1891
Jan. 19.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

AND

WILLIAM THOMAS ..... DEFENDANT.

Cancellation of a land-patent—The Manitoba Act—33 Vic. c. 3 s. 32 sub-sec. 4, and 38 Vic. c. 52 s. 1—R. S. C. c. 54 s. 57—Improvidence in granting patent.

T., a half-breed, was on the 15th July, 1870, in actual peaceable possession of a lot of land in the Province of Manitoba, previously purchased by him, and of which he had been for some years in undisturbed occupancy. On the 3rd of August, 1871, he shared in the gratuity given to certain Chippewa and Swampy Cree Indians under a treaty then concluded with them, and in the years 1871, 1872, 1873 and 1874 he participated in the annuities payable thereunder. But before taking any moneys under the treaty he enquired of the commissioner who acted for Her Majesty in its negotiation, whether by accepting such money he would prejudice his rights to his private property, and was informed that he would not; and when in 1874 he learned for the first time that by reason of his sharing in such annuities he was liable to be accounted an Indian and to lose his rights as a half-breed, he returned the money paid to him in that year. Subsequently his status as a half-breed was recognized by the issue to him in 1876 of half-breed scrip.

Held, that under *The Manitoba Act*, and amendments, (33 Vic. c. 3 s. 32 sub-sec. 4, and 38 Vic. c. 52 s. 1) he was entitled to letters-patent for the lot mentioned.

THIS was an information, filed by Her Majesty's Attorney-General for the Dominion of Canada, whereby the Crown sought to obtain a declaration by the court that a certain patent for land had been improvidently granted to the defendant and should be delivered up to be cancelled.

The facts of the case are fully stated in the judgment.

June 5th and 6th, 1890.

Aikins, Q.C. and *Culver* Q.C. for the plaintiff:

The defendant assented to the treaty, and admitted

1891

THE QUEEN v. THOMAS.

Argument of Counsel

he was an Indian. He must be bound by his action in accepting treaty-money. The defence admits that the land in question formed part of the Reserve; and that being so, and there being no surrender to the Crown, it could not properly be disposed of by the Crown's patent. The Crown is bound to look carefully to the execution of the treaty, and to see that the lands belonging to the Indians are maintained for their benefit. The question is not what the Crown may or ought to do as to the patent, but whether or not it was properly advised in issuing such patent (Cites *The Attorney-General* v. *Contois* (1); *Graham* v. *The Northern Railway Co.* (2); *The Attorney-General* v. *McNulty* (3); *Martyn* v. *Kennedy* (4); *Rees* v. *The Attorney-General* (5); *The Attorney-General* v. *Fonseca* (6); Reg ex. rel. *Gibb* v. *White* (7).)

Howells, Q.C. and *Cumberland* for the defendant:

The taking of treaty-money under a mistake of his rights and position as a half-breed should not deprive defendant of his property. He was in possession of the property before the patent issued, as a settler, and outside the patent altogether he has a good right to the land. He is not an Indian within the meaning of the Indian Act of 1874. He did not belong to any band or tribe of Indians. As soon as he discovered his position with respect to receiving treaty-money, he returned the money he had received for the then current year. The *onus* to establish improvidence in the granting of the patent is on the Crown, but so far from doing that the evidence shows that all the facts were before the Crown.

(Cites the judgments of Gwynne and Patterson, JJ in *Fonseca* v. *The Attorney-General* (8).)

(1) 25 Grant 346.
(2) 10 Grant 259.
(3) 8 Grant 324.
(4) 4 Grant 61.
(5) 16 Grant 467.
(6) 5 Man. L. R. 173, and 17 Can. S. C. R. 612.
(7) 5 Pr. R. 315.
(8) 17 Can. S. C. R. 612.

1891

THE QUEEN v. THOMAS.

Aikins, Q.C. in reply, cites *The Queen* v. *Clarke* (1); *The King* v. *Clarke* (2); *The Attorney-General* v. *Garbutt* (3); *Bacon's Abridgement* (4); *Stephen's Blackstone* (5).

Reasons for Judgment.

BURBIDGE, J. now (January 19th, 1891) delivered judgment.

This information is brought to annul letters-patent issued on the 27th of October, 1887, in favor of the defendant, for lot numbered 22 in the Parish of Saint Peter and Province of Manitoba.

The ground upon which the cancellation of the patent is sought, is, briefly, that the defendant is not, as at the time when it was issued he was supposed to be, entitled to the lot in question under *The Manitoba Act* and its amendments (6), and that, therefore, it was issued through error and improvidence within the meaning of the 57th section of chapter 54 of the *Revised Statutes of Canada*.

It is admitted that the defendant is a half-breed, and it appears from the evidence that he has during all his life lived after the manner of white men, and never according to the mode and habits of life of the Indian. He is by trade and occupation a carpenter and farmer. For many years he was a warden of the church at Saint Peter; and on several occasions he has been a representative from that church to the Synod. After the transfer of Rupert's Land and the North-West Territory to Canada, and before the Treaty to which reference will be made, he was appointed a Justice of the Peace.

It is also clear that since the year 1864, when for the sum of seventy-five dollars he purchased the lot in question from one Robert Sandison, he has been in

(1) 7 Moo. P. C. 77.
(2) Freem. 172.
(3) 5 Grant 181.
(4) Vol. 8 p. 150.
(5) Vol. 1 p. 624.
(6) 33 Vic. c. 3 s. 32 sub-sec. 4, and 38 Vic. c. 52 s. 1.

undisturbed occupancy thereof, and that on the 15th of July, 1870, the date of the transfer, he was in actual peaceable possession of the same. This is not denied, but it is said that by participating in the gratuity given to certain Chippewa and Swampy Cree Indians in 1871, under a Treaty made with them at Lower Fort Garry on the 3rd of August of that year, and in the annuities payable thereunder, the defendant lost his status as a half-breed, and forfeited his right to the lot and letters-patent in question.

The defendant admits that in 1871, 1872, 1873 and 1874 he received for himself, his wife and two daughters, the annuity of three dollars for each person payable under the Treaty, and it appears that he shared in the gratuity given when the Treaty was concluded He says, however, that before taking any money under the Treaty he asked Mr. Simpson, the commissioner acting for Her Majesty, if by taking the same he would interfere with his private property, and that Mr. Simpson told him he would not; and that when, in 1874, he learned for the first time that by the acceptance of such annuities he would deprive himself of his rights as a half-breed, he returned the amount paid to him in that year, and that since he has not taken any money under the Treaty; and that the Crown has recognized his rights as a half-breed by the issue to him, in October, 1876, of half-breed scrip.

The enquiry is, I think, somewhat narrowed by the fact that none of the statutes of the Dominion relating to Indians and Indian Affairs were in force in Manitoba prior to 1874, when by 37 Vic. c. 21 certain provisions of 31 Vic. c. 42, and of 32-33 Vic. c. 6, were extended to that province. It may be admitted that if in 1874, and thereafter, the defendant had participated in the annuities payable under the Treaty, he would have brought himself within the definition of an Indian contained in the

1891

THE QUEEN v. THOMAS.

Reasons for Judgment.

Acts mentioned (1), and that he could not subsequently have regained his status of a half-breed except in accordance with the law or practice in that behalf for the time being in force.

The first question to be decided is : Did the defendant by participating in the gratuity and annuities mentioned make an election and renounce the status and personal condition of a half-breed, and acquire that of an Indian ? Unexplained, his conduct would no doubt raise the presumption that he had done so. But looking at all the circumstances of the case, it does not appear to me that such was at any time his intention. We have seen that he was careful before taking any money under the Treaty to enquire of the commissioner whether his acceptance would prejudice his position in respect of his private property; and that when in 1874 he realized the true state of the case he returned the annuity then lately paid to him, and that in 1876 his status as a half-breed head of a family was formally recognized by the Crown. It is said that Mr Simpson could not bind the Crown by any such assurance as that alleged to have been given to the defendant. Possibly not, and yet it may be right and proper to weigh the defendant's acts in the light of such assurance. But take it that the defendant's status, from the day he received his first payment under the Treaty until he returned the last, must be deemed to be that of an Indian, the further question presents itself: By virtue of what law did he forfeit his interest in the homestead that he purchased, and on which, with his wife and family, he was residing. The only answer suggested in reply to that enquiry is, that such is the effect of the 19th section of *The Indian Act* (*R.S.C.* c. 43), whereby it is, amongst other things, provided that every Indian in the Province of Manitoba who has,

(1) 31 Vic. c. 42 s. 15, and 37 Vic. c. 21 s. 8.

1891

THE QUEEN v. THOMAS.

Reasons for Judgment.

previously to the selection of a Reserve, possession of a plot of land, included in or surrounded by a Reserve, upon which he has made permanent improvements, shall have, in respect thereof, the same privileges as are enjoyed by an Indian who holds under a location title. But that provision was first enacted in 1876 by 39 Vic. c. 18 s. 10, and cannot, I think, be construed to deprive the defendant of any rights of property theretofore acquired, seeing that there is no pretence that he was at that time an Indian or liable to be considered or treated as an Indian within the meaning of the statute.

Mr. Aikins, for the plaintiff, upon the authority of the cases cited, further contended that although the defendant might be found to be entitled to the letters-patent issued to him, they should be set aside because the Minister of the Interior acted in ignorance of the fact that that the defendant had not refunded the forty-eight dollars paid to him under the Treaty in the years 1871, 1872 and 1873. It seems that this fact was not, as it should have been, brought to the attention of the Minister either in 1876, when half-breed scrip was issued in favor of defendant, or in 1887, when his claim to lot 22 was disposed of. This issue is not, however, raised by the pleadings, and it is not necessary to decide it, or to consider how far the earlier cases referred to have been modified by *Fonseca* v. *The Attorney-General* (1), in which the 57th section of the *Revised Statutes*, chapter 54, has been so recently and fully considered. On the issues presented by the pleadings the defendant is, I think, entitled to succeed.

Judgment for defendant with costs.

Solicitors for plaintiff: *O'Connor & Hogg.*

Solicitors for defendant: *Archibald, Howell & Cumberland.*

(1) 17 Can. S. C. R. 612.