinitely.

The scheme of the *Indian Act* is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee. This is provided for by s. 28(1) of the Act. If s. 31 were restricted as to lands of which there is a locatee to actions brought at the instance of the locatee, agreements void under s. 28(1) by a locatee with a non-Indian in the alienation of reserve land would be effective and the whole scheme of the Act would be frustrated.

Reserve lands are set apart for and inalienable by the band and its members apart from express statutory provisions even when allocated to individual Indians. By definition (s. 2(1) (o)) "reserve" means

> a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.

By s. 2(1) (a), "band" means a body of Indians

> (i) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart . . .

By s. 18, reserves are to be held for the use and benefit of Indians. They are not subject to seizure under legal process (s. 29). By s. 37, they cannot be sold, alienated, leased or otherwise disposed of, except where the Act specially provides, until they have been surrendered to the Crown by the band for whose use and benefit in common the reserve was set apart. There is no right to possession and occupation acquired by devise or descent in a person who is not entitled to reside on the reserve (s. 50, subs. (1)).

One of the exceptions is that the Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered (s. 58(3)). It was under this section that the Minister had the power to make the ten-year lease to the defendant which expired on November 30, 1960.

Under this Act there are only two ways in which this defendant could be lawfully in possession of this farm, either under a lease made by the Minister for the benefit of any Indian under s. 58(3), or under a permit under s. 28(2).

Evidence was given of attempted arrangements between the defendant and the purchaser and the assignee of the purchaser under s. 50(2) which would have enabled the defendant to remain in possession at a rental which would have made it possible for the purchaser to make his instalment payments. The Crown took the position that these attempted arrangements were irrelevant, the Department not having consented to any further lease or permit. This objection was properly taken and the attempted arrangements do not assist in any way the defendant's claim to remain in possession. He also says that as an unpaid vendor who has not contracted to give up possession, he is entitled to remain in possession until he receives the full proceeds of the sale by the Superintendent made under s. 50 of the Act. He has no such right. He must give up possession and his right is limited by s. 50 to the receipt of the proceeds.

There should, therefore, be judgment for Her Majesty on behalf of the Six Nations Band of Indians that vacant possession of the lands be delivered with costs in this Court and in the Exchequer Court.

CARTWRIGHT J. (*dissenting*):—The facts and statutory provisions relevant to the solution of the questions raised on this appeal are set out inthe reasons of my brother Judson and in those of Thurlow J.

On the argument of the appeal we were told by counsel that the respondent is still in actual occupation of the lands in question. For the purposes of the appeal I am prepared to assume that the respondent has not shewn any right to remain in possession of these lands.

The action was commenced by an Information in which "Her Majesty the Queen on the Information of the Deputy Attorney General of Canada" is plaintiff and the respondent is defendant. The Information does not in terms allege that the Six Nations Band of Indians, hereinafter sometimes referred to as "the Band" is entitled to possession of the lands but does state that the Band has demanded vacant possession of the lands from the defendant and that he has refused to vacate the same. The prayer for relief so far as relevant reads:

> The Deputy Attorney General of Canada, on behalf of Her Majesty, claims as follows:—
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> (*a*) vacant possession of the said lands on behalf of the Six Nations Band of Indians.

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It will be observed that possession is not claimed by Her Majesty in her own right but only on behalf of the Band. This is in accordance with the provisions of s. 31 of the *Indian Act* which so far as relevant reads:

> 31. (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been
>
> (*a*) unlawfully in occupation or possession of . . . . a reserve or part of a reserve, the Attorney General of Canada may exhibit an Information in the Exchequer Court of Canada claiming, on behalf of the Indian or the band, the relief or remedy sought.

I can find no ambiguity in this section. It contemplates, as do many other provisions of the Act, that the right to possession of a parcel of land in a reserve may belong to the Band or to an individual Indian. The claim for possession is to be made either on behalf of the Band if it is entitled to possession or on behalf of the individual Indian if he is so entitled.

I agree with Thurlow J. that the evidence shews that the right to possession of the lands in question is vested in Hubert Clause or in Arnold and Gladys Hill, all of whom are Indians and members of the Band, and not in the Band.

I also agree with Thurlow J. when he says:

> When a member of a band obtains lawful possession of land in a reserve the right which the band would otherwise have to possession of that land is at an end, though circumstances may arise in which the band may once again have a right of possession either by purchase of the individual members' right or on reversion of the right to the band under ss. 25(2) or 50(3). The statutory scheme accordingly in my opinion contemplates a statutory right of possession of any part of a reserve being vested in an individual member of a band, or in the band itself, but not in the band when it is vested in the individual member.

The applicable principle of law is accurately stated in the passage from Williams and Yates on Ejectment, 2nd ed., page 1 et seq, quoted and adopted by Thurlow J., and particularly the following sentences:

> To entitle a plaintiff to bring an action for the recovery of possession of land he must have a right of entry either legal or equitable. A right of entry means a right to enter and take actual possession of lands, tenaments, or hereditaments, as incident to some estate or interest therein.
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> * * *
>
> The right of entry must be a right to the immediate possession of the property. A reversionary or other future estate is not sufficient until it has become an estate in possession.

I can find nothing in the *Indian Act* to alter these well settled rules as to actions for the possession of the land.

For the reasons briefly stated above and for those given by Thurlow J., with which I am in full agreement, I would dismiss the appeal with costs.

Appeal allowed, CARTWRIGHT, J. *dissenting.*

Solicitor for the Appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent: Ballachey, Moore & Hart, Brantford.